

ACTUS REUS AND CUSTOMARY CRIMINAL LAW IN NIGERIA:
AN APPRAISAL OF CONTEXT AND APPLICABILITY

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ABSTRACT

Under Nigeria Customary law, certain actions are proscribed and are therefore visited with penalties when carried out. Although Section 36 (12) Constitution of the Federal Republic of Nigeria, 1999 provides that no person can be convicted of a criminal offence unless that offence is defined and the penalty prescribed in a written law, the Nigerian customary criminal law was, however, in full operation before the introduction of English criminal law in Nigeria. The latter proscribes some of the actions considered criminal under customary law. This paper, therefore, considers *actus reus* in the context of Nigeria customary criminal law jurisprudence arguing that under Nigerian customary criminal law as it existed, the twin concepts of *actus reus* and *mens rea* were recognized across the various tribes. Although the jurisprudence on the distinction between these concepts was not developed, they are however not alien to the Nigerian customary criminal law jurisprudence. We concluded that, it is almost impossible to distinguish between *actus reus* of some of the offences in our native laws and customs, such as the offence of witchcraft; there are also some difficulties in distinguishing some criminal wrongs from civil wrongs; and, there is a general lack of decided customary criminal law cases to offer legal precedents. The paper suggests that, there is the need for the customary legal system to be developed to accommodate the basic principles of common law.

Keywords: Actus Reus, Customary law, Criminal law

1. INTRODUCTION

One of the many classifications of law is into Civil and Criminal law. Criminal law is distinguished from civil law in the sense that, unlike civil wrongs, criminal wrongs are considered to be wrongs against the state. Criminal law is therefore geared towards protecting the interest of the society at large by ‘punishing certain conducts which are believed to be harmful to the society.’¹ The key purpose of punishment is to deter others from engaging in the same detrimental conduct. On the other hand, civil wrongs are considered to be wrongs against the individual. The objective of civil law is therefore ‘the recovery of money and other property or the enforcement of a right or advantage.’² Civil law is thus, geared towards compensating the

¹*Mellon v. Debenham* (1880) 5QB d 467; S. Fabamise, A, Sanni, ‘Aspects of Law’ in A. Sanni (ed) *Introduction to Nigerian Legal Method* (Ile-Ife: Obafemi Awolowo University Press Limited, 2006)65; C.O Okonkwo *Criminal Law in Nigeria* 2nd ed (Ibadan: Spectrum Books Limited, 2002) p20.

² S. Fabamise, A. Sanni, *Ibid*.

individual.³ It is worthy of note that under Nigerian customary law, certain conducts are considered detrimental to the society at large and are therefore punished accordingly to deter others.⁴ Whereas other wrongs are considered to be wrongs against the individual and the perpetrator of such wrong if found guilty is required to redress the wrong done to the individual.

Customary law is the body of rules that emanates from the customs of the Nigerian people. Customary law has also been defined as ‘any system of law other than a common law or a law enacted by a competent legislature in Nigeria, which is enforced and binding in Nigeria as between the parties subject to it.’⁵ Customary criminal law, which is largely unwritten and the unwritten portions of which cannot be enforced⁶ owing to the provisions of Section 36(12) Constitution of the Federal Republic of Nigeria, 1999 provides that no person can be convicted of a criminal offence unless that offence is defined and the penalty prescribed in a written law, was however fully operational before the introduction of English criminal law.⁷ Although Nigerian customary criminal laws were unwritten, members of the society governed by these laws knew of their existence through town criers or through family heads who were usually present during the promulgation of laws and were expected to communicate these laws to members of their respective families.⁸ In Nigerian customary criminal law, the role of enforcement is bestowed on the King, Chief Priests, Masquerade groups, age grades, etc.⁹ Thus, ‘any matter related to the disruption of social equilibrium, especially in relation to crimes must be reported to the King, Chief or Sub-Chief (as the case may be) in the locality where the crime was committed.’¹⁰

Customarily, certain actions are unacceptable within our society and as such are discouraged. How seriously the society frowns at some of these unacceptable actions depends on the categorization of it. The degree of the said unacceptability is often proportional to the sanction attached to each of such action.

It is settled law that every crime consists of two basic elements; the physical and mental elements.¹¹ Under the English criminal law, the physical element is referred to as the *Actus reus*¹² while the mental element is referred to as the *Mens rea*¹³. The physical element of a crime may consist of an act or omission. Owing to definitional challenges, *actus reus* has been defined as ‘the whole definition of a crime with the exception of the mental element’.¹⁴ While most offences require proof of *mens rea*; that is to say, proof that the accused person intended, foresaw, desired or knew the consequences of the *actus reus*. Strict liability offences do not however require proof of mental element.¹⁵

This paper considers *actus reus* within the context of Nigerian customary criminal law jurisprudence. Some specific crimes recognized under customary law shall be considered with a

³ C.O Okonkwo, *Ibid*, p20.

⁴ O. Okogeri, G.E.Oaikhena, ‘A Legal Reappraisal of Customary Adjudicatory System in Nigeria’ p.7. www.nigerianlawguru.com. Accessed 9th December, 2014.

⁵ *Zaiden v. K. Molissen* FH (1973)11 SC 1 referred to in *Ekeocha v. Ariataraonyenwa* [2009] ALL FWR (Pt.456) 1972 paras D-E.

⁶ See I,K,E Oraegbunam, ‘Crime and Punishment in Igbo Customary Law: The Challenge of Nigerian Criminal Jurisprudence’ p23. www.ajol.info/index.php/og/article/download/57917/46285. Accessed 9th December, 2014.

⁷ G.O Okogeri, ‘Ezi Okwu Bu Ndu’ in *Igbo Customary Law. Ezi Okwu Bu Ndu: Truth is Life. Interpretative Essays*, N. Otakpor, (ed), Uniben Studies in Philosophy, Vol 1 (2006) pp172-179 in O. Okogeri, G.E.Oaikhena, ‘A Legal Reappraisal of Customary Adjudicatory System in Nigeria’ p.6. *ibid*.

⁸ I,K,E Oraegbunam, ‘Crime and Punishment in Igbo Customary Law: The Challenge of Nigerian Criminal Jurisprudence’ pp1, 7 and 13. *Ibid*.

⁹ *Ibid*, p23; O. Okogeri, G.E.Oaikhena, *ibid*, p1.

¹⁰ O. Okogeri, G.E.Oaikhena, *ibid*, p6.

¹¹ *Ibid*, p43.

¹² *Actus reus* in Latin means ‘guilty act’.

¹³ *Mens rea* in Latin means ‘guilty mind’.

¹⁴ G. Williams, *Criminal Law: The General Part*, (London: Stephens & Sons, Ltd., 1953). p18 in C.O Okonkwo, *ibid*, p45.

¹⁵ G. Williams, *ibid*, pp102-103 in C.O Okonkwo, *ibid*, p49; *R. v. Efana* (1927) 8NLR 81.

view to specifically pointing out the elements that constitute the *actus reus* in those crimes. The point should be noted that the knowledge of customary law is compendious. This paper is also geared towards showing that the meaning of the term or phrases “*actus reus*” as an element of crime is not alien to the Nigerian customary criminal law jurisprudence. The paper shall, thereafter, identify some challenges associated with customary criminal law as it relates to *actus reus* after which, the paper shall conclude with recommendations.

2. What Constitutes a Crime?

The terms ‘crime’ and ‘offence’ are often used interchangeably. Under the Nigerian Criminal Code, an offence is defined as ‘an act or omission which renders the person doing the act or making the omission liable to punishment under this code or under any Act, or Law.’ The Penal Code, in the same vein, defines an offence as including ‘an offence under any law for the time being in force.’ Crime has however, been defined as ‘activities that involve breaking the law’. This definition best captures what a crime is. According to Zems, Mathias:¹⁶

What constitute crime varies from culture to culture, and from time to time criminals have been various things to different people through, out times heroes, villains fools, revolutionaries, deviants scumbags... crime in law consists of two basic elements, the actus is the physical element or guilty act and it requires proof where there is no actus reus, there is no crime.

The second element of crime is the *mens rea* which is the mental element or the guilty mind. It is the intention. A man is said to intend doing something if he desires it. Nnamdi E. defines a crime as¹⁷;

An act punishable by law; usually considered an evil act. It is also an evil act not necessarily punishable by law e.g. crimes of principle. It may be a transgression, violation of a duty or moral principle..., crime refers to a grave and serious form of anti-social behaviour. It is an act of commission or omission, which tends to the prejudice of the community.

Flowing from the excerpt above, to say that an act is a crime; such act must have been a violation of the ethical standards of the society. The community must view such violation as anti-social behaviour hated and punishable by the law of that Community or State. It is noteworthy, that Nnamdi Ebo in his book further illustrated seven elements of crime. According to him: there are seven interrelated conditions that have to be present before an act can be considered a crime:

- There must be harm or injury inflicted on some other person(s) by the actor.
- The act must be prohibitive by the criminal law at the time it was committed.
- There must be intentional or reckless conduct which causes the harm of injury directly or indirectly.
- There must be *mens rea* or criminal intent on the part of the actor when he decides to engage in the act. The intention or motive of the actor must be shown to be willful and deliberate in engaging in the unlawful conduct.
- There must be a coincidence of *mens rea* and *actus reus*. The mental element (criminal intent) must correspond with physical element (the harmful conduct).

¹⁶ Zems M. *Crime in Normal*, Corpus Prints and Partners, 2011 P. 2.

¹⁷ Nnamdi E. *Legal Method*, 1st Edition LawLords, Lagos, 2012 p. 363.

- There must be a causal relationship between the outlawed harm and the voluntary misconduct. This means that if A shot B and B dies later there is no direct link between the gun-shot wound and the death of B.
- There must be legally prescribed punishment for the out-law conduct. If there is no legally sanctioned punishment for the conduct, that conduct does not constitute crime.¹⁸
- Normatively, crime is defined as act that violates a political, religious, or moral command considered important in protecting the interest of the state or the welfare of its citizens or subjects (individuals).¹⁹ This is to say in essence that violation of the commands of the community or a violation of the interest of the welfare of an individual in the society is a crime. Customarily saying, a violation of the commands of the king, elders of the community, chiefs, title holders, or the violation of the interest of the individual members of the society amounts to what, under English Law is called a crime against public interest.

Accordingly, Kofi Q.²⁰ observed that: “A particular behaviour joined the category of crime (only) when it threatened the interest and peaceful survival of the society as a whole, until when an act was regarded a threatening to the whole social fabric, the society did not elevate it to the level of crime.” Objectively, *actus reus* the prohibited act or conduct or rule that allegedly has been breached-should specify the act or the conduct that is necessary for there to be a violation of the rule.

3. THE CONCEPT OF *ACTUS REUS* WITHIN THE CONTEXT OF CUSTOMARY CRIMINAL LAW

Generally, under Nigerian customary criminal law, a distinction is made between intentional acts and accidental acts, with each carrying different sanctions. An accidental act if punished would carry a light sentence as against an intentional act. This section examines some offences recognized as such under English law, and inquires into whether customary criminal law, which also recognizes these offences, further recognises the physical act “*actus reus*” of the offences.

3.1 *Genocide*

This is a crime against humanity. Accordingly, it is a conduct aimed at the destruction of an ethnic group; it involves the killing of a group. The *actus reus* in this instance is, actual killing of members (i.e. more than one member) of an ethnic group. Akalaka one of the headmen and others with him fled Benin Kingdom for fear of being killed (destroyed) during the reign of Oba Ewuare (11th Century A.D) *Alagoa and Derefaka*.²¹ The *actus reus* of the crime of genocide may include:

- Causing serious bodily harm to the members of the group by the offender group.
- Inflicting conditions of life calculated to bring about the destruction of the group.
- Imposing measures to prevent birth within the group, and
- Forcibly transferring children of the group to another group.

3.2 *Murder*

¹⁸ Nnamdi E. (*Op. cit* at pp. 363-364).

¹⁹ Zems (*Op. cit* at p. 5).

²⁰ Kofi Q “Reflection on the Judicial Process in Traditional African”, *Nigeria Judicial Review*, 1989-90, pp. 4-5.

²¹ Alagoa E.J.; Derefaka A.A. *The Land and People of Rivers State, Eastern Niger Delta*, Onyoma Research Publication 2002 pp. 176-177.

This is unlawful killing of any member of the community. Customary law recognizes it as a crime. Meek²² commenting on the recognition of this crime in the Nigerian customary criminal law context stated that “Punishment by death sentence or damages depending on who committed the offence, the social Status of the offender affected the sentence.”

Customary law recognized the inflicting of bodily harm resulting in the death of the victim as the *actus reus*. The offender in this instance may use an object e.g. cutlass to attack and inflict injury on the victim. To prove this, witness(es) testify as to what they saw. Sometimes the offender is caught red handed using a gun, or spare, sticks etc. on the victim. Generally speaking, the Ndoki people of Rivers State abhor shedding of blood. They do not indulge in killings either of a kinsman, a non-indigene, or even a slave living, doing business or serving someone in the community. This makes it difficult to write on murder as it concerns Ndoki people. However, there have been few incidents of murder, stories of which have been passed from generation to generation. For example, the story is told of a hunter who lent his gun to his friend who was also a hunter. The owner of the gun usually loaded it with gun powder but his friend loaded it with live cartridges because he was going to hunt game with it. When he returned the gun to the owner, he left some live cartridges in the gun instead of removing them and putting back the gunpowder that was inside when he borrowed it.

During “*Ekpe*” in festival, the owner of the gun brought out the gun and was dancing with it just as other men were holding theirs and dancing. It is the usual practice that during this festival men would occasionally shoot into the air for the sheer fun of it. This hunter believing that what he had in his gun was gunpowder, lifted his gun and shot in the air, the bullet hit a man who was his brother-in-law and the man died. It was judged and, agreed that he made a mistake; he did not kill intentionally so he was pardoned. No punishment was meted on him. This story points to the fact that our customary criminal law jurisprudence recognizes intentional and unintentional killing.

3.3 Unintentional Killing

This situation arises as illustrated above where the murderer did not intend to kill the victim. Death results because of an accident. Our customary criminal law in this scenario does not make the murderer liable to the extent of being punished either by hanging or banishment. To assuage the pain caused to the victim’s family compensation may be paid and the murderer is free to mix up with other members of the community.

3.4 Intentional Killing

This situation arises where a man commits the act of murder with intent. It is a verified and deliberate killing by the offender. Communities hate acts of murder. In Ndoki, such offender is banished from the community for a period of not less than ten (10) years. Where the offender is married or married with children, his family is banished with him; if they chose to go with him. Otherwise punishment is only for the offender who committed the crime. Punishment does not affect other members of the offender’s family. However among the Ekpeye’s in Rivers State where a man intentionally kills and runs away, the community will demand that the relatives of the offender produce him. In the alternative, the maternal uncles of the victim will burn the house of the murderer and seize the properties of the offender’s family. If the murderer is caught within the period the act is committed, he must be made to hang himself and die as well.

3.5 Adultery

²² Meek, *Law and Authority in a Nigeria Tribe*, Oxford University Press, London, 1956 p. 90.

Adultery generally is a civil wrong. However, it is customarily recognized in many African traditions that, where adultery is committed with the king's wife, it is regarded as a criminal conduct for which the perpetrator had to die. The *actus reus* is the act of having sexual intercourse with the king's wife. Where the adultery is committed with the wife of a freeman, damages was required to be paid to the husband of the woman and other traditional rites performed in accordance with the custom.

According to the Ekpeyes and the Ogbas in Rivers State, where it is committed in the bush, then it attracts sacrifices to pacify the gods of the land. In Ndoki where a man commits adultery with his father's wife and the wrong comes to the notice of his father; the mother of the offender may decide to take him away on self-exile, the man banished himself. The punishment in this case is that the offender will not be allowed to come home and bury his father and mother. (1) In the case of an adulterous, when the adulteress dies, she will be buried in her town and not in her husband's place; and, (2) Where the offender is banished by the community as punishment, he was banished alone, except his families decide to go with him. When the offender is returned to the community, he performs a ceremony called Osikor as a mark of reconciliation with the victim, the victim's family and the community.

3.6 Adultery and the Case of Impotency

It should be noted that in some cases a man and a woman may engage in sexual relationship and under customary law it may not be seen as an adulterous act. Customary Law therefore differentiates between adultery and an agreed situation or arrangement between the husband and the wife. This situation may arise where the man is impotent. The woman is asked to go out and have sex in order to raise children for the impotent man. Therefore, the proof of the *actus reus* in this particular instance will not amount to adultery in the eyes of the customary law. This customary practice is obtainable among the Ikwerre, Ekpeye and Ogba people of Rivers State.

3.7 Incest

This is the offence of having sexual intercourse with a family member or with blood relation. The other members of the family and the community see the offender as destroying the ethical norms of their family and the community. The offender may be ostracized from the membership of the family and community until they are pacified, and sacrifices performed where necessary, to pacify the family and community gods. This is the typical position of the Ekpeyes, the Ogba's and the Ndokis in Rivers State. Among the Ndokis such traditional rituals include (i) Mmanya Mbu (ii) Mmanya Abuo (iii) Oji (Native kolanuts) (iv) Mkpishishi Azu and Ose Oje. Parties are thereafter warned seriously to desist from such act. The *actus reus* as viewed by our native criminal law is the very act of having sexual intercourse. If caught while doing it, is enough proof, instead of proving beyond reasonable doubt as required by the received English Law. Relatives are prohibited from engaging in any form of sexual play as it is seen as immoral and criminally wrong against the society. Among the Ekpeyes and the Ogbas in Rivers State when you want to marry it is expected that you asked questions to find out if the lady is your blood relation.

3.8 Affray

Crime of affray is said to have been committed when any member of the community takes part in a fight in a public place. Public place may include, village play ground, market square or the gathering of people to worship a family or Community deity. The *actus reus* is, the unlawful fighting by the person.

In *R.V. Mapstone*,²³ it was observed that it is enough if people saw the acts (of fighting) in question. This, in fact, is the position with our customary criminal law jurisprudence that there must be one or two witnesses who will testify to the very act of fighting in the market place, village playground and family or community place of worship. It is important to know the one who started the fight. Customary criminal law must raise this question of whether two of them can be held liable. The one who started the fight is usually blamed and seen as the offender.

However, where there is injury as a result of the fight the position of the law is that, the one who started the fight, if he is injured, is asked to treat himself. But, where he wounds the other person, then he must offset the medical bills or he is asked to treat the victim. Among the Ekpeye people in Rivers State, it is considered a crime to take a cutlass and chase a person or to fight a man using a knife whether the victim is wounded or not. This crime is punishable customarily with the imposition of a fine. Refusal to pay the fine may result to excommunicating the offender from associating with other members of the community.

3.9 Suicide

In the African traditional setting suicide was seen as a crime. Suicide is the act of killing oneself. The society viewed it as an act against the humans in the society and the gods. Members of the family of the offender who took away his life are expected to sacrifice to the gods of the land to pacify the gods (Chi) of the land. Suicide committed in a situation where the victim had murdered, a fellow member of the society and in other to avoid punishment meted on him by the members of his community is normal in the eyes of our customary criminal laws.

The *actus reus* of suicide include: intentional drinking of poisonous substances, stabbing oneself with sharp objects, or adopting any means whatsoever that can cause death with a view to taking one's life. The *actus reus* also include the act of hanging oneself and death resulted.

4. DIFFERENCES BETWEEN SUICIDE AND PUNISHMENT BY HANGING FOR MURDER

Customary criminal law recognizes the difference between suicide and hanging as punishment for murder. As said earlier where an offender commits murder and he is caught. The community must ask him to commit suicide by hanging himself. This is because the Community believes that a life must go for the life that been taken.

Among the Ekpeye, Ogba and Ikwerre people in Rivers State, once the offender dies then the murder case is ended. Each family is expected to bury their own dead in accordance with the native law and custom. This is the point where suicide co-relates with murder.

Also, according to Ikwerre native law and custom, anybody who commits suicide is usually taken to evil forest for burial. Anybody who aids another to commit, suicide is made to appease the gods of the land. Death by suicide is seen as an abominable act, which requires the land be cleansed by the performing of sacrifices to pacify the members of the society and the gods of the land. This pacification is usually done by the members of the family of the man or woman that took his or her life.

Flowing from the above illustration suicide is therefore distinct from punishment by hanging for the crime of murder in accordance with our native law and custom.

4.1 Poisoning

²³ 3 All E.R. p. 390.

It is observed that: Among the Igbo's it is a serious offence for anyone to put a piece of bad medicine on a valuable tree or near the fountains of water which the people draw water for drinking.²⁴ In this instance, the public is not satisfied with the behaviour of the offender, which is viewed as unethical and inimical to other members of the community; and capable of killing members of the community. The *actus reus* is the act of putting the (Charm) or bad medicine on the water, or food as the case may be. Where the offender is caught red handed it does not require much proof. It required investigations where the offender was at the initial stages suspected to have been the one. He is expected to prove his innocence as custom demands; which in most cases is by swearing to an oath of innocence.

There is co-relation between poisoning and witchcraft. This is the point where the offender is not seen actively participating in the very act. However, it is enough that in the offender's house there is an object such as mirror, white chalk, sword or red clothe which the community believe is enough to perpetrate such act; either through incantations and invocations.

This is also a point where invocation, incantation, poisoning and witchcraft co-relate. The punishment is that the offender is banished or exiled from the community for a long time. If he or she dies in exile the family members are allowed to return if they survived the punishment period; some never return.

Where a person accused of using any of these methods insists on being innocent, he is made to swear to an oath and he is given a period of 12 months to confess or be killed by the gods. If after a period of 12 months he survives the oath, in accordance with tradition he will make a feast and dance round the community to celebrate his innocence.

5. THE ISSUE OF SHIFT OR ONUS OF PROOF

The important issue that will arise is, at what point should the onus of proof shift to the accused? It should be noted that to give answer to the issue raised, it must be noted that proof in customary law is placed on the one who says he was poisoned.

This onus shifts to the accused at the point where the victim had reported to the community. The accused is then expected to exonerate himself from the accusation against him. Where oath taking is required or recommended and the offender refused to take the oath, the law deems him guilty and the offence proved at this point.

5.1 At What Point is the *actus reus* Determined?

To determine the *actus reus* in customary law is not the same in all ramifications with the common law principles. In our customary criminal law jurisprudence, it is enough if elements of charm are found in the house or around the house of the accused. In this instance, the accused must have been believed to possess such medicine and powers to perform such act.

Common law principle at this point will still require proof beyond reasonable doubt. It will further require that essential ingredients of establishing the offence of poisoning be present. In Ndoki, there are several ways people poison their kinsmen.

- The offender may bury charms in the person's farm or compound so that when the victim steps on it, the victim contacts the poison.
- The offender may also put poison in food or drink.
- Sometimes it is administered by "African remote control" i.e. spiritually without any personal contact.
- The offender may dance round the victim's house in the night to invoke death on the person; this is "*Ite nsi*".

²⁴ Green M.M., (Ibo Village Affairs, France Case & Co. Ltd. London 1964) pp. 111-112.

- In all these cases it is difficult to establish that a person commits this crime because no one witnessed it. In order to ascertain who committed the crime, the community consults an oracle for divination. This is particularly in the situation where no element of charm is found in the offender's house.

The oracle says who committed the crime, using differing methods. For instance, some oracle pour water into a white basin and make certain incantations, the murderer appears in the water. Some also place a mirror and call the murderer to appear in the mirror and he so appears.

5.2 *Treason*

Treason is a conduct comprising of breach of allegiance owed to the sovereign i.e. the king (known locally as Oba, Eze, etc) e.g. killing arty member of the Eze-In-Council while performing his duties. This is to say that in times past in order to show breach of allegiance to the King's constituted, authority, some persons may kill the loyalists to the king. In some cases the king and, or his heir is assassinated. Such act according to Elias²⁵, are: Acts disruptive of social order i.e. acts capable of creating social disaffection within the community, or result in subversion of public order, or challenge constituted authority.

The *actus reus* is the act of gathering members to challenge, inflict bodily harm (attack) and kill a member(s) of the constituted authority. It also includes violently or unlawful breaking away from the constituted authority to gain autonomy; and inciting members of the community against the norms of the society is viewed as unlawful and criminal.

In fact, this was a factor that resulted to the rise of different smaller communities in our traditional African setting. The offender(s) in order to avoid being punished by death usually ran away with the members of his family and those loyal to him to establish a new community. In some cases, the offenders are banished from ever coming to the domain of the king by a decree of the king-In-Council.

5.3 *Trespass*

According to Black's Law Dictionary Trespass is: "An unlawful act committed against the person or property of another, a wrongful entry on another's real property."²⁶ However, it is noteworthy that in our customary criminal Law jurisprudence, where a chief murders the slave of another, he is deemed to have committed trespass on the "property" of the owner because a slave was regarded as property in our customary law. For trespass to constitute a crime it must involve the act of permanently depriving the owner of the services of the slave, and the death of the slave due to injuries inflicted on him. The *actus reus* is the act of killing the slave. Punishment is restitution if committed by a Chief, and if committed by a freeman, the punishment is death. This is more so like the offence of adultery where a civil wrong, may become a crime if the offender refused to pay the damages awarded against him. In the words of Begho,²⁷

Even though usually regarded as civil wrong against an individual member of the community, it sometimes become a crime if the adulterer refused to pay the damages imposed on him for such a refusal was viewed as a behaviour (that) could lead to civil war, depending on the personalities involved.

²⁵ Elias T.O., *Nature of African Customary Law*, Manchester University Press, London, 1956 p. 219.

²⁶ Bryan G.A. (7th Edition, West Group Publishing Company 1999) p. 1059.

²⁷ Begha M.A. *Law and Culture in the Nigerian and Roman World*, MidWest Newspaper Corporation, Benin City, Nigeria p. 104.

5.4 Witchcraft

Witchcraft is the use of evil magic powers or sorcery against another member of the family or community. It should be noted that witchcraft is generally detested by the general populace, and therefore seen as a crime. To determine the *actus reus* is not an easy task. This is because even where the victim experiences marks on his or her body, portraying that somebody is engaging in witchcraft against him, it is still very difficult to know who that person is, unless subjected to divination. However, where a person is caught planting charms or making unwelcome movement in the backyard of a member of the community at a very odd hour of the night, this act usually will qualify as the *actus reus* of that offence. Some persons also engage in collecting material such as women pants, underwear or men's money for sorcery. This act of Witchcraft is not easy to identify the offender even after investigation by divination, there may be oath taking if the offender still denies.

6. THE ISSUE OF PRESUMPTION OF INNOCENCE WITH REGARD TO WITCHCRAFT

6.1 Actions in Dreams and Witchcraft

Can actions in dream amounts to *actus reus*? It cannot. It is where the offender is physically seen invoking or planting charms or where instruments of witchcraft are found in the offender's house; that our customary criminal law establishes the offence of witchcraft. In witchcraft, before the onus shifts from the accuser, he must have made a case (a complaint) by reporting to the community or summoning the offender at the juju shrine to defend and free himself of the accusation.

6.2 Theft, Burglary and Stealing

In these instances the property of the individual or the Community is taken away from them without consent. It is burglary if in the night and if where the property kept was broken into. The *actus reus* is the act of taking that property to deny the real owner of making use of it. For instance, a woman who goes to other women's farms and uproots cassava tubers has stolen the cassava. The act of uprooting the cassava and taking same away constitutes the *actus reus* of the offence of stealing.

A young man who breaks into an elder's house (Ilo-ha) Amala, to steal the Community money is a thief and if in the night, it is burglary in line with the received English Law classifications. The punishment may vary from Community to Community. The offender may be banished, and if he is caught in the night with the stolen items, and such offender may be summarily executed.

In Ekpeye, Ogba, Ndoki and Ikwerre Customary Laws, the person who stole is made to dance naked round the community with the stolen item tied on her/his waist. Our customary criminal law sees the offences of theft, burglary and stealing, as being the same. The classification is unlike the common law principles.

The one who converts another's property without consent or deprives the owner of the use of the property or broke into another's house either in the day or night is said to have stolen. In Emohua Community in Rivers State the offender is called "*Nne-Oshi*".

6.3 Rape

An important issue to determine is whether customary criminal law distinguishes between capacity of the common law and customary law with respect to age. Customary criminal law in this respect is different from the position of the common law. Where a man is

not up to twelve (12) years old common law will presume the person is a minor lacking the capacity to commit the act.

Customary criminal law position is that once the act is committed age is irrelevant. All necessary steps must be taken to make sure compensation is paid to the victim and the victim's family. For instance, where a young girl of six year is raped by a young boy of nine years the issue of capacity does not come to play as it is with common law especially where the act is done in the bush or any place which the community frowns at.

6.4 Pregnancy Termination (Abortion)

In our African Customary Criminal Law (Ekpeye and Ogba Customs) for instance, termination of pregnancy by a young lady and young man both of them unmarried is viewed as a civil wrong. However, where a young lady is married, and another young man committed adultery with her thereby resulting to pregnancy termination, the community sees that act as a crime.

The difference in punishment compared to that of common law crime of abortion is that the customary criminal law considers damages to the victim (in this case the husband of the young lady and the family of the lady's husband). It is the position under customary law that a life with prospects has been taken. Where the offender cannot pay, custom demands that his family must pay to remedy the injury caused (*vicarious liability*). Customary criminal law recognizes the fact that every injury has a remedy.

The *actus reus* of terminating a pregnancy (Abortion) is that act of administering a local medicine or concoction to terminate the pregnancy. It is noteworthy to mention at this stage that in South Africa abortion is no longer a crime; the law allows it. In fact the Law²⁸ provides that:

It is now a legal right to commit abortion during the first 12 weeks of pregnancy upon the request of the woman and from the 13th - 20th weeks of pregnancy for reasons including the fact that the pregnancy resulted from rape or incest; after 20 weeks the pregnancy could be terminated on some grounds including the need to save the woman's life.

It should be noted that customary law viewed death resulting from pregnancy due to adultery as civil wrong; but, where the offender refused to pay the damages as demanded, the traditional community saw it as a crime. Once viewed as a crime the penalty changed from mere monetary compensation to stricter demands as seizure of family lands or family fish ponds. Having made attempt at discussing *actus reus* with reference to some offences, a hypothetical case shall be presented to know, if in the midst of the received English law, there is still the exercise of customary criminal justice in our societies.

7. A HYPOTHETICAL CASE ANALYSIS

Consider a situation where a man takes a female child or wife out of the lawful possession of the father or husband and also has sexual intercourse with the female child or wife of the man. It is immaterial that the female is question consented to the act. Under our customary criminal law justice, seduction is committed. This wrong of seduction is aggravated if the man who had sexual intercourse with the female child also took her virginity. This is because it is an injury to the mental feelings of the victim as well as the father or husband, it is a

²⁸ Choice of Termination of Pregnancy Act No. 92 of 1996.

crime. The fact that there was penetration on the vaginal of the female girl, without her consent, amounts to crime.

The *actus reus* in the scenario above is the act of taking out the female child or the wife of the man from the father's or husband's house, and the act of having sexual intercourse with the victims. It should be noted that the hypothetical case illustrated above is to paint an imaginary scenario of a wrong which although civil may as well be a criminal offence having the essential ingredients of *mens rea* and *actus reus* qualifying as a crime even in our customary criminal law jurisprudence.

8. CONCLUSION AND RECOMMENDATIONS

The Nigerian customary criminal law jurisprudence recognizes minor and capital offences. It also, just like English Law, recognizes that a crime is made up of both physical and mental elements. This is evident in the examination of the crimes of murder, manslaughter, genocide, etc under Nigerian customary law. The development of the jurisprudence in this aspect of law is however, hampered by neglect and a near lack of documentation of cases on customary criminal law in Nigeria.

There are some elements of universalism in condemnation and punishment of certain conducts but what may constitute crime, its elements and proof thereof must vary from culture to culture. There should always be cultural variants. This seems more pronounced in the case of the classification and determination of *actus reus*, both in content and context.

The hallmark of some legal systems is the compliance with domestic setting, the cultural affinity and robust acceptance in form and delivery. The received English law creates a huge gap in this area. The criminal justice administration in Nigeria is alien and presents a divorce posture from the recipient community. Justice is ideal when its nature can be comprehended. The cultural variant in the perception of criminal wrongfulness should be acknowledged and vigorously incorporated in the general criminal justice administration in Nigeria. The elitist content of an alien law or regime of rules dampens the true virtue of justice.

The various Nigerian cultural perceptions and practice of crime and punishment is part of our history; our heritage as a people. They help define our content and relevance and set us out as active participants in an evolving international community that accepts the showing of differences. Our past, our history and heritage should be part of the process.

This paper recommends that customary court judges be encouraged to study carefully the jurisprudence of the customary criminal law system of the various ethnic groups in the state where they practice. It is further recommended that we should in no wise regard to our customary criminal law system as inferior to the received English law system. Rather, concerted efforts should be made towards developing the jurisprudence of Nigerian customary criminal law. The Nigerian customary criminal law system suits Nigerians more and serves their purpose better than that which is alien to them.