

# ***CUSTOMARY LAW IN UGANDA***

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## ***INTRODUCTION***

Customary law is the written and unwritten rules which have developed from the customs and traditions of communities. This refers to unwritten set of rules of conduct passed down by tradition and practice that are widely accepted as binding on the members of a particular society or community e.g. payment of bride price in most tribes of Uganda, prohibition against marrying members of the same clan among Baganda, Batoro, Banyoro and others tribes in Uganda among other customs;

For customs and traditions to become law, they must be known to the community, followed by the community, and Enforceable (able to be carried out). Any example would be payment of bride price in African customary marriages which was confirmed in *Mifumi v AG*<sup>1</sup> and the prohibition against marrying clan mates in *Buganda Confirmed IN Bruno Kiwuwa vs. Ivan Kiwanuka & another*, HCCS 52 of 2006.

Customary law is made up of uncodified (unwritten) and also codified (written) laws. unwritten customary law is often criticized for being confusing, for leaving out certain aspects and areas of customary law and giving an impression that there is one system of customary law. In *Mifumi v Ag* <sup>2</sup>TUMWESIGYE, JSC while acknowledging that the Constitutional Court was right to take notice judicial of the custom of paying bride prize observed that the customs varies from time to tribe. In Uganda customary is recognised as part of the law of Uganda under Article 37 of the constitution and sections 14 and 15 of the Judicature Act. Section 15 of the Judicature Act permits the courts to apply, and any person to benefit from, a custom unless the custom has been declared to be repugnant to natural justice, equity and good conscience, and not compatible with any written law. Customary law was judicially applied in *Mifumi & others V AG SC Constitutional Appeal No. 02 of 2014* and *Bruno Kiwuwa vs. Ivan Serunkuma and another HCCS No.52 of 2006*<sup>3</sup> among other cases.

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<sup>1</sup> **Supreme Court Civil Appeal No. 02 of 2014**

<sup>2</sup> **Supreme Court Civil Appeal No. 02 of 2014**

<sup>3</sup> **Though** TUMWESIGYE, JSC in ***Mifumi & others V AG SC Constitutional Appeal No. 02 of 2014*** seems to suggest that this case is wrongly decided. It is submitted that he was referring to the point in issue of

Customary laws are binding on members of the particular community provided they are not contrary to written law and rules of equity under section 14 and 15 of the Judicature Act. In *Mifumi & others v AG SC Constitutional Appeal No. 02 of 2014* the Supreme Court held that the custom of payment of bride price during celebration of a customary marriage was consistent with the constitution of the republic of Uganda but further held that the custom of demand of repayment of bride price during dissolution of a customary marriage is contrary to the constitution and therefore null and void. Tribes in Uganda who have a custom of demanding bride price during customary marriages therefore have a right to continue to do so if they please within their customs. However tribes that have a culture of demanding refund of bride price on divorce or separation cannot continue to do so because this custom conflicts within written law (the Constitution of the republic of Uganda, 1995).

In order to be valid and binding the custom must have been in existence for a long time and must be accepted as binding on all members of the community. The courts require proof of the custom<sup>4</sup> before it is accepted as customary law and once coherent proof is produced and court finds that there is no inconsistency with rules of equity and written law, then the custom will be enforced as customary law under Article 37 the Constitution of the republic of Uganda, 1995 and section 14 of the Judicature Act. In *Bruno Kiwuwa vs. Ivan Serunkuma and another HCCS No.52 of 2006* court enforced a Buganda custom prohibiting marriages between members of the same clan but in *Uganda Electricity Board v G.W. Musoke SC Civil Appeal No. 30 of 1993*, court refused to enforce an alleged custom that children have a duty to look after their parents in their parent's old age for lack of sufficient proof of the custom.

### **FAMILY CUSTOMARY LAW**

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In family law most customary law applies to marriages especially customary marriages. Payment of bride price is the most recognised customary law in Ugandan family law and it was upheld by the Supreme Court in *Mifumi & others V AG SC Constitutional Appeal No. 02 of 2014* while refund of bride price was nullified in the same case. Customary marriages are strictly governed by the Customary Marriages Registration Act and customs of the parties to the marriage (in

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Africans Marriage Act not the ratio decidendi of the case which was that customs of a community once sufficiently proved and accepted by the community are binding provided they comply with equity and written law.

<sup>4</sup> *Kimani V. Gikanga & another (1965) EA.735*. It was held by the Court of Appeal that where African custom or customary law is neither notorious nor documented it must be established for the court's guidance by the party intending to rely upon it. See also *Uganda Electricity Board v G.W. Musoke SC Civil Appeal No. 30 of 1993*.

particular customs of the woman) because it is a strict requirement that the marriage be celebrated under the customs of the girl- *Nassanga v Nanyonga* [1977] HCB 314<sup>5</sup>. However in spite of the all-encompassing application of customary law to customary marriages, customs that are contrary to written law and equity do not apply. Customs denying the wives ownership of property or condoning violence against women<sup>6</sup> or martial rape<sup>7</sup> are examples of invalid customs that do not apply in family law.

Customs however do not apply to other types of marriages since they are specifically regulated by written law which supersedes customary law. Even customs relating to children are superseded by the children Act and therefore children do not belong to the man but to both the parents of the child.

### **CRIMINAL CUSTOMARY LAW**

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This would refer to conduct that is illegal and punishable by the rules and customs of a particular community. Customary criminal law has no application in Uganda due to the principle of legality under article 28(7) and (12) which requires that all criminal offences be defined by written law and their punishment prescribed by an act of parliament. Customary law is inherently unwritten rules of conduct that are passed down by tradition and practice that are binding on members of a particular community. In any case even if they were written down they vary from community to community and Article 28 requires that criminal be prescribe by a statute. Customary Criminal Law does not meet the criteria provided for by the principle of legality. There is no Customary Criminal Law in Uganda.

### **COMMERCIAL CUSTOMARY LAW**

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Under contract law customs and trade usages are binding upon the parties. They refer to any system, custom, or practice of doing business used so commonly in a vocation, field, or place that an expectation arises that it will be observed in a particular transaction. The custom can imply terms into a

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<sup>5</sup> Though this case has been accepted as good law, it is suggested that a marriage based on the customs of the man where they are fundamentally similar to those of the woman would remain valid because following the customs of the man that are the same as customs of the woman inherently amounts to following customs of the girl. For example a customary of a munyooro woman at her home under the label of Toro custom.

<sup>6</sup> See Section 4 and 5 of the Domestic Violence Act, 2010.

<sup>7</sup> See *R v R* [1991] UKHL 12. Though a UK criminal law case it is bases on evolution of the common law and therefore applicable in Uganda via section 14 and 15 of the Judicature Act. See also Sabani Kibenga V Crispus Juko, Civil Suit No.35/66 reported in (1972) HCB 65; which held that the common law applies in Uganda.

contract if there is evidence that under local custom they would usually be present and observed by the parties. See *Smith v. Wilson* (1903) 2 IR 45. Trade usages refer to terms routinely used in contracts within a particular trade or business may be implied into other such contracts. See e.g. *British Crane Hire Corp. Ltd. v. Ipswich Plant Hire Ltd.* (1975). However this is very uncommon and unlikely to occur since African trade customs have died out in commercial transactions when African commerce was replaced by capitalistic rules of trade in the early 20<sup>th</sup> Century. Commercial customary law has no or very little significance.

## **CONCLUSION**

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In Uganda customary law is a vital part of the law of Uganda especially due to the high number of customary marriages and a revered tradition of culture and cultural institutions that have their roots in customs and traditions especially among the Kingdoms of Uganda. However to ensure justice and consistency, the law of Uganda requires that customs of a community must meet a particular standard set by written law in order to have the force of law.