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The Nature, Types and Jurisdiction of Customary Courts in The Nigeria Legal System

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ABSTRACT
This paper discusses the nature, types and jurisdiction of Customary Courts in the Nigeria legal System. It gives us an insight into the historical background and development of customary Courts in Nigeria, which started with the Native Courts before the arrival of the colonial legal system. It also talks about the modern position on establishment and constitution of customary courts which powers are derived from the 1999 Constitution of the Federal Republic of Nigeria, even though they are described by section 6 of the 1999 Constitution as Inferior Courts of Record for the fact that the Constitution empowers the State Houses of Assembly to create them. The nature and judicial functions of the Customary Courts are discussed in full details in this paper, and a notable feature of the customary courts in the exercise of their judicial functions is that they do not apply the Evidence Act and other statutory laws unless authorized by Law as we will see in full details of this paper. The customary Courts ensure quick dispensation of justice without recourse to the rigours and technicalities of the common law. The composition and quorum, appointment of members, tenure of office of a member, dismissal of members, immunity of members of this court are fully explained in this paper. Special reference is made to a large extent in this paper to Lagos and Enugu States of Nigeria. The types of customary courts with their various jurisdiction over issues are also listed and discussed. Lastly, it is recommended that the concept of *tenure for members* of customary courts should be done away with in Nigeria, while permanent and pensionable roles be assigned to them.

Keywords : Customary Court, Jurisdiction, Members of customary Court, S.H Makeri, President of the Customary Court, 1999 Constitution of Federal Republic of Nigeria, Native Courts, Area Courts, Sharia Court, historical development, Nature, judicial function, appointment, tenure, dismissal, immunity, appeal.

Brief Historical Development of Customary Courts in Nigeria[1]

Customary Courts had their origin in Native Courts. Before the arrival of the colonial legal system, there was already in operation a system of Law in Nigeria. In 1900, the colonial legal system in Nigeria permitted natives of the colony of Lagos and its protectorates to operate their native law and custom as far as they were not repugnant to natural justice, equity and good conscience, and also not incompatible with the relevant statutes. While natives were allowed to administer their own native laws and customs, special arrangements were made under traditional leaders to ensure that dispute involving natives and non-natives were referred to the Governor.
A clear distinction was drawn as to who was a native and non-native for administrative purposes. But because there were glaring injustices found in the native courts, the colonial Administrators had to bring the native courts within statutory ambit to ensure a greater measure of surveillance or supervision. In 1906, therefore, the Native Courts Proclamation was made and it provided for a dual system of Native Courts namely '*minor courts'* and '*native courts'*. Each category of court had its defined limits and could hear both civil and criminal cases between *natives* and *non-natives*. The same 1906Northern Nigeria was occupied by the British who introduced the Native Courts Proclamation that reviewed the Native Courts in Northern Nigeria.

With the amalgamation of Northern and Southern Nigeria on 1st January 1914, the Native Court Ordinance 1915-1918 ushered in a system which was consistent with, and enhanced the amalgamated political structure. By these enactments, Warrant Native Courts were established by Residents subject to the Governor's approval and were graded with varying powers and jurisdiction.

[1] THE JUDICIARY AND THE CHALLENGES OF NATION BUILDING – A PAPER DELIVERED BY HON. JUSTICE S.H MAKERI,
PRESIDENT OF CUSTOMARY COURT OF APPEAL, KADUNA STATE AT THE ALL NIGERIA JUDGES CONFERENCE (5th – 9th November, 2007)

By the Native Courts Law1956 (N.R No.6 of 1956), 600 Native Courts were established in Northern Nigeria with civil and criminal jurisdiction spelt out in the warrants establishing these Courts. Later, new guidelines were made providing for operating the reformed and re-constituted native courts with political officers, i.e. District Commissioners and Residents who supervised them by way of Appeals. At best, the Northern Nigeria had a system whereby men of good conduct were made Judges of Native Courts whose decisions were reviewed by Administrative Officers who were men of common sense, not learned in the Law but fully imbued with the colonial system policy of Indirect Rule in Nigeria. In these Courts where Colonial Administrative Officers sat in judgment, Native customary law was regarded more or less as foreign law and had to be proved by evidence. This was the position of Customary Courts up till 1967 when the Area Courts were established and replaced the Native Courts in Northern Nigeria.

Also in the Eastern Nigeria, Native Courts were established with warrant chiefs and Judicial officers at village and community levels. In the Western part of the country, the story was very similar. Native courts developed into customary courts too, so that by 1957, there was Customary Courts Law 1957 (Cap 31) Laws of Western Nigeria, just like Customary Courts Law (Eastern Region no. 21 of 1956).

When the Mid-Western Region was created in 1963out of the old Western Region, the Laws of the former became applicable in the new Region and continued to function until the promulgation of the Customary Courts Edict No. 38 of 1966.
It is these Native Courts that metamorphosed into Area Courts throughout the Northern States in 1967. These same Courts later again metamorphosed into Customary Courts in some States in the Northern Nigeria. In 2001, Kaduna State Government, for example, established Customary Courts and the Customary Court of Appeal by Law No. 9 and 14 of 2001 respectively.

ESTABLISHMENT AND CONSTITUTION OF CUSTOMARY COURTS IN NIGERIA[2]

Under s.6 of the Constitution of the Federal Republic of Nigeria, 1999, the judicial powers of the Federation are vested in Law Courts established for the Federation. Under s.6 (2) of the Constitution, the judicial powers of the State are vested in Courts established by the Constitution for the States. The Courts established for the Federation and the States are enumerated in s.6(5)(a)-(i) of the Constitution, and these are all superior Courts of Record, while those established by the State Houses of Assemble are inferior courts, and they include the Magistrates Courts, Customary Courts, Area Courts and Sharia Courts. The superior courts of Record listed under s.6 (5) (a)-(i) are: The Supreme Court of Nigeria, The Court of Appeal, The Federal High Court, The National Industrial Court, the High Court of the FCT, the Sharia Court of appeal of the FCT, Sharia Court of Appeal of a State, the Customary Court of Appeal of the FCT, the Customary Court of Appeal of State (j) such other Courts as may be authorized by Law to exercise jurisdiction on Matters with respect to which the National Assembly may make Laws.

Apart from the superior courts of record listed, the s.6(4) of the 1999 Constitution says that '*nothing in the foregoing positions of this section shall be construed as precluding-(a) the National Assembly or any House of Assembly from establishing courts, other than those to which this section relates, with subordinate jurisdiction to that of a High Court'.*

Under s.1 of the Customary Courts Law of Lagos State 2011, it is the Judicial Service Commission of Lagos State in consultation with the Governor of Lagos State that establishes Customary Courts. According to Anyafulude[3], *where this power to create a State Court is not exercised by the State House of Assembly, the process becomes inconsistent with the position of s.6(4) of the 1999 Constitution of the Federal Republic of Nigeria* which has been cited earlier.
In Enugu State, s.3 of the Customary Court Law 2004 has it that the State House of Assembly established the Customary Courts of Enugu State. However, the power to determine the number of courts for every local

[2] **Tom Anyafulude – Principles of Practice and Procedure of Customary courts in Nigeria through the Cases (Mercele Press, Enugu, Nigeria) 2012 @ pp 1-2**
[3] Principles of Practice and Procedure of Customary Courts in Nigeria supra @ p. 2

government is vested in the Governor, but it is not the Governor that established the Customary Courts. Rather, his power is restricted to distribution of the Courts.

NATURE AND JUDICIAL FUNCTIONS OF CUSTOMARY COURTS

The main purpose of setting up the courts is to do substantial justice to the parties without recourse to the rigours, harshness and technicalities of the common law. See *Dincey v. Ossie* 5 WACA 177,*Ajayi v. Aina* 16 NLR 67; *Ogunnaike v. Ojayemi* (1987) 1 NWLR PT 53 (a) p.670. Their function is to interprete the prevailing customary law of the area which is binding on the parties.

A customary court's proceedings should be simple and uncomplicated. For instance, a party who relies on traditional history in a land suit in the customary court may not plead particulars of it as is required in the high Court. Similarly, a customary Court may suo motu invite a witness to testify. These principles were established in *Onwuama v. Ezeokoli* (2002) 5 NWLR PT 760@ p.353. In this case, the Trial Customary Court on its own called a witness. This procedure was one of the grounds of appeal. On appeal, the Supreme Court held inter alia as follows : '*In considering proceedings of Native, Customary or Area Courts, an appellate Court should act liberally and this is done by reading the Record to understand what the proceedings were all about so as to determine whether there is evidence of substantial justice and the absence of any miscarriage of justice. This is because such Courts are not required to strictly comply with the Rules of practice and procedure or evidence, and the rationale for creating them is for the need to make the administration of justice available to the common man in a simple, cheap and uncomplicated form. In the instant case, since the proceedings were that of a customary Court, the Respondent was not bound to plead particulars in support of traditional history as it would have done if the case was commenced at the High Court. Furthermore, the fact that the Trial Court called a witness on its own to resolve the conflicting evidence adduced by the parties did not vitiate the proceedings*[4]*.See Zaria v. Maituwo (1966) NMLR 59; Ikpang v. Edoho (1978) 6-7 SC 221; Ibero v. Ume-Ohana (1993) 3 NWLR PT 277 @ p.510; Duru v. Onwunelu (2001) 18 NWLR PT 746 p.672; Lawal v. Olufowobi (1996) 10 NWLR PT 477 @p.177;Ekpa v. Utong (1991) 6 NWLR PT 197 @p.258; Akpan v. Utin (1996) 7 NWLR PT 463@p.634; Mba v. Agu*

(1999) 12 NWLR PT 629 @p. 1

In *Ogunnaike v. Ojayemi* (1987) NWLR PT 53 pg 760, *it was held that a customary court cannot make use of the Evidence Act unless authorized by Law*. The fact that such customary court was presided over by a legally qualified person and the parties were represented by legal practitioners cannot justify the application of the Evidence Act which the law has not authorized.

A customary court can issue a warrant of arrest. Thus, in general terms, the office of a customary court Judge is a judicial office. But it is not recognised as such under s.318 of the 1999 Constitution of the Federal Republic of Nigeria. Yet, he/she is regarded as a judicial officer, because he sits in Court (even though the court is an inferior court of record, but the Constitution at least, recognises that this is a Court of Law as in its s.6).

As a Court of Record (though an inferior one), the customary court keeps records of its proceedings and it also has the power to punish for contempt and impose fines. S.32 of customary courts Law of Lagos State 2011 provides that '*the decision of the court shall be reduced into writing on the day that proceedings are concluded*'. This applies also to the Eastern and Western States. Failure to record the proceedings of a court is a fundamental defect[5].

COMPOSITION AND QUORUM

In the South - Eastern and South - South States, a customary court consists of 3 members who sit as members or Judges in the Court. One of them is the Chairman of the Court. In the absence of the chairman, member 1 acts for him and presides over the proceedings. All members of a customary court are appointed on full time basis by the Judicial Service Commission on the recommendation of the President of the Customary Court of Appeal[6].

In s.2 of the Lagos State Customary Courts Law, a Customary Court shall be properly constituted if it has a minimum of 3 members and a maximum of 5 members. For the purpose of hearing any Cause or Matter, the 3 members of the Court shall be present. However, where the 3 members can not for any reason be present, 2 out

[4] Anyafulude @ p. 3
[5] Anyafulude @ p. 6
[6] Anyafulude @ p. 8

of the 3 members may hear a Cause or Matter. One member cannot sit alone. Where certain members give certain judgment when they were absent during the whole of the proceedings, the judgment will be a nullity. See *Nana Essei Tawia III v. Kwesi Ewudzi 3 WACA 52*; *Otwiwa & Anor v. Kwaseko* 3 WACA 230; *Runka v. Katsina Native Authority* 13 WACA 98*; Madam Vakoh Chapman v. CFAO* 9 WACA 81;
Nevertheless, cases may be commenced *de novo* (afresh) where (1) a new panel of Judges is constituted (2) a retrial is ordered before a customary court.

APPOINTMENT OF MEMBERS

In Lagos State, s.5 of Customary Court Law of Lagos State 2011 says that a person shall be qualified to hold office as a President or member of a customary court if he (or she) is -
(a) A person of proven character and good standing in the society ;
(b) A person of adequate means;
(c) properly placed by his circumstances to perform the functions as a member of the customary court.
(d) a person with educational qualification not below school certificate; and
(e) has attained the age of 50 years.

To me, age is no criteria for ability to perform and intelligence. It is suggested that any competent, fit and proper person of 30 years and above should be qualified to be a member of the customary court. The concept of *adequate means* as listed in criteria (b) above is immaterial going by the socio-economic conditions that are prevalent in today's Nigeria. No wealthy or successful person in term of cash would want to be a member of the customary court. The term *adequate means* is rather ambiguos and should rather refer to *adequate relevant knowledge* of customary Law and things that happen in the society. The educational qualification should not be any thing below a degree in a good course (preferably in Law). So, I recommend a reform of the customary Laws of Lagos State on the conditions for appointment of members of a customary court.
In Enugu State, s. 5 of the customary Courts Law 2004 provides that 'no person will be appointment a member of a customary court unless-

1. He (or she) is literate in English and understands Igbo or any other local language
2. He (or she) has a wide knowledge of the customary Law, tradition and usage prevailing in the area of the customary court.
3. He (or she) is a person of good character
4. He (or she) is not less than 35 or more than 65years of age
5. He (or she) is resident within the area of the customary courts.

Other South - Eastern States of Nigeria have similar criteria. But then, the members must have a first degree (for Educational qualification) and the age of 30 is recommended for membership of the court.

TENURE OF OFFICE OF A MEMBER

In Enugu, Abia & Ebonyi States, a member of a customary court is usually appointed for 3years, and may be eligible for re-appointment for second term or further terms of 3years in each case, as the Judicial Service Commission may deem necessary.

In Lagos State, s.6 of the Customary Courts Law 2011 provides that *the office of a member of the customary court shall be by appointment for a renewable term of 5 years, and shall not be pensionable*. This in my view does not do justice as such appointment should be permanent and pensionable if we must achieve good and efficient justice delivery at the end of the day.
In some States that engaged legal Practitioners as members of Customary Courts, there are agitations for improved conditions of service and increased financial benefits[7]. Happily, some States have made legislation which make appointment of members full time and pensionable. The idea of appointing experienced, elderly people as members is informed by the belief that they are presumed to be more knowledgeable in customary law than the younger people.

DISMISSAL OF MEMBERS

In Enugu State Customary Courts Laws, it is provided that a member shall hold office for 3years, but may be dismissed or removed at any time by the Judicial Service Commission if –
a). The member is no longer able to perform his duties as a result of ill health

[7] Anyafulude @ p. 22

b). gives or accepts bribe or is involved in any corrupt practice, abuse of office, abuse of power or in any other act of misconduct or
c). for any other reason which the commission considers adequate[8].

In Lagos State, s. 7 of the Customary Courts Law 2011 provides that a person shall be disqualified from holding office of President or member of a customary court if –

a). In the opinion of the commission, he is mentally impaired or otherwise unable or unfit to discharge the functions of a president or member of the court.
b). he has been convicted of an offence which involves Fraud, dishonesty of high moral turpitude, and
c). for reason of discipline and misconduct, the commission determines that a President or member be removed from office.

The dismissal of a president or a member shall be published in the State official Gazette.

IMMUNITY OF MEMBERS

S.17 of Customary Courts Law of Lagos state 2011 provides that *no member of a customary Court shall be liable for any act done by him or ordered by him to be done in the discharge of his judicial duty whether or not within the limits of his jurisdiction, provided that in good faith, he believed himself to have jurisdiction to do or order to be done the act in question at the time.*

This provision protects members from legal actions in the performance of their functions as customary courts members. But it does not protect them when they say, do or order things to be done outside the scope of their judicial powers or authority. And even where members act without jurisdiction, but in good faith, they shall not be liable in actions. Yet, this does not protect reckless arbitrary exercise of judicial powers.

Under s. 10 of Customary Courts Laws of Enugu State 2004, *a member of the court shall not be liable in any action for any act done or ordered to be done by him or thing said by him in good faith within his powers and jurisdiction under this law.*

In *Joe Sanday v. Hotuga* & Anor 14WACA 18, the plaintiff (A) sued the defendants, B, C & D who were members of the Native court, claiming damages for assault and false imprisonment. The defence of B,C,D was that the imprisonment of A was in lawful execution of the judgment of the native court. After the first sitting of the court, B,C,D alleged a second sitting at which A was stubborn and ordered to be detained. But at this second sitting, there was no record showing anything that happened in court. It was held that B, C, & D were liable to pay damages because they acted outside the scope of their powers. There was no record of what happened in the proceedings, and this was held to be improper.

NOTE : Customary courts are not to apply the common law principles. (See Amadasun & Ors. v. Ohenso Ors) (1966) NMLR 179. Here, the Supreme Court of Nigeria rejected the English concept of legal personality being applied and held that it has no application to customary courts. See also Dinsey v. Ossei 5 WACA 177, Olalekan v.COP (1962) WNLR 215, C 217; Ajayi, (The Balogun of Ijanna)v. Aina (Oba of Ibese) 16 NLR 67@ 71; Oladepo v. Akinsowon 157 WRNLR 215 @ 216; Sekoni II & Ors v.Agboza & Ors 13WACA 241

TYPES OF CUSTOMARY COURTS

In the North, including the FCT Abuja, we have the Area courts .Using Kano State as an example, we have the **AREA COURTS** which are made of -

1). Upper Area court
2). The Area court I
3). The Area court II

The Jurisdiction of the Area courts include-

a). all question of Islamic personal law
b). Matrimonial Causes & Matters between persons married under customary law
c). Suits relating to custody of children under customary law
d). Civil actions involving debt demand & damages
e). Matters relating to succession to property and the Administration of Estates under customary law. Appeal goes to the customary court of Appeal.

[8] Anyafulude @ 22 – 23

2). SHARIA COURTS : is a feature of the judicial system of the Northern States of Nigeria . Some of the Northern States have established the Sharia Court. An example is Zamfara State. The court is divided into 3 grades as follows:
1). Upper Sharia court
2). Higher Sharia court
3). Sharia court.

Jurisdiction – the jurisdiction of the Sharia court relates to civil proceedings in Islamic law in respect of rights, power, duty, liability, privilege, interest, obligation or claim in issue. Appeals from here go to the Sharia Court of Appeal**.**

3). CUSTOMARY COURTS - Customary Courts are established by Customary Court Laws of the States of Southern Nigeria as an alternative to the Area Courts in the North[9]. Nevertheless, some States in the North have Customary Courts. The Jurisdiction of customary courts in Lagos State, for example, covers the following:

a) Matrimonial Causes & Other Matters between persons married under customary law

b). Suits relating to guardianship and custody of children and customary law
c). Matters relating to inheritance upon intestacy and the administration of intestate estate under customary law
d).Other cases or Matters for debt demand or damages

Appeals from here go to the Customary Court of Appeal. Customary Courts are made of the following :
1). Grade A Customary Court
2). Grade B Customary Court
3) Grade C Customary Court

All Grade A customary courts are presided over by legal practitioners, some grade B courts are specified by a direction in writing issued by the Commissioner for Justice that they should be presided by legal practitioners, and then, the other Grade B Courts & Grade C courts are headed lay people.

CONCLUSION

It is humbly recommended that the concept of *tenure of office* for customary Law court members should be abolished. This is no elective office, since the appointment of members is done by the Judicial Service Commission of the different States. In Lagos State, customary courts are currently being established by the Judicial service Commission in consultation with the State Governor. This cannot continue to be acceptable as it is contrary to section 6 of the 1999 Constitution of the Federal Republic of Nigeria. The Lagos State House of Assembly should exercise this power, and other Nigerian States having their customary Courts established as those of Lagos State should correct the situation because it is improper. The age for appointment of members of customary Courts in Nigeria should be reduced to thirty years because a person of such age is energetic in most cases, fit and proper to take up the role with its challenges. The power and jurisdiction of the Customary Courts should be unlimited over all Issues that can be brought before it. It is not sufficient if it has *unlimited* jurisdiction over *some* Matters. Rather, such unlimited powers should cover all cases within its scope of jurisdiction. The powers of the customary courts to impose Sentences and Fines should also be more than what is currently obtainable under the Law.
Under the s. 5 of the Customary Courts Law of Lagos State 2011, part of the conditions for the appointment of a member of this court is that he (or she) should be a person of *adequate means. The term adequate means* in my

[9] **ABILORO, S.O – JURISDICTION AND COURTS ESTABLISHED BY THE CONSTITUTION**(being paper presented at the
Mandatory Continuing Education Programme on Legal Intervention and Procedures in Environmental Health Litigation at Ta'al Conference Hotel, Lafia on 18th – 20th April 2012)

view is ambiguous, and should rather refer to *adequate knowledge of the relevant customary law*. The fact is that if *adequate means* refers to a person of financial comfort or wealth, such a person will rather do something else than opt or accept to be a member of the Customary Court, going by the socio – economic conditions of today's Nigeria. The criteria of having no less than a university degree (preferably in Law) should equally be introduced as one of the conditions for appointment of every member of the customary Courts in Nigeria. Lastly, the welfare and conditions of service of Customary Court members in Nigeria should be restuctured to meet their needs. Now than ever, is indeed the time to give the different Customary Courts in Nigeria their pride of place.

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