THE SHARIA AND CUSTOMARY COURT IN OUR JUDICIAL SYSTEM: CUSTOMARY PERSPECTIVE

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Protocols

My lords, it is indeed an honour for me to have been called upon to deliver this all important paper at this august conference. I must say, the theme of this year's conference which is ***Sustaining Democracy Through Effective and Efficient Administration of Justice*** is apt considering the role the judiciary continues to play in our democratic journey as a people. My lord, the Administrator, I congratulate your lordship most heartily.

Introduction

Justice is the foundation upon which all civilized democracies must thrive. On this foundation lies the tripod pillar of justice as very elegantly prescribed by the erudite Chukwidufu Oputa, JSC (as he then was and of blessed memory) in ***Josiah v. State***[1] where his lordship postulated the principle of justice being a three way traffic, thus: ***justice for the accused, the society and the victim.*** For the attainment of a sustainable democracy, these elements must be constant in justice delivery and the administration of justice. To achieve this feat, the Constitution of the Federal Republic of Nigeria (as amended) 1999 has vested judicial powers in the courts

[1] (1985) 1NLWR (Pt 1) 125 at 141

established for the Federation and the States.[2] Section 17(2) (e) of the Constitution guarantees the independence, impartiality integrity and accessibility of the courts.

However, the courts to which the Constitution made express mention are courts usually located in urban locations thereby defeating one of the fundamentals of the court system which is accessibility. Owing to the places where these courts are sited, it will appear as though only the elites of society can approach these courts thereby shutting out the rural dwellers and the not so sophisticated members of our societies.

It is in anticipation of this challenge that the drafters of our Constitution made provisions for State Houses of Assembly to be able to establish for their respective States, Area and Customary Courts to enhance justice delivery at the grassroots. It is this all important function that the Sharia (Area) and Customary Courts perform towards efficient and effective administration of justice in Nigeria for sustainable democracy.

For the purpose of this paper, I have been restricted to the **Customary Perspective** of the Sharia and Customary Courts in our Judicial System only and except it becomes necessary, I intend to maintain the restriction.

CREATION OF CUSTOMARY COURTS

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. These Native Laws were usually administered by traditional leaders or persons appointed by them for these purpose. With the advent of colonialism, these native laws were subjected to what is today known as the Repugnancy Test which was the beginning of the subjugation of our Native Laws to the received English Law. When the Colonial Masters felt there were glaring injustices found in the native courts, the colonial Administrators had to bring the Native Courts within statutory ambit to

[2] Section 6(1) & (2) CFRN 1999

ensure a greater measure of surveillance or supervision. In 1906, therefore, the Native Courts Proclamation was made. 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.[3]

It is these Native Courts that metamorphosed into Area/Sharia Courts in the North and Area/Customary Courts[4] in some States of the North and most States of the South

Section 6 (5) (j) (k) of the 1999 Constitution as amended gives States in the Federation the liberty to create inferior courts with summary jurisdiction. Therefore some States especially in the North Central and the Southern part of Nigeria have established the Customary Court in their respective States[5].

In some States of the Federation where there are no Customary Courts, it is the Area Courts that apply the customary laws in those States[6]. Therefore it cannot be correct as is erroneously held in some quarters that only States where Customary Courts exist, apply Customary Laws.

[3] Native Courts were established in Northern Nigeria with civil and criminal jurisdiction. 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 1963 out 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.

[4] Customary Courts are courts established by the FCT and states by virtue of section 6(5) (j) & (k) of the Constitution to exercise summary jurisdiction applying native laws and customs prevailing in their area of jurisdiction.

[5] FCT Customary Court Act, 2007, Enugu State Customary Court Law, 2004, Ondo State Customary Court Law, Laws of Ondo State Cap 41, 2006, Lagos State Customary Court Laws, 2011 (to mention but a few).

[6] Sec. 20, 21 Area Court Edict

NATURE OF CUSTOMARY (AREA) COURT

The primary objective of setting up the Customary (Area) Courts is to do substantial justice to the parties without recourse to the rigours, harshness and technicalities of the common law. Their function is to interpret the prevailing customary law of the area which is binding on the parties[7]. Proceedings at the Customary Court should therefore be simple and uncomplicated. For instance, a party who relies on traditional history in a land suit in the Customary Court may not have to plead particulars of such traditional history as is the requirement in the High Court.

Speaking on the nature of the Customary (Area) Court, the Supreme Court had this to say in ***Onwuama v. Ezeokoli***[8]:

> '*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 .See Zaria v. Maituwo (1966) NMLR 59; Ikpang v. Edoho (1978) 6-7 SC 221; Ibero v.*

[7] See ***Dincey v. Ossie 5 WACA 177; Ogunnaike v. Ojayemi (1987) 1 NWLR PT 53 (a) p. 670***.
[8] (2002) 5 NWLR pt 760 p 353

Ume-Ohana (1993) 3 NWLR PT 277 @ p.510; Duru v. Onwunelu (2001) 18 NWLR PT 746 p.672."

It is the need to keep proceedings at the Customary Courts as less technical as possible that has informed the need to limit the scope of applicability of the Evidence Act in such proceedings[9]. The Act however gives some latitude under which the courts mentioned therein may enforce all or any provisions of the Act. It is in furtherance of this provision that certain provisions of the Evidence Act have been made applicable in proceedings at the Customary Court[10]. It must therefore be understood that it is not entirely correct to say the provisions of the Evidence Act is not applicable in Customary Courts as the Act indeed gives room for some exceptions as to when some or all the provisions of the . The position is that the rigid standard of proof provided by the Act does not necessarily apply and this too must not be misunderstood to mean evidence has no place in the Customary Court. Otherwise, the question will be how else does the court establish a fact? In ***Akintola & Ors v. Solano***[11], Oputa, JSC puts it this way:

> *"If a thing is self-evident, it does nor not require evidence. What therefore is evidence? Simply put, it is the means by which any matter of fact the truth of which is submitted for investigation may be established or disproved. Evidence is therefore necessary to prove or disprove an issue of fact."*

JURISDICTION

Customary (Area) Courts exercise both civil and criminal jurisdiction depending on its area of jurisdiction. In the FCT for instance, the Customary Court does not as at present, exercise criminal jurisdiction. It is however hoped that sometimes soon, the

[9] See section256 (1)(c)Evidence Act
[10] Section 65 Customary Court of Appeal Act, 2007.
[11] (1986)4 SC 141 @ 184

need to confer some criminal jurisdiction on the Customary Courts will be appreciated.

Civil Jurisdiction.

Customary Courts are established to exercise civil jurisdiction in the following areas:

i. Matrimonial causes and other matters between persons married under the customary law[12].
ii. Guardianship and custody of children under customary law;
iii. Inheritance upon intestacy and the administration of intestate estate under customary law; and
iv. Other cases or matters for debt demand and damages.

The above represents the scope of jurisdiction of Customary Courts across Nigeria[13]. These provisions notwithstanding, the Customary Courts are enjoined to as much as is practicable, encourage reconciliation amongst parties.

Although not specifically mentioned, for any Customary Court to exercise jurisdiction on land matters, such land must be governed by Customary Rights of Occupancy. In other words, the land must not be in an area designated to be urban area. Section 41 of the Land Use Act, 1978 puts it thus:

> *An Area Court or Customary Court or other court of equivalent jurisdiction in a state shall have jurisdiction in respect of proceedings in respect of a customary right of occupancy granted by a local*

[12] In the FCT however, the jurisdiction of the Customary Court is not limited to causes and matters arising from a marriage contracted under customary law provided it can be established that some steps had been taken in line with the cultural beliefs of either of the parties. This is regardless of whether the relationship culminates in a marriage or not. In other words, as soon as steps are taken or implied to have been taken in line with any native law and custom, whether or not there is a marriage properly so called under any customary law, the court in the FCT can hear and determine any issue arising from such relationship.

[13] *See for example, Section 14 (2) of the FCT Customary Court Act, 2007, section 2(3) (4) (5), First Schedule to the Akwa Ibom State Customary Courts Laws, Cap 40, Laws of Akwa Ibom State, 2000, section 21, First Schedule Customary Court Laws, 2001 of Kaduna State, Ondo State Customary Court Law, Cap 41 Laws of Ondo State, 2006 and Customary Court Law of Enugu State 2004, amongst others.*

government under this Act and for the purpose of this paragraph, proceedings include proceedings for a declaration of title to a customary right of occupancy and all laws including rules of court regulating practice and procedure of such courts shall have effect with such modifications as would enable effect to be given to this section.

This provision of the Land Use Act notwithstanding, the Customary Court of the FCT does not have the *vires* to exercise jurisdiction over land in the FCT irrespective of their locations. This is so because generally speaking, land in the FCT are all designated as urban areas and are all vested in the Federal Government of Nigeria who through the Minister of the FCT administers same[14]. It doesn't matter where it is located, any dispute relating to land in the FCT goes to the High Court of the FCT.

In exercise of civil jurisdiction by the Customary Courts, the appropriate Customary Law shall be one prevalent in its area of jurisdiction. In the FCT however, the Customary Courts exercises jurisdiction over all persons within the Federal Capital Territory[15] so long as the subject matter relates to or is on Customary Law and is applicable between the parties before the court. It is therefore not necessarily the Customary Law prevalent in its area of jurisdiction that becomes applicable. The rationale for this is not farfetched. The FCT being a cosmopolitan society, to apply the Customary Law prevalent in its area of jurisdiction will work to shut a lot of its dwellers out from justice.

Criminal Jurisdiction

As has been stated earlier in this paper, Customary Courts are creation of statutes. It is trite law that it is the statute establishing a court that prescribes its area and

[14] No Customary Right of Occupancy can be granted over lands in the FCT. Only Statutory right of Occupancy. See section 297(2) 1999 CFRN (as amended), section 18 FCT Act, Cap 503 LFN. See also ***Ona v. Atenda (2000) 5 NWLR pt 556; Akinrimisi v. Maersk (Nig.) Ltd (2013) 10 NWLR Pt 1361 p.73***

[15] Sec. 14(1) FCT Customary Court Act, 2007; Martin Ikini & Anor. v. Aisha Juliet Ushang (2012) FCT-CCALR Vol. 2

scope of jurisdiction. It is these statutes that donates to the Customary (Area) Courts the powers to exercise criminal jurisdiction subject of course to any other written law. In Akwa Ibom State for example, the Customary Court Laws, thereof provides thus:

> *"Customary Courts have jurisdiction to hear and determine criminal causes and matters where the penalty is a fine not exceeding one thousand naira or imprisonment for a term not exceeding three months or both such fine and imprisonment, or where in the case of juvenile offenders, the penalty does not exceed twelve strokes"*[16].

Section 55 of the same Law confers jurisdiction on the Customary Court to hear and determine cases of assaults, obstruction and molestation amongst others. It will appear therefore that in Akwa Ibom State, apart from capital offences, the Customary Court has jurisdiction to hear and determine virtually all the offences contained in the Criminal Code.

In Lagos State, while section 3 of the State Customary Court Laws vests criminal jurisdiction on the court, section 1 (2) of the same Law lists its area of limitation in exercising such powers.

What I have attempted to do so far is to show that the Customary Courts contribute to the civil and criminal justice delivery system in Nigeria. One common feature of the criminal jurisdiction of the Customary Courts however are the ridiculously low monetary fines provided in lieu of imprisonment. It is my considered opinion that if these fines are not jacked up to meet the current economic realities, the court may continue to opt for custodial sentences which will turn out to become counterproductive in the long run.

[16] item 1of the First Schedule

APPEALS FROM CUSTOMARY COURTS

Appeals against the decisions and/or judgments of the Customary Courts lies to the Customary Courts of Appeals in States that have developed and applied the Customary Court of Appeal system. In the Federal Capital Territory, appeals lie automatically to the Customary Court of Appeal which is a superior court of record established by Degree No. 30 of 1991 and the Constitution[17]. Section 267 of the Constitution prescribes the jurisdiction of the FCT Customary Court of Appeal thus:

> *The Customary Court of Appeal of the FCT, Abuja shall, in addition to such other jurisdiction as may be conferred upon it by an Act of the National Assembly, exercise such appellate and supervisory jurisdiction in civil proceedings involving questions of Customary Law.*

This section has unfortunately been construed time and again in such a way that the appellate jurisdiction of the Customary Court of Appeal becomes exercisable only and only when the grounds of appeal raise questions of customary law and no more[18]. The far reaching implication of this interpretation therefore is that where grounds of appeal does not raise question of Customary Law, the appeals will go to the High Court. This has even been taken further in the past to mean where parties before the Customary Court of Appeal are aggrieved by the decision of the Customary Court of Appeal on grounds other than grounds of Customary Law, the appeals lie to the High Court thereby placing the High Court as an appellate Court over the judgments and decisions of the Customary Court of Appeal.

[17] Section 265 CFRN 1999 (as amended)

[18] ***See Babang Golok v Mambok Dilyapwan (1990) 3 NWLR (pt. 139) p. 411; Ahmadu Usman V. Sidi Umaru(1992) 7 NWLR (pt. 254) p. 377***

The Supreme Court has however put an end to this very sad narrative of justice delivery when in the case of ***Customary Court of Appeal, Edo State*** *v*. ***Chief (Engr.) C. A. Aguele, Mrs. Beatrice Aguele and Attorney General, Edo State***[19] it held

per Hon. Justice Mary Ukaego Peter-Odili, JSC, CFR, thus

> *"It is clear that neither of the two sections 272 and 273 has vested on the High Court an appellate or supervisory jurisdiction over decisions of the Customary Court of Appeal. No such jurisdiction or power has been conferred on the High Court by the State House of Assembly subjecting Customary Court of Appeal to the supervisory jurisdiction of the High Court. Both High Court and Customary Court of Appeal are intended by the Constitution to be superior courts of records. Appeals from both courts lie to the Court of Appeal. Both are courts of co-ordinate jurisdiction".*

Unfortunately however, appeals can only lie from the Customary Courts to the Customary Court of Appeal where one exists.

Criminal Appeals from Customary Courts

Section 282(1) of the Constitution provides thus:

> *"A customary court of appeal of a State shall exercise appellate and supervisory jurisdiction in civil proceedings involving questions of customary law."*

From the above section which stipulates the jurisdiction of the Customary Court of Appeal of a State, the appellate jurisdiction of the courts have been restricted to civil causes and matters only. A lacuna is obvious here since the courts as the name implies, are ordinarily created to hear appeals from Customary Courts. We have seen in the course of this paper that the Customary Courts exercises criminal

[19] SC.123/2006

jurisdiction in some states. Not being final courts, the question then is, to which court does criminal appeals from customary courts lie?

In Akwa Ibom State for instance, appeals in criminal matters lie from the Customary Courts to the Magistrate Courts and then to the High Court. See section 41(1) (2) of the Customary Courts Law of Akwa Ibom State[20]. Respectfully, this defeats the spirit of the doctrine of hierarchy of court considering the fact that both the Magistrate and Customary Courts are both inferior courts which are created to exercise co-ordinate jurisdiction.

Until such a time as the Customary Court of Appeal may be vested jurisdiction to hear criminal appeals, it is my humble opinion that it will be neater if the appeals are allowed to go from the Customary Courts to the High Courts. This is even more so that most jurisdiction are now appointing or considering appointing only legal practitioners as Judges (members) of their respective Customary Court Bench.

Original Jurisdiction of Customary Court of Appeal

Being appellate courts does not ordinarily work to oust the Customary Courts of Appeal from exercising original jurisdiction. The courts can indeed be vested original jurisdiction in some special cases as is the case of the other appellate courts in the land. These special cases however, may be on or related to native laws and custom. For instance, the National Assembly in the exercise of the powers vested in it by section 267 of Constitution, passed into law the Customary Court of Appeal of the FCT, Abuja (Jurisdiction on Chieftaincy Matters) Act, 2011 by which original jurisdiction to hear and determine any dispute on or relating to Chieftaincy matters in the FCT is vested exclusively on the Customary Court of Appeal of the FCT. The position therefore is that in the FCT, the Customary Court of Appeal exercises both original and appellate jurisdiction unlike what is obtainable in the States where the

[20] Cap 40 Vol. 2 Laws of Akwa Ibom State, 2000

jurisdiction of the Customary Court of Appeal is only appellate. The State Houses of Assembly may borrow a leaf from the National Assembly.

Conclusion

I have sought to examine the customary perspective of the Sharia and Customary Court in our judicial system. From our discourse thus far, it is manifestly clear that the Customary Court is not only an integral part of our justice system, it is a very important part of justice delivery and that it is the court where the ordinary man gets justice according to his native beliefs. I therefore look forward to the day where our customary court and customary law will be given its true pride of place in our justice system unlike the present situation where the borrowed laws are given priority over our indigenous laws, a day when the Nigerian Courts would disagree with the principles of the common law that are in conflict with aspects of our Native Laws and Customs.

My lords, distinguished participants, permit me once again to place on record my profound appreciation to the Administrator of the Institute and your lordship's staff for the opportunity to share my views on this topic.

Thank you for your kind attention.

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