COURTS OF COMMON LAW IN NIGERIA

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Abstract

Among the disciplines taught at the Law Institute of the Peoples' Friendship University of Russia, one of the central places is allocated to the course “Civil Procedure in Foreign Countries”. PFUR teachers conduct ongoing research work and thoroughly monitor reforms in the field of civil justice, arbitration and mediation in foreign countries. (Ermakova et al., 2018).

This article is the result of such research. It includes the following subsections: 1) Customary law courts of Nigeria in the pre-colonial and colonial eras; 2) Legal regulation of the activities of customary law courts in modern Nigeria; 3) Composition of the customary law court and the procedure of the case; 4) Advantages and disadvantages of the administration of justice in the courts of customary law; 5) Reforms in the field of ordinary justice. The article outlines the views of African, American and Russian authors on customary law and its modern development in African countries.

Conclusion is made that the views of most Europeans on customary law and ordinary courts of African countries do not correspond to reality. Customary law is not a dying branch of law, but one of the elements of modern legal regulation of the daily life and activities of the African population. In some African countries, up to 80% of civil disputes are resolved through customary justice systems rather than formal or state legal system.

The administration of justice in the courts of customary law has both advantages and disadvantages. Given the high demand and public confidence in the customary law courts, African leaders should foster their efforts towards improving the system of customary law courts and the training of customary law judges (chiefs and others).

Keywords: Nigeria law, customary law, customary law courts, natural courts

1 INTRODUCTION

In the past, sole customary law was the only source of law in pre-colonial sub-Saharan Africa. Currently, the law of African countries is mainly subject to national codified legislation (in countries of French-speaking Africa), statutory law and common law (in English-speaking countries). However, in many African countries, customary law continues to regulate issues of family law, traditional credentials, property rights and succession. Even where national statutory law exists, customary law is still often applied because of long-

standing social practices and community expectations, as well as lack of knowledge or difficulty in accessing the formal legal system, as noted by American authors J. Fenrich and M. McEvoy, customary law can be defined as "the normative order followed by the population, formed by regular social behavior and the development of an existing sense of duty" (Fenrich, 2014).

The usual nature of African law is explained by the nature of the civilisation of the peoples living in this region, as written by an African lawyer S. Kulidali (Coulidaly, 2011). Traditional African societies of the pre-colonial era had the form of hierarchical groups, but not discriminatory, since the rights and duties of a person were determined according to his place in the community and in relation to the community. At the head of these communities there usually stood the leader surrounded by noble people. Traditional African societies had rather different views of the world. For them, the individual was between the living world and the afterlife, and between these two worlds, there was interaction through faith in the ancestral spirits who remain among the living. This cosmogony exerted and continues to influence the formation of law, which is regarded as an emanation of the will of the ancestors. As a result, members of a social group play only a minor role in the formation of law.

The president of the Edo State Court of Appeals (Nigeria), Joseph Otabor Olubor, defined customary law as follows: "Customary law is the organic or living law of the indigenous peoples of Nigeria governing their lives and activities. Customary law is organic in the sense that it is not static. Customary law is normative in the sense that it controls the life and activities of the community to which it belongs. It is said that custom is a mirror of the culture of the people. I would say that customary law goes further and brings justice to the lives of all those who obey it" (Olubor J., 2000).

2 METHODOLOGY

First, the authors would like to declare that this work is a scientific study explicitly prepared for students in order to lay out the basis for the legal regulation of the customary courts in Nigeria in the most accessible form. The information presented in this article may serve postgraduate students and law students a theoretical basis for the preparation of dissertation research, reports, term papers and diplomas. General information about the customs and customary law of African countries can be found in the works of Russian authors: I. Sinitsyna's monographs. "Custom and Customary Law in Modern Africa" (Sinitsina, I.E., 1978) and PhD thesis of Say L. Ginho "Judicial and Arbitral Consideration of Labor Conflicts in Developing Countries of Africa" (Ginho S., 1998). The work is also based on research by African lawyers (Adangor Z., 2018), (Coulidaly S., 2011), (Nwagbara Ch., 2014), (Olubor J., 2000), as well as by American authors Fenrich Jeanmarie and McEvoy Mary (2014).

A number of regulations were also used in the work: Constitution of the Federal Republic of Nigeria (Third Alteration) Act of February 22, 2011; Customary Courts Edict, 1984; Customary courts and rules of law in Enugu State, 2004; Customary Courts Law of Lagos State 2011. There were also examined case precedents: Kharie Zaidan v. Fatima Khalil Mohssen, 1973; Nwaigwe v. Okere, 2008; Onwuama v. Ezeokoli, 2002.

3 RESULTS

3.1 Customary law courts of Nigeria in the pre-colonial and colonial era

African customs in the pre-colonial era were numerous and incredibly diverse. They differed from one community to another and from one ethnic group to another. Differences could be related to factors such as language, origin, history, social group and economy. For example, the customary law system of an ethnic group in a city could be different from a similar system in a neighbouring city, even if both groups spoke the same language. However, the rules of law arising from these customs had certain characteristics common to all ethnic groups. These common features, which are recognised by many authors, indirectly confirm the profound unity of the traditional African foundation. This fact allows us to differentiate this law from the legal systems of Western European countries.

The colonial separation changed the legal map of Africa. Since the legislative policy of the European states in the colonies was determined by the legal concepts of the metropolis, each colonial power imposed its own legal model on its domains: French law was introduced in French Africa and Madagascar; Belgian law in Congo; Portuguese law in Angola and Mozambique; common law - in English colonies; Romano-Dutch law, which was later changed under the influence of English common law - in South Africa, as I. Sinitsina says (Sinitsina I., 1978). Black Africa has experienced two models of colonisation: the British system of indirect control of the colonies and the system of France, Spain, Belgium, Italy, Portugal, and others, seeking to

assimilate indigenous peoples. In both cases, the goal and the result were the same. The goal was to achieve cultural, political, economic, and legal supremacy over African nations (Frolova et al., 2017).

In Nigeria, customary law courts existed in the pre-colonial era and were called “Native Courts”. After 1900, the colonial administration in Nigeria permitted the natives of the Lagos colony to act according to their own laws and customs, since they did not contradict the principles of natural justice, equity and good conscience, and were compatible with the laws in force. However, while the indigenous people were allowed to live by their own laws and customs under the control of local leaders, special measures were taken to resolve disputes between the indigenous people and the Europeans, which were considered by the governor. A clear distinction was made regarding who is a native and non-natives for administrative purposes, as the Nigerian lawyer Ch. Nwagbara noted (2014).

In 1906, the “Native Courts Proclamation” was adopted, which provided for a dual court system, namely, “minor courts” and “native courts”. In 1914, the British Administration issued the “Native Court Ordinance 1915–1918”, which created a system whereby the courts of the indigenous peoples, subject to the approval of the governor, were given various powers and jurisdiction. The decree was valid until 1956, when, in accordance with the Native Courts Law 1956 (NR No.6 of 1956), 600 such courts that had civil and criminal jurisdiction, were established in Northern Nigeria. This fact was stated in the warrants to create them. Nigeria became independent in 1960, but indigenous courts survived until 1967 when they were replaced by Area Courts.

3.2 Legal regulation of customary courts in modern Nigeria

In modern Nigeria, the judiciary is exercised by the courts. In addition to state federal and state courts, art. 6 of the 1999 Constitution of the Federal Republic of Nigeria (2011 edition) explicitly recognises the following customary law courts and Islamic law courts as the highest court in Nigeria: 1) The Sharia Court of Appeal of the Federal Capital Territory, Abuja; 2) Sharia Court of Appeal of a State; 3) The customary court of appeal of the Federal Capital Territory, Abuja; 4) A customary court of Appeal of a state (Adangor Z., 2018). In addition to the highest courts, subordinate (or lower) courts also operate in Nigeria. These include the Magistrates Courts, Customary Courts and the Muslim Courts of the Nigerian States. Customary law courts have jurisdiction over those subject to customary law. Their activities are regulated by state laws.

Under art. 1 of Customary Courts Law of Lagos State 2011, the Judicial Service Commission of Lagos State, after consultation with the Governor of Lagos, decided on the establishment of customary law courts. In Enugu State, art. 3 of the Customary Court Law of 2004 states that the State House of Assembly establishes the customary law courts of Enugu State.

Since Nigeria is a country of common law, judicial precedents are also the primary source of legal regulation of the activities of customary courts in the country. In 1973, in the decision on the case "Zaidan v. Khalil Mohssen” The Supreme Court of Nigeria clarified that “customary law is any legal system that is not common law and is not a law passed by any competent legislative authority in Nigeria but which is enforceable and binding in Nigeria between the parties, to which the law applies and has influence”. The binding force of customary law sets them apart from the usual rules of social behaviour, the observance of which by community members is not considered mandatory. In other words, customary law is the law of the indigenous community because of its acceptability and applicability by members of the community. In 2008, the Supreme Court of Nigeria again emphasized the main features of customary law in the verdict in the case of “Nwaigwe v. Okere”: “Customary law derives from the traditional usage and practice of people in a given community, which, through general acceptance and tacit consent on their part, and a long and unchanging habit, acquired to some degree an element of coercion and force of law to the community members”.

The main purpose of creating customary courts is to ensure the resolution of disputes between the parties to a dispute, without resorting to harsh and complex common law mechanisms (Olubor J., 2000). Proceedings in a customary court should be uncomplicated and straightforward. For example, a party who relies on customary law in a land claim in a traditional court does not have the right to refer to evidence, as required by the Federal High Court. However, a customary court may invite witnesses to testify. These principles were established in 2002 in a decision of the Supreme Court of Nigeria in the case of Onwuama v. Ezeokoli. In this case, the court of the first instance invited the witness on its own initiative. This action was one of the grounds for appeal. When considering the appeal, the Supreme Court of Nigeria ruled, in particular, the following: “When considering cases in customary or district courts, the Court of Appeal must act freely, and this is done by reviewing the protocol in order to understand what is being said as evidence of justice and the absence of any errors in justice”. Customary law courts are not obliged to strictly follow the Rules of

Proceedings or the Rules of Evidence. The main purpose of their creation is to make the mechanism of justice for an ordinary person simple, cheap and easy".

3.3 Composition of a customary law court and its proceedings

In general terms, the position of the judge adjudicating disputes in customary law (office of a customary court Judge) is a judicial position. Although this is not entirely consistent with art.318 of the Nigeria Constitution of 1999, nevertheless, such a judge is considered to be a judicial officer because his seat is in the court (although this court is a lower court). Like the Court of Record (albeit subordinate), the court in cases based on customary law records its proceedings and also has the right to punish any contempt of court and impose fines. Article 32 of the 2011 Law on the Courts of Lagos provides that "the decision of the court shall be reduced to writing on the day the hearing ends." This also applies to the eastern and western states. The absence of court records (a record of court proceedings) is a fundamental flaw in the ordinary courts.

In the southeastern and southern states of Nigeria, a regular court consists of 3 members who sit as judges or members of the court (members or Judges). One of them is the Chairman of the Court. In the absence of the President, one of the members of the judiciary stands for him and presides over the hearing. All members of the ordinary court are appointed on a permanent basis by the Judicial Service Commission on the recommendation of the President of the Customary Court of Appeal. For example, on March 17, 2018, the National Judicial Council (NJC) of Nigeria appointed three new judges to the Oyo State Court of Appeal, as well as 60 new judges in 25 states of the federation (InsideOyo, 2018). Under art. 2 of the 2011 Lagos Customary Law Act, the composition of the court for the consideration of a particular dispute must be properly formed, it must have at least 3 and no more than five members. Three members of the Court must be present to consider any matters. According to art. 5 of the 2011 Lagos Customary Law Act, a person with the following qualities can become a member of the court: a) a person of a proven character and good standing in the society; b) a person person of adequate means; c) a person who has the ability to perform the functions of a member of a customary law court; d) a person with an educational qualification not lower than a school certificate and e) having reached the age of 50.

In the Nigerian states of Enugu, Abia and Ebony, members of the customary law courts are usually appointed for three years and may be eligible for reappointment for a second term or for an additional three years in each case, which may be deemed necessary by the Judicial Service Commission. Article 6 of the 2011 Lagos Customary Law Act provides that a member of the court is appointed to a position for five years with the possibility of renewal for another five years (at the same time, a member of the court cannot continue to hold his position upon reaching retirement age). For example, in January 2018, the chairman of the Customary Court of Appeal (CCA) of the Federal Capital Territory, Judge Moses Abubakar Bello, resigned from the position of head of the court after reaching the mandatory retirement age for members of the judiciary. He was holding this position for 25 years (Adavize, 2018).

In Art. 6 of the 2011 Lagos Customary Law Act it is stated that a person should be removed from the position of the President or a member of a customary law court if: a) according to the commission, this person is mentally impaired or otherwise unable to perform the functions of the chairman or member of the court; b) the person was found guilty of committing a crime involving fraud or violation of morality. If a person violates the discipline or commits unlawful actions, the commission decides on the removal from office of the President or a member of a customary law court, which then is published in the official state newspaper.

In 2005, the United Nations Development Program (UNDP) established the Commission for the Empowerment of Poor People in Developing Countries to study the relationship between isolation, poverty and the law. American authors J. Fenrich and M. McEvoy noted that after three years of research, the Commission published a report that identified four "pillars" of legal support. Studies have shown that in some African countries, up to 80% of disputes are resolved through customary justice systems, rather than the formal or state legal system. (Fenrich, 2014) In sub-Saharan Africa, customary law regulates the lives of more than 75% of the population who have little or no access to formal state law. In particular, for rural and other marginal communities that do not have physical, financial or educational means to access formal state systems, conventional justice systems provide the only available dispute resolution mechanism, despite such issues as discriminatory treatment of women and violation of certain international standards in human rights. (Fenrich, 2014) The UN Commission concluded that, given the dependence of African countries on traditional justice systems, there is a need to improve the quality of these systems.

Traditional justice outside the formal system in Nigeria has both advantages and disadvantages. B. Arnot, the national manager of the J4A Program (Justice for All) (J4A program, 2015), expressed his opinion on how the authority of traditional rulers could be strengthened while improving access to justice for the

population. The traditional rulers are the local leaders. They apply Sharia law, which is customary law, that is, derived from custom. In addition to their legal functions, traditional leaders perform religious functions, such as appointing imams in the main mosques of the emirate (Arnot B., 2015). There are more than 250 different ethnic groups in the country, each of which has its own leader. Traditional law in each group is also different. While the emirs in the Islamic north of Nigeria carry out religious functions, in the south of the country the leaders do not perform such functions. Traditional rulers are respected and trusted by the public because legal systems are based on local traditions, culture, history and religion. The society accepts traditional law better than the official police and court system. The public believes that these formal systems are alien and do not take into account the social harmony, culture and religion of the local population.

How is an application filed in a customary court? In the north of Nigeria, the complainant approaches the traditional ruler (leader) and explains his complaint. The chief addresses the complaint to the respondent. Then the applicant is asked to repeat his complaint in the presence of the defendant. The respondent is asked whether what the applicant said is true or not. If the defendant does not agree, witnesses can be called, and the traditional ruler acts as an intermediary. If the defendant agrees with the complaint, the applicant is asked about what he wants. For example, in case of damaging the crops, the applicant may require the defendant to pay the cost of damage, and so on. Where a settlement of a dispute cannot be reached, the traditional ruler may refer the disputants to the most senior traditional leader in the hierarchy or an official court. (Arnot B., 2015).

3.4 Advantages and disadvantages of the administration of justice in the courts of customary law

Customary law courts have many attractive features. They are more accessible to ordinary people in African countries than formal courts. Traditional tribunals are inexpensive, efficient, and often geographically very close to users. Their hearings are understandable to the participants in the proceedings because they usually use local dialects and avoid legal language. Traditional courts give communities a sense of belonging and social cohesion. Another essential advantage of ordinary tribunals is that they encourage mediation and reconciliation, and make decisions that are restorative, tend to restructure social relations, unlike the formal judicial system, which must be competitive. The rules applied by these tribunals are usually more flexible and take into account the current local values and morals.

The disadvantages of the system of courts of customary law include the following: the system is patriarchal with a low or poor understanding of human rights standards by the lower cadre of traditional rulers. As a result, they do not adhere to generally accepted principles of human rights protection. However, there are also other drawbacks: some traditions do not allow women or children to speak among men; however, there is no separate customary court for them in which women participate as plaintiffs or defendants. Compliance with the decisions of traditional rulers depends on people's respect for the ruler and the traditions of the community. A customary law court does not have the authority to enforce its decisions. Moreover, finally, due to the lack of clerical work, resolved disputes can be resumed and dealt with several times. As another disadvantage of the application of customary law, it should be noted that in communities governed by customary law, rights and obligations are largely determined on the basis of gender, kinship, age and birth order. The different attitudes towards men and women in such systems are widely known and often criticised. Customary law systems are also criticised for preserving existing social hierarchies and power structures in the community that disadvantage poor and other marginalised groups.

3.5 Reforms in the field of ordinary justice

Changes in the administration of justice in African countries are taking place in different ways. The J4A Justice for All Program (J4A program, 2015), mentioned above, is aimed at assisting the traditional rulers of Nigeria (the leaders) in resolving problems existing within the traditional justice system by preparing training and reference materials on human rights and alternative dispute resolution in customary law courts. During the implementation of the J4A Program, more than 1,500 traditional leaders in the state of Jigawa and more than 100 of their wives were trained. It is noted that the level of resolution of disputes in the courts of customary law has increased. For example, more than 90 per cent of complaints filed by women were resolved to the satisfaction of both parties to the dispute. The overall level of public satisfaction with services provided by traditional leaders also shows a steady increase. Speaking about reforms in the field of ordinary justice, Nigerian lawyer C. Nwabbara noted that the age for candidates for members of the courts of customary law in Nigeria should be reduced to thirty years (now the age is 50 years) as at this age a person is energetic and experienced enough to cope with this task; another criteria - a university degree (preferably

in law) should be introduced as one of the preconditions for being appointed a member of a traditional court in Nigeria.

4 FINDINGS

It should be emphasized that the views of most Europeans on customary law and ordinary courts in African countries do not correspond to reality. Customary law is not a dying branch of law, but one of the elements of modern legal regulation of the daily life and activities of the African population. In some African countries, up to 80% of civil disputes are resolved through customary justice systems rather than the formal or state legal system. The administration of justice in the courts of customary law has both advantages and disadvantages. Given the high demand and public confidence in the customary law courts, African leaders should direct their efforts towards improving the system of customary law courts and the training of customary law judges (chiefs and others).

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