IMPLEMENTATION OF ALTERNATIVE DISPUTE RESOLUTION IN NIGERIA: POSSIBILITIES AND HINDRANCES

BY

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A thesis submitted in fulfillment of the requirement for the degree of Doctor of Philosophy (Law)

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ABSTRACT

Alternative Dispute Resolution (ADR) stands adopted in various parts of the world as convenient most vehicles for the resolution of disputes. Its adoption among other things is basically to correct the problems created by litigation or the adversarial justice system. The problems associated with litigation are multi-dimensional as excessive cost, undue delay, formalism and acrimony which affect the relationship of the parties. These have in ways affected justice delivery system thus, access to justice and quick justice delivery have become only a mirage. These problems are manifest in the resolution of disputes in Nigerian Courts. Thus, backlog of cases and delays are hallmarks of the Nigerian judicial system too. Different laws have been adopted or enacted in various jurisdictions in furtherance of the practice of the ADR processes. Although some such laws have been adopted in Nigeria too, but the extent to which the laws can guarantee a successful implementation of ADR in Nigeria is uncertain. Thus, the study adopts the traditional research method encompassing the primary and secondary sources of law as well as the qualitative methods to examine and find solutions to the problems. However, the study examines the laws on the practice of ADR in Nigeria. It shows the shortcomings in these laws and the fact that the search for ADR remains confined to the Arbitration and Conciliation Act 2004 which only deals with arbitration and conciliation. There are other meaningful ADR processes. The study also examines various customary ADR practices in Nigeria and the possibilities of finding in these practices some solutions. The study reveals that arbitration is fraught with litigation in Nigeria. International commercial arbitration is infected with problems of excessive cost, delay and formalism. However, reforms are proposed to make arbitration and conciliation more user-friendly. It is also recommended that certain concepts should be injected into the practice of international commercial arbitration to make it more settlement savvy. That Islamic ADR practices like *Sulh, Tahkim,* and *Fatwa*, etc are practiced in a formal way, particularly in the North. It shows as well that ADR processes, particularly Court-annexed mediation, need a legislation to spread its practice nationally in Nigeria. The study therefore, proposes a reform and recommends the adoption of the ADR Act of 1998 (USA) in order to legalize and formalize the application of ADR in all civil courts and to open the doors for court-annexed mediation. A Mediation Act is also found necessary to strengthen the practice of mediation in Nigeria. It is hoped that these reforms will entrench ADR in Nigeria to achieve quick justice delivery and to ensure the participation of every strata of the society in dispute resolution.

ملخّص البحث

يُتبنّى حلُّ النّزاع المتناوب في عدّة مناطق العالم، كوسيلة لحلّ الخلافات. وعلى أيّة حال، فإنّ تبنّيه، ضمنَ أشياء أخرى، يُعدّ طريقاً أساسيّاً لحَلّ المشكلة النّاتجة عن الخصومة أو النّاتجة عن نظام القضاء المخالف المعاد. فإن المشاكل المتعلّقة بالنّزاعات تتعدّدُ، ومنها السّعر الزّائد، والتأخُّر غير اللاّئق، والشّكليّة، والقسوة التي تؤثّر على العلاقة بين الأطراف. وقد أثّرت كلُّ هذه بطرق متعدّدة على نظام إعطاء العدل والحقوق، ولذلك، فإن الحصول على العدالة، والإنصاف السّريع، صار نوعاً من السّراب، ومهما كان الأمر، فقد صارت هذه المشاكل تنعكس في حلّ النّزاعات في محاكم نيجيريا، ولذلك، فإنّ تراكم الظروف العارضة وتأجيلها، قد صار ظاهرة نظام القضاء النّيجيري، ففي السّلطات القضائية المتنوّعة، صارت القوانين متبنّاة أو مُصدرة لتطوير ممارسة عمليّات متنوّعة لحَلّ النّزاع المتناوب. وأكيد، إنّ بعض القوانين قد صارت متبنّاة في نيجيريا، ولكنّ مدى ضمان هذه القوانين لتطبيق ناجح على حلّ الخصومة المتناوب في نيجيريا، ليس محقّقاً. ولذا، فقد تبنّى هذا البحث المنهج التّقليدي الشّامل لمصادر القانون الأوّليّة والثّانويّة، كما يحوي المناهج الوصفيّة للفحص وللتعرّف على حَلّ هذه المشاكل. ومع ذلك، فقد درس البحث القوانينَ النيجيرية المتعلّقة بممارسة حلّ الخصومة المتناوب، وقد أبرزت الدّراسةُ العيوبَ في هذه القوانين، كما أظهرت أنّ مسلك التّحكيم والمصالحة للعام 2004 قد زوّد وعالج أمورَ التّحكيم والصّلح فقط، بدون اعتبار إلى عمليّات أخرى مهمّة تتعلّق بحَلّ النّزاع المتناوب. وقد فحص البحث أيضاً في الأعمال التقليديّة المتنوّعة التي يُمارسها حَلُّ النّزاع المتناوب في نيجيريا، كما فحص في الجدليات التي تدور حول الممارسة، سعياً وراء حلّها. فأبدت الدّراسة أنّ التّحكيم قد صار محروما مكبوتاً بالخصومات في نيجيريا، كما أظهرت أيضاً أنّ التّحكيم التّجاري الدّولي، قد أُصيب بمشاكل وأمراض منها السّعر غير المناسب والتأخير والتأجيل والشّكليّة. بيد أنّه قد اقتُرح التّعديل والإصلاح لجعل مسلك التّحكيم والمصالحة أكثر جاذبيّة وفعّاليّة. وقد قُدّمت التّوصية بإدخال بعض المفاهيم في ممارسة التّحكيم التّجاري الدّولي لجعله سهل الإدراك والتّنظيم. ثمّ كشفت الدّراسة عن حقيقة أنّ طرق الشّريعة الإسلاميّة كالصّلح، والتّحكيم، والفتوى، في ممارسة حَلّ النّزاع المتناوب، كلّها طرق غير رسميّة. وقد أظهرت الدّراسة أيضاً أنّ عمليّات حَلّ الخصوم المتناوب، وخاصةً وساطة المحكمة الملحَقة، تحتاج إلى التّشريع لاقتطاع ممارستها وطنيّا في نيجيريا. فلذلك، تقترح الدّراسة الإصلاح كما تُوصي بتبنّي مسلك حَلّ الخصوم المتناوب للعام (1998 للولايات المتّحدة الأمريكيّة) وذلك لتعميم تطبيق أوالية حَلّ الخصوم المتناوب في كلّ الحالات العارضة في المحاكم المدنيّة، ولشرعنة توسّط المحكمة الملحقة. وقد رأينا أيضاً ضرورة إخراج مسلك أو قانون الوساطة لتقوية عمليّة التّوسّط في نيجيريا. والمرجوّ هو أنّ هذا الإصلاح سوف يحذف نظام حَلّ النّزاع المتناوب في نيجيريا لتحقيق إعطاء العدل السّريع ولضمان المشاركة الجماعيّة في حلّ النّزاعات.

APPROVAL PAGE

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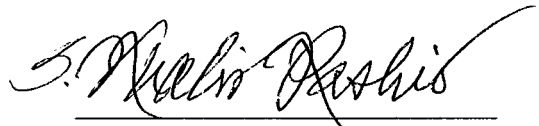

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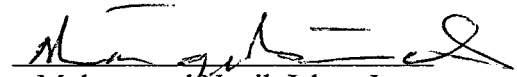

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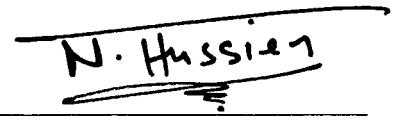

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DECLARATION

I hereby declare that this thesis is the result of my own investigations, except where otherwise stated. I also declare that it has not been previously or concurrently submitted as a whole for any other degrees at IIUM or other institutions.

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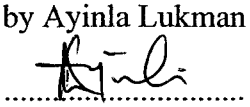

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This research work is dedicated to the entire Ayinla Family.

Particularly,

To my Parents and to the cause that I am striving to represent:

an epitome of humility.

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TABLE OF CONTENTS

LIST OF CASES

LIST OF STATUTES

Administration of Islamic Law (Federal Territories) Act 1993 (Act 505) of Malaysia
Administration of Islamic Law Enactment 1989 (Enactment No. 2 of 1989) Selangor
Administration of Muslim Law Act, 1966 (Chapter 3) Singapore
Alternative Dispute Resolution Act of 1998 (H.R. 3528)
Anti-Money Laundering Act 2001, Laws of Malaysia Act 613
Anti-Terrorism and Security Act 2001
Arbitration and Conciliation Act Cap. A18 Laws of the Federation of Nigeria, 1990
Arbitration Law Cap. 10 Laws of Eastern Nigeria 1963
Arbitration Law Cap. 8 Laws of Western Nigeria 1959
Arbitration Law Cap.7 Laws of Northern Nigeria 1963
Arbitration Law of China
Arbitration Ordinance (Act), Cap. 13, Laws of the Federation of Nigeria and Lagos 1958
Arbitration Ordinance of 1914
Area Courts Edict, 1967, Central-West State of Nigeria Gazette No. 7, Vol. 1, 21st December 1967-Supplement
Bangladesh Prevention of Money Laundering Act, Act No. VII of 2002
Children and Young Persons Ordinance No. 41 of 1943
Constitution of the Federal Republic of Nigeria 1979
Constitution of the Federal Republic of Nigeria, 1999
Court of Resolution Law Cap. 28 Laws of Northern Nigeria, 1963
English Arbitration Act of 1889
English Wills Act of 1837
Evidence Act, Cap. 112 Laws of the Federation of Nigeria, 1990
High Court Act Cap. 510, LFN (Abuja) 1990
High Court Law Cap. 49 Laws of Northern Nigeria, 1963
High Court of Kwara State (Civil Procedure) Rules 2005
High Court of Lagos Act, Cap. 80
High Court of Lagos State (Civil Procedure) Rules 2004
High Court of the Federal Capital Territory Abuja Civil Procedure Rules 2004
Hong Kong Arbitration Ordinance 1990
Indian Arbitration and Conciliation Act, 1996
Islamic Family Law Act, 1984 (Enactment No. 4 of 1984) Selangor
Islamic Family Law Act, 1984 (Federal Territories) Act 303
Kano State Hisbah (Amendment) Law No. 6 of 2005
Kano State Hisbah Board Law No. 4 of 2003
Lagos Multi-Door Courthouse Law, No. 56, Vol. 40, 2007
LMDC Practice Direction on Mediation Procedure 2008
Magistrate Court Ordinance No. 43 of 1943
Money Laundering (Prohibition) Act 2004 Nigeria
Money Laundering (Prohibition) Act No. 7 of 2003 Laws of the Federation of Nigeria
Moslem Court of Appeal Law, Northern Region Law No. 10 of 1956
Native Court Ordinance No. 44 of 1933
Native Court proclamation No. 1 of 1906
Native Courts (colony) Ordinance No. 7 of 1943

Native Courts Ordinance No. 5 of 1918
New York Convention on the recognition and enforcement of foreign arbitral awards, June 10, 1958
Northern Region Law No. 17 of 1960
Protectorate Court Ordinance No. 47 of 1933
Provincial Court Ordinance No. 7 of 1914
Rules of Professional Conduct for Legal Practitioners 2007
Shariah Civil Code Enactment, 1991 of Selangor
Shariah Civil Procedure (*Mal*) Act of 2001
Shariah Court (Administration of Justice and Certain Consequential Changes) Law 2000 of Jigawa State
Shariah Court Civil Procedure (*Sulh*) Federal Territory Act 585 Rules 2004
Shariah Court Civil Procedure (*Sulh*) Malacca Rules 2004
Shariah Court Civil Procedure Enactment 1991 Act No. 7 of 1990
Shariah Court Civil Procedure Enactment Selangor 2003
Shariah Court Law of Jigawa State (2000)
Singapore Arbitration Act, 2001
Supreme Court Ordinance No. 33 of 1943
Supreme Court Ordinance No. 6 of 1914
Supreme Court Ordinance, 1900
Syariah Civil Procedure (Federal Territories) Act 1998
The Law of personal Status, 1976 (Jordan)
The United Nations Convention against Transnational Organized Crime of 2001
The United States Depository Institution Money Laundering Amendment Act, 1990
UNCITRAL Model Law on International Commercial Arbitration (UN document A/40/17, annex 1) as adopted by the United Nations Commission on International Trade Law on 21 June 1985
Vienna Convention of 1988 (The United Nations Convention Against Illicit Traffic in Narcotic Drug and Psychotropic Substances)
West African Court of Appeal Ordinance No. 30 of 1943
West African Court of Appeal Ordinance No. 47 of 1933

LIST OF ABBREVIATIONS

AAA	American Arbitration Association
AALCC	Asian-African Legal Consultative Committee
AALCO	Asian-African Legal Consultative Organization
ABA	American Bar Association
AC	Appeal Cases
ADR	Alternative Dispute Resolution
All ER	All England Law Reports
ALQ	Arab Law Quarterly
ADRJ	Australian Dispute Resolution Journal
BLR	Building Law Reports
CCIG	Chamber of Commerce and Industry of Geneva
CIETAC	China International Economic and Trade Arbitration Commission
ICLR	International Construction Law Review
HNLR	Harvard Negotiation Law Review
IBA	International Bar Association
ICC BULL	International Court of Arbitration Bulletin
ICC	International Chamber of Commerce
ICLQ	International and Comparative Law Quarterly
ICSID	International Centre for Settlement of Investment Disputes
IIUM LJ	International Islamic University Malaysia Law Journal
ILM	International Legal Materials
ILR	International Law Reports
JAL	Journal of African Law
JIA	Journal of International Arbitration
JLP	Journal of Law & Policy
Lloyd's LR	Lloyd's Law Report
LMDC	Lagos Multi-Door Courthouse Law
LR	Law Review
MLR	The Modern Law Review
MLJ	Malayan Law Journal
Model Law	Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law (UNCITRAL)
NBA	Nigerian Bar Association
NCMG	Negotiation and Conflict Management Group
NJC	National Judicial Council
NWLR	Nigerian Weekly Law Report
OSJDR	Ohio State Journal on Dispute Resolution
RADIC	African Journal of International and Comparative Law
RCICA	Regional Centre for International Commercial Arbitration
SC	Supreme Court Judgment
SCC	Arbitration Institute of the Stockholm Chamber of Commerce
SCNJ	Supreme Court of Nigeria Judgment
SJC	State Judicial Council
UCLA L R	University of California Los Angeles Law Review

WACA	West African Court of Appeal Decision
WIPO	World Intellectual Property Organization
WLR	Weekly Law Report

TRANSLITERATION

Table of the system of transliteration of Arabic terms and names followed in this thesis

Consonant

ب	b		ط	ṭ
ت	t		ظ	ẓ
ث	th		ع	‘
ج	j		غ	gh
ح	ḥ		ف	f
خ	kh		ق	q
د	d		ك	k
ذ	dh		ل	l
ر	r		م	m
ز	z		ن	n
س	s		هـ	h
ش	sh		و	w
ص	ṣ		ء	’
ض	ḍ		ي	y

Short Vowels = ـَ = a ـِ = i = ـُ = u

Long Vowels = ا + ـَ = ā ي + ـِ = ī و + ـُ = ū

Diphthongs = اي = ay او = aw

CHAPTER ONE

GENERAL BACKGROUND OF THE STUDY

1.0 INTRODUCTION

In the contemporary world, Alternative Dispute Resolution (ADR) is gaining prominence as an alternative for providing expeditious, cheaper, more flexible and confidential modes of dispute resolution.[1] Nigeria cannot afford to be left out in the use of Alternative Dispute Resolution processes after seeing its successful use in various jurisdictions of the world like USA, China, India, Canada, Malaysia, Australia, and U.K, etc. In the business world as well as in other interpersonal relationships, an effective dispute resolution mechanism is a catalyst for economic growth and access to justice for the entrenchment of a just society. ADR may be instrumental in achieving this.

Nigeria has witnessed different regimes of ADR practices, from the pre-colonial period to the present position. The country which is today known as Nigeria comprises of different communities with set down customary rules for the resolution of dispute. In the pre-colonial period, prior to the conquest or colonization of Nigeria, each community had its own informal ways of resolving disputes.[2] There are two major types of societal setting, the centralized and non centralized society. However, in the pre-colonial period the two major laws that regulated the life of Nigerians were

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[1] Syed Khalid Rashid, *ADR in Malaysia*, (Malaysia: Kulliyyah of Laws IIUM, 2006) at 1-11. See also Henry Brown and Arthur Marriot, *ADR Principles and Practices*, (London: Sweet and Maxwell, 2nd edn., 1999), at 12-15.

[2] John Ohireime Asien, *Introduction to Nigerian Legal System*, (Ibadan: Sam Bookman Publishers, 1997), at 147. Amazu A. Asouzu, *International Commercial Arbitration and African States, Practice, Participation and Institutional Development*, (Cambridge: University Press, 2001), at 115.

Islamic Law and Customary laws. Islamic law was dominant in the North[3] while in the South customary law was practised with unfettered application.[4] Customary dispute resolution practices were prevalent. Hon. Justice Oguntade JCA (as he then was), held in *Okpuruwu v. Okpokam*[5] that:

> In the pre-colonial times and before the advent of the regular courts, our people (Nigerians) certainly had a simple and inexpensive way of adjudicating over disputes between them. They referred them to elders or a body set up for that purpose. The practice has over the years become strongly embedded in the system that they survive today as custom.

This case and so many other cases[6] that lend credence to the existence of this type of dispute resolution in Nigeria are discussed in the thesis. However, the chiefs[7] or the elders[8] preside over disputes resolution depending on the political structure and the nature of the dispute. Thus, the chiefs in the Yoruba speaking areas of the South-West and in the non centralized societies of the East, elders administered customary law.[9] Thus, customary law governs and regulates the lives and transactions of the people of Nigeria.[10] It is argued that arbitral and conciliation proceedings were and are of frequent use and are still important in the African Society.[11]

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[3] A. A. Oba, "Shariah Court of Appeal: The Continuing Crisis of Jurisdiction," Seminar Paper Presented at the Faculty of Law University of Ilorin, 2006, at 1. See also Ahmed Beita Yusuf, *Nigerian Legal System, Pluralism and Conflict of Laws in the Northern States,* (New Delhi: National Publishing House, 1982), at 54-87.

[4] E. A. Keay and S. S. Richardson, *The Native and Customary Courts of Nigeria,* (London: Sweet and Maxwell, 1966), at 4. M. C. Okany, *The Role of Customary Courts in Nigeria,* (Enugu: Fourth Dimention Publishing Co. Ltd., 1984), at 1-6.

[5] *Okpuruwu v. Okpokam* (1988) 4 NWLR (Part 90) 554 at 572

[6] *Foli v. Akese* (1930) 1WACA at 1, *Assampong v. Amuaku* (1932) 1 WACA 1, *Mensah v. Takyiampong& Ors* (1940) 6 WACA at 118, *Larbi v Kwasi* (1954) 13 WACA at 76, *Ohiaeri v. Akabeze* (1992) 2 NWLR (Part 221) at 1.

[7] Amazu A. Asouzu, *International Commercial Arbitration and African States, Practice, Participation and Institutional Development*, n. 2 at 115

[8] Ibid, at 116. See also Ayinla, L. A, "ADR And The Relevance of Native or Customary Arbitration in Nigeria," *The University of Ilorin Law Journal*, vol. 5, No. 1 (2009) at 258.

[9] A. A. Oba, n. 3 at 2. A. N. Allot, *Essays in African Law,* (London: Butterworths, 1960), at 117, 120-1. A. A. Kolajo, *Customary Law in Nigeria Through the Cases,* (Ibadan: spectrum, 2000), at 219-234. Gaius Ezejiofor, *The Law of Arbitration in Nigeria,* (Ikeja: Longman, 1977), at 22-31.

[10] The Supreme Court in *Oyewumi v. Ogunsesan* (1990) 3 NWLR (Part 137)182 at 207

[11] A. A. Asouzu, n. 2 at 116.

One notable characteristic feature of the dispute resolution system like that of the substantive customary law is its unwritten nature and its emphasis on reconciliation and maintenance of social cohesion[12] stands out clearly.[13] Dispute was resolved in the ancient Benin Empire by family head and village head. They served as arbitrator or mediator depending on the nature of the dispute. While in the Yoruba settings, the Oba (King) appointed eminent chiefs to serve as mediator or arbitrator.[14] The family head and village head functioned as mediators in their respective domains. This was and still a significant element of African customary law.[15]

However, the maintenance of a peaceful co-existence, law and order is a responsibility of elders who are to maintain "the cord that binds humanity", and resolve broken ties of friendship.[16] The elders, the priest or other leaders have been described as the typical third parties who are respected members of the community. Their role is to help the parties resolve their controversy but they also represent the community, its value and norms, and the communal interest in the restoration of harmony, order and the respect of its law.[17] The aim and objective of law, from a juristic perspective, transcends the mere resolution of dispute or conflict[18] to a wider scope, which is "the maintenance of the equilibrium of the society...as a corporate

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[12] Ibid, at 117

[13] There are other features of customary law that are discussed elsewhere.

[14] See an account of this in Ephraim Akpata, *The Nigerian Arbitration Law in Focus,* (Lagos: West African Books Publishers Ltd., 1997), at 1-2.

[15] Virtus Chitoo Igbokwe, "Socio-Cultural Dimensions Of Dispute Resolution: Informal Justice Processes Among The Ibo-Speaking Peoples Of Eastern Nigeria And Their Implications For Community/Neighbouring Justice System," *African Journal of International and Comparative Law,* vol. 10, Part 3 (1998) at 446.

[16] E. A. Ajisafe Moore, *The Laws and Customs of The Yoruba People,* (Abeokuta n. d.), at 40. See Omoniyi Adewoye, "Proverb as Vehicle of Juristic Thought Among The Yoruba" *Obafemi Awolowo University Law Journal,* vol. 3 & 4 (1987) at 4.

[17] Christian Buhring-Uhle, *Arbitration and Mediation in International Business, Designing Procedures for Effective Conflict Management,* edited by Julian Lew, (Hague: Kluwer law, 1996), at 276

[18] Omoniyi Adewoye, n. 16 at 4.

whole."[19] Thus, emphasis is laid on the promotion of conciliation and continued bond between disputants[20] and the readjustment of the disturbed social relationship.[21]

As stated earlier that there are two major laws in force in Nigeria, the Northern part of Nigeria is predominantly regulated by Islamic Law, due to the Jihadist movement of Usman Danfodio who founded the Sokoto Caliphate around 1804,[22] or 1808,[23] or 1809.[24] Prior to 1900, virtually the whole of Northern Nigeria was governed by *Sharī'ah*,[25] and the Sokoto Caliphate was set up on the principles of Islamic justice and rule of law. The Caliphate was the largest empire after the fall of the Songhai in 1591.[26] However, Islamic law was the predominant law practised in the West Africa, particularly in the Northern Nigeria.[27] In the Caliphate, judges or *Qadis* were guided by Islamic tenets which included amicable settlement of dispute as provided by Allah in the Holy *Qur'ān*, and the *Sunnah* of the Prophet (S.A.W). *Sharī'ah* generally governed settlement of disputes in the Caliphate. The judiciary was the second pillar which supported the Caliphate,[28] the *Bayan Wujub al-Hijra* spelt out the duties or function of the office of the *Qadi* among other things to include the following single

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[19] J. H. Driberg, "The African Conception of Law," *Journal of the African society,* vol. 34 (1955) at 231

[20] J. M. Elegido, *Jurisprudence,* (Nigeria: Spectrum Law, 2001), at 128.

[21] M. Gluckman, "Natural Justice in Africa" (1964) 9 Natural Law Forum 25, 28, see J. M. Elegido, n. 20 at 128.

[22] Isabella Okagbue, "Private Prosecution in Nigeria: Recent Developments and Some Proposal," *Journal of African Law,* vol. 34 (1990) at 53-54. See also <http://www.onlinenigeria.com> (accessed 26 August, 2008).

[23] Aisha R. Masterton, "The Sokoto Caliphate: *Dar Al-Ilm*," <http://www.islamonline.net/> (accessed 26 August, 2008).

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