CUSTOMARY COURTS, CRIMINAL JURISDICTION, AND MENTAL HEALTH SAFEGUARDS IN NIGERIA: TOWARDS RIGHTS-COMPLIANT GRASSROOTS JUSTICE

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Abstract

The evolving role of customary courts in Nigeria presents an opportunity to expand access to justice, particularly for rural communities where statutory courts remain inaccessible. Recent reforms allowing lawyers to preside over customary courts strengthen their procedural credibility, raising the question of whether these courts should be vested with criminal jurisdiction. This article examines the feasibility of such an expansion, with particular emphasis on the integration of safeguards under the Mental Health Act 2021. It argues that while customary courts retain legitimacy through linguistic inclusivity and cultural accessibility, their extension into criminal justice requires procedural, institutional, and linguistic reforms to ensure fairness and compliance with human right standards. Adopting a doctrinal legal- methodology, the study analyses constitutional provisions and judicial decisions on customary courts, criminal justice, and mental health regulation in Nigeria. This is complemented by a comparative approach drawing on the experiences of South Africa and Kenya, the article reveals demonstrates that grassroots courts can exercise criminal jurisdiction without compromising rights, provided robust oversight, capacity building, and mental health-sensitive frameworks are embedded in the adjudication within its cultural and linguistic perspective. The study concludes with concrete policy recommendations for harmonising customary justice with statutory safeguards, positioning Nigeria as a potential model for rights-compliant grassroots criminal justice system in Africa.

Keywords: Customary courts, Criminal jurisdiction, Mental Health Act 2021, Access to justice, Human rights safeguards

INTRODUCTION

The Nigerian justice system continues to confront profound challenges relating to accessibility and legitimacy, particularly in semi-urban and rural communities where formal courts remain geographically distant, financially burdensome, and often linguistically and culturally misaligned with the populations they are intended to serve[451]. The customary court system was established primarily to bring justice closer to the people in a manner that is accessible, affordable, and straightforward. The expectation is that, with customary courts in place, litigants can obtain timely justice, unlike in conventional common law courts, whether superior or inferior[452]. These courts are particularly important because they are local, culturally grounded, and accessible to ordinary people, providing a form of justice that is both legitimate and understandable. By reflecting community norms rather than relying solely on formal or written laws, they complement the formal common law system.

Despite this proximity and cultural significance, customary courts are significantly constrained by legal boundaries most notably their exclusion from criminal jurisdiction.[453] This exclusion aggravates the justice gap for many Nigerians, leaving serious wrongs either un-addressed or handled informally outside formal legal protections.

Within this perspective, customary courts occupy a distinctive and indispensable position in Nigeria's plural legal order. Embedded within local communities, operating predominantly in indigenous languages, and drawing regulatory authority from established cultural practices, these courts serve as a primary point of contact for grassroots dispute resolution[454]. Their proximity and

[451] A Akintunde ,'Access to Justice: Socio-Cultural, Economic and Geographical Limitations Thereto – A Critique' [2017]Pp1-15<https://ayoakintunde.com/wp-content/uploads/2018/10/AccesstoJustice-LatestPresentationforOndoStateJudiciary.pdf#:~:text=Access%20to%20justice%20issues%20Inadequate%20number%20of,jurisdictions%20and%20have%20only%20courts%20in%20Akure>.accessed on 21st March,2026

[452] B R Oniha ,'Towards Fast-Tracking Justice Delivery In Customary Courts In Nigeria'[2024] *Nigerian Law Guru* < https://nigerianlawguru.com/wp-content/uploads/2024/10/TOWARDS-FAST-TRACKING-JUSTICE-DELIVERY-IN-CUSTOMARY-COURTS-IN-NIGERIA.pdf#:~:text=The%20system%20has%2C%20it%20can%20be%20said%2C,conventional%20common%20law%20superior%20and%20inferior%20courts>.accessed on 22nd March,2026

[453]G Ihesiulo, 'Senate Empowers FCT Customary Courts to Try Criminal Matters' [Daily Times Nigeria, 18 September 2025] <https://dailytimesng.com/senate-empowers-fct-customary-courts-to-try-criminal-matters/> accessed on the 21st March 2026

[454] J I Udosen, 'The Judiciary and the Role Of Customary Courts In Nigeria' [2017] *Global Journal of Politics and Law Research 34* < https://www.eajournals.org/wp-content/uploads/The-Judiciary-and-the-Role-of-Customary-CourtsinNigeria2.pdf#:~:text=Area%20and%20Customary%20Courts%20as%20the%20Courts,to%20natural%20justice%2C%20equity%20and%20good%20conscience.> accessed on 21st March,2026

sociocultural legitimacy enhance their accessibility and public trust, positioning them as viable institutions for the decentralisation of justice delivery.

Notwithstanding these advantages, the jurisdictional competence of customary courts remains significantly circumscribed, particularly in relation to criminal matters. By constitutional design and judicial interpretation, their role in criminal adjudication is either excluded or narrowly confined[455]. This limitation has the unintended consequence of displacing minor criminal disputes from formal adjudication at the community level, thereby fostering reliance on informal or extra-legal mechanisms that may undermine procedural fairness, accountability, and the protection of fundamental rights.

Scholarly discourse on Nigeria's justice system consistently highlights the structural barriers to access, particularly for rural and economically disadvantaged populations. Scholars such as Odusi and Odusi[456] have noted that the formal legal system in Nigeria, largely a legacy of colonial transplantation, reflects both an entrenched ideological commitment to legal positivism and a structural orientation that is markedly urban-centric and procedurally rigid. Rooted in the positivist tradition, judicial reasoning within the formal system tends to prioritise strict adherence to codified rules and procedural exactitude, often at the expense of substantive justice and lived social realities. This orientation, while promoting certainty and predictability, frequently results in outcomes that appear overly technical and disconnected from indigenous conceptions of fairness, equity, and communal justice.

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[455]Unreported case of Bassey Vs, Chief Sunday Arong Osang &2 ors Suit No- MAC/MISC17/2024 theinvestigator.ng/2025/05/<customary-courts-lack-power-to-hear-criminal-cases-of-assault-forcible-entry-on-land-and-threatening-violence-court-declares/>accessed on 21st March, 2026. Customary Courts in Akwa Ibom State exercise limited criminal jurisdiction over non-capital offences, subject to statutory ceilings of ₦1,000 fine or three months' imprisonment (or both), alongside territorially confined competence and a conciliatory role in minor matters (ss 7(2), 8(1), 55 and First Schedule, Customary Courts Law, Cap C15, Laws of Akwa Ibom State), whereas in Lagos State, Customary Courts are vested with limited criminal jurisdiction for the summary trial of offences created under the bye-laws of a Local Government or Local Council Development Area, with punitive authority capped at ₦50,000 for individual offenders and ₦100,000 for corporate offenders; they further retain jurisdiction to punish contempt committed in facie curiae, in accordance with statutorily prescribed limits (Customary Courts Law, Cap C18, Laws of Lagos State, s 40). Section 22(1)(a)(b)Ekiti State Customary Court Laws,2014 provides that A customary court shall have jurisdiction , to try and determine criminal cases and to impose the punishment authorized by law in respect of: offences against the provisions of an enactment which expressly confers jurisdiction on the Court ; offences against the rules and bye-laws made by a Local Government Council or having effect as if so made under the provisions of any enactment and in force in the area of jurisdiction of the Court.

[456] B Odusi, & M B Odunsi, 'Administration of Justice in Nigeria: Ideological Constraints and Allied Challenges'. [2025] 8[2], *Strathmore Law Journal* 69.https://doi.org/10.52907/slj.v8i2.548 <https://journal.strathmore.edu/index.php/law/article/view/548/345> accessed on 21st March,2026

Structurally, the system is concentrated in urban centres and characterised by complex procedures, high costs, and linguistic formalism, all of which operate as significant barriers to access for rural dwellers and socially marginalised groups. The combined effect of these ideological and structural limitations is the emergence of a justice system that is not only geographically and economically inaccessible but also customarily alien to the socio-cultural perspective within which it operates and this undermines public confidence in the administration of justice and reinforces patterns of legal exclusion among vulnerable populations

Adekoya[457], in his discourse on access to justice, provides a comprehensive exposition of the structural impediments confronting the Nigerian legal system. One of the most significant challenges he identifies is the prohibitive cost of accessing the courts. Aggrieved litigants are required to bear filing fees, service of process charges, and a range of ancillary administrative expenses. In addition, Nigeria's adversarial, lawyer-centred[458] system necessitates the engagement of legal practitioners who possess the requisite expertise to navigate the complex terrain of substantive and procedural law, as well as the technical language of the courts.

In a socio-economic perspective characterised by widespread poverty where the statutory minimum wage remains as low as Seventy-Seven Thousand Naira per month the financial burden associated with litigation becomes an overwhelming deterrent. Legal fees and related costs frequently escalate into Hundreds of Thousands of Naira, rendering the pursuit of justice an unattainable aspiration for many. This reality is further compounded in instances where cases traverse multiple appellate tiers, culminating in the Supreme Court, thereby exponentially increasing the financial demands on litigants[459]. The cumulative effect is the exclusion of economically disadvantaged individuals from meaningful access to justice, fostering a perception that the legal system disproportionately serves the affluent.

Beyond cost-related barriers, Adekoya also highlights systemic inefficiencies, including congested court dockets, protracted delays in adjudication, and the geographical distribution of courts. High Courts are predominantly situated in state capitals, with limited divisions in major towns; the Court of Appeal operates from designated urban centres, while the Supreme Court sits exclusively in

[457] C O Adekoya, 'Betrayal of the Poor in Accessing Justice in Nigeria: The Judas in our Midst' 103rdInaugural Lecture, Olabisi Onabanjo University, 13 December, 2022, 23-36
[458] C O Adekoya, 'Betrayal of the Poor in Accessing Justice in Nigeria: The Judas in our Midst' 24 - 33
[459] Ibid @N8

Abuja. For litigants residing in rural or remote areas, the necessity of travelling long distances to access these courts imposes additional financial and logistical burdens. Consequently, issues of physical accessibility not only impact the cost of litigation but also reinforce the urban-centric character of the formal legal system, further alienating grassroots populations.

Legal pluralism, however, offers an alternative framework through which multiple legal systems including customary law coexist and interact[460]. Adegbite and Eluyefa[461] note that customary law systems are deeply embedded within the social fabric of many African societies, where it regulates essential aspects of personal and communal life, including marriage, inheritance, and land relations. Beyond its functional scope, it often commands a high degree of legitimacy among local populations, who perceive it as more accessible, culturally resonant, and responsive than formal legal systems. This has led to increasing scholarly recognition of customary courts as critical instruments for enhancing access to justice.[462]

Customary courts have been widely recognised for their accessibility, procedural flexibility, and cultural relevance within local communities. Their use of indigenous languages and relatively informal, simplified processes serves to significantly reduce barriers to justice, particularly for individuals who may find formal legal systems distant, complex, or financially burdensome[463].

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[460] M N, 'The Role Of Customary Law In The Nigerian Judicial System' [2025]. *Obafemi Awolowo University Law Journal,* 5(2), 134-146 <https://oaulj.oauife.edu.ng/index.php/oaulj/article/view/13> accessed on 21st March, 2026.

[461] A E Adegbite & O. M. Eluyefa, 'Theoretical Reviews In Legal Research: Challenges In Examining African Customary, Colonial, And Postcolonial Jurisprudence' [2025] *International Journal of Civil Law and legal Research* 121<https://www.doi.org/10.22271/civillaw.2025.v5.i1b.128> accessed on 21st March, 2026.

[462] "*As such, customary justice systems play a much more important role in the lives of many of the world's poor than do state justice systems. One study refers to figures collected by development cooperation departments in the United Kingdom and Denmark, indicating that, in some countries, up to 80 percent of the population is governed by customary justice systems and has little to no contact with state law. These figures are corroborated by findings from academics who study African law, showing that customary justice "governs the daily lives of more than three quarters of the populations of most African countries", while according to one author, "up to 90 percent of cases in Nigeria are settled by customary courts". Customary justice systems are thus the lived reality of most people in developing countries, especially in rural areas. On the one hand, it is a choice, in cases where people select customary justice institutions over state institutions for their perceived positive attributes. On the other hand, it is a need, in localities and cases where limited penetration of state institutions or lack of access to them is combined with a strong or at least a stronger local presence of customary institutions"* J. Ubink and B.V Rooij, 'Towards Customary Legal Empowerment: An Introduction' in J. Ubink & T. McInerney (eds), *"Customary Justice: Perspectives on Legal Empowerment"* [International Development Law Organization in conjunction with the Van Vollenhoven Institute, University of Leiden 2011] <https://idlo.int/sites/default/files/Customary%20Justice%203%20%20Perspectives%20on%20Legal%20Empowerment.pdf >accessed on 21st March,2026.

[463] Ibid @N12

Where formal and customary systems fail to address disputes, communities often resort to informal justice mechanisms. While such mechanisms may provide immediate and culturally acceptable resolutions, they frequently lack procedural safeguards and may result in human rights violations. This underscores the need for integrating informal justice practices into formal structures in a regulated manner, rather than allowing them to operate unchecked.

The intersection between mental health and criminal justice has historically been neglected in Nigeria. Prior to the enactment of the Mental Health Act 2021, the legal framework was governed by the outdated Lunacy Act of 1958, which adopted a custodial and stigmatizing approach[464].

Recent scholarship underscores the transformative potential of Nigeria's Mental Health Act 2021. Adaramola and Adeyemi[465] contend that the Act represents a significant regulatory shift, aligning Nigeria's mental health framework with international human rights standards through its emphasis on dignity, non-discrimination, and community-based care. Of particular significance is the incorporation of structured mechanisms for mental health assessment and the protection of vulnerable persons within the justice system[466], which serve as critical safeguards for vulnerable defendants. This legislation marks a decisive departure from the archaic Lunacy Act 1958, which was largely custodial and punitive in orientation. In contrast, the 2021 Act adopts a rights-based and patient-centred approach, extending protection to persons with intellectual, psychosocial, and cognitive disabilities[467].

Emerging scholarship increasingly supports the development of hybrid justice systems[468] that integrate formal legal safeguards with community-based adjudicatory mechanisms. Scholars argue

[464] O O Adaramola, A O Adeyemi et al.'Forensic Psychiatry and Mental Health Services within the Nigerian Criminal Justice System'. [2026] 6 Discov Ment Health https://doi.org/210.1007/ < file:///C:/Users/HP/Downloads/s44192-026-00396-6_reference%20(2).pdf> accessed on 22nd March,2026.
[465] Ibid N@14
[466] Section 46(1) of National Mental Health Act,2021
[467] Section 12(1)(a)-(h) of National Mental Health Act,2021
[468] "*towards strengthening such hybrid structures, particularly when the approach is assumed to be attuned to local needs and opportunities, and focuses on reducing tangible instances of injustice in incremental steps rather than attempting to achieve an ideal form of justice. Grounded legitimacy portrays the way of incorporating traditional authorities and practices within the formal state in order to provide the belief systems within which to enhance the capacity and effectiveness of new forms of statehood . On the adoption of the "grounded approach" to strengthening hybrid justice systems, five key steps were proposed by Clark and Stephens and these include: a) understanding the historical and contemporary political and policy context of formal and customary justice systems; b) analysing the strengths and weaknesses of formal and customary legal systems; c) identifying entry points for strengthening hybrid justice systems based on an analytical framework of institutional change; d) realistically assessing the opportunities for engagement on the entry points; and e) ensuring a flexible and long-term commitment to implementation".* – O K

that decentralised justice models, when properly regulated, have the potential to enhance efficiency, improve access to justice, and strengthen public confidence in legal institutions.[469]Nevertheless, this body of literature cautions that such reforms must be accompanied by robust institutional capacity-building, effective oversight structures, and strict adherence to constitutional and human rights standards in order to mitigate the risk of arbitrariness and abuse.[470] This perspective aligns with the central proposition of the present study that any expansion of customary court jurisdiction must be carefully circumscribed, procedurally structured, and firmly grounded in rights-based principles or approaches.

This article advances the argument for a carefully structured hybrid model of justice, in which customary courts are vested with limited and clearly defined criminal jurisdiction, subject to robust procedural safeguards and institutional oversight. Contrary to an unqualified expansion of jurisdiction, the proposed model advocates a standardized approach, restricting such jurisdiction to minor offences while ensuring compliance with constitutional guarantees and fair trial standards.

Central to this proposition is the integration of safeguards under the Mental Health Act 2021, which represents a significant shift from the archaic Lunacy Act 1958 toward a rights-based, community-oriented framework for mental health governance in Nigeria. The Act introduces statutory mechanisms for the protection, assessment, and treatment of persons with mental health conditions, including those who come into contact with the criminal justice system[471]. Its emphasis on dignity, non-discrimination, and community-based care provides a regulatory and institutional foundation for safeguarding vulnerable persons within decentralised adjudicatory structures.

Opasina,' Legal Pluralism In Contemporary States: Between Traditional And Formal Justice Mechanisms In Nigeria And Côte D'ivoire'[2017] 5 *Journal Of Culture, Politics And Innovation* DOI: 10.12893/gjcpi.2017.1.< file:///C:/Users/HP/Downloads/opasina_gjcpi_2017_1.pdf> accessed on 22nd March,2026

[469] International Development Law Organization (IDLO), 'Policy and Issue Brief: Navigating Complex Pathways to Justice: Engagement with Customary and Informal Justice Systems' [2019] 8. https://www.idlo.int/sites/default/files/pdfs/publications/IDLO-Policy-and-Issue-Brief-Customary-and-Informal-Justice-web-FINAL.pdfacccessed on 22nd March,2026.

[470] N19

[471] Section 46 (1), National Mental Health Act,2021 "*Where a person is brought before a Court for a criminal offence, or an offence punishable on summary conviction with imprisonment, the Court may by a hospital order authorise his admission for observation in a hospital if it has cause to suspect that the person may be suffering from mental disorder"*. C Onyemelukwe & P Folorunsho, 'Centre for Health Ethics Law & Development, Policy Brief: National Mental Health Act 2021'[2023]<https://cheld.org/wp-content/uploads/2023/07/National-Mental-Health-Act-A-policy-Brief-1.pdf> accessed 22nd March, 2026.

By embedding mental health protections within an expanded, but carefully regulated jurisdiction of customary courts, this hybrid model seeks to achieve multiple objectives. First, it enhances access to justice by bringing limited criminal adjudication closer to affected communities. Second, it reduces dependence on informal or extra-judicial practices that often lack accountability. Third, it promotes culturally intelligible justice outcomes while maintaining fidelity to constitutional and human rights standards.

However, the viability of this model is contingent upon critical enabling conditions, including judicial training, clear procedural frameworks, access to legal representation where necessary, mental health assessment mechanisms and well-defined appellate pathways. Furthermore, sustained institutional monitoring and regulatory oversight are essential to mitigate risks of abuse, arbitrariness, or rights violations.

Accordingly, this article contends that a rights-sensitive expansion of customary court jurisdiction, based in the safeguards of the Mental Health Act 2021, offers a pragmatic and practical responsive pathway toward strengthening Nigeria's grassroots justice framework while advancing the protection of vulnerable individuals within the legal system.

CONCEPTUAL AND LEGAL FRAMEWORK

This article adopts a socio-legal perspective or legal research methodology to examine the place of customary courts within Nigeria's plural legal order, with particular attention to how their institutional role is evolving in relation to access to justice and the protection of human rights. Nigeria operates a legally plural system comprising statutory law, customary law, and Islamic law, each with distinct regulatory foundations and institutional expressions. Customary courts occupy a unique position within this framework, functioning as grassroots justice institutions that translate legal norms into culturally intelligible and linguistically accessible processes.

Conceptually, the study draws from access to justice theory, legal pluralism, and human rights-based approaches to criminal justice. Access to justice is understood not merely as physical proximity to courts but as the ability of individuals' particularly rural dwellers, women, and persons with psychosocial disabilities to meaningfully engage with legal processes. Legal pluralism recognises that law in Nigeria is not monolithic, and that customary institutions continue to regulate everyday life more effectively than formal courts in many communities. However, the

expansion of customary courts into criminal adjudication raises fundamental human rights questions, especially regarding fair trial guarantees, due process, and the protection of vulnerable persons.

The study is further informed by Nigeria's international obligations under instruments such as the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, 1983 which remains enforceable domestic law, and the Convention on the Rights of Persons with Disabilities (CRPD), particularly as operationalised through the Mental Health Act 2021. These instruments impose positive duties on the State to ensure equality before the law, procedural fairness, and reasonable accommodation for persons with mental health conditions across all justice institutions, including non-formal and customary forums.

Against this background, the article evaluates whether customary courts traditionally limited to civil and communal disputes can be redefined as rights-compliant forums for criminal justice, provided appropriate procedural, institutional, and mental health safeguards are embedded.

2.1 **The Evolution of Customary Courts in Nigeria: Historical Foundations and Constitutional Legitimacy**

Customary courts in Nigeria are a legacy of pre-colonial dispute resolution mechanisms that were later formalised during colonial administration. Prior to colonial rule, indigenous communities relied on councils of elders, chiefs, and lineage heads to resolve disputes based on communal norms, restorative principles, and social harmony. The colonial state subsequently codified these institutions, transforming them into "native courts" and later customary courts, primarily to facilitate indirect rule in Nigeria.

In contemporary Nigeria, customary courts derive constitutional legitimacy from the 1999 Constitution of the Federal Republic of Nigeria (as amended), which recognises them as part of the judicial framework of the states. While the Constitution does not establish customary courts directly, it empowers State Governments to create and regulate them through enabling laws[472]. This has resulted in diverse customary court systems across states, including Customary Courts, Area Courts, and Grade A-C customary courts, depending on local legislative frameworks.

[472] Constitution of the Federal Republic of Nigeria 1999(Third Alteration) [Act No 24] Section 6(4)(a)

In a number of states, reforms implemented since 2010, particularly the policy of appointing legally trained individuals as Presidents or Chairmen of Customary Courts have helped to improve the courts' procedural integrity and public confidence in their processes . These reforms reflect a growing recognition that customary courts are no longer purely informal institutions but judicial bodies capable of aligning with constitutional norms when adequately structured.

Jurisdictional Scope and Limitations

Traditionally, the jurisdiction of customary courts in Nigeria has been confined largely to civil matters, including family disputes, marriage and divorce under customary law, inheritance, land matters, chieftaincy disputes, and minor community disagreements. Criminal jurisdiction has either been expressly excluded or severely limited to petty offences, depending on state legislation.

This jurisdictional restraint has been justified on several grounds, the perceived informality of customary procedures, the absence of legal representation in some customary courts, and concerns about compliance with constitutional fair hearing standards under section 36 of the Constitution. Consequently, serious criminal matters have remained within the exclusive domain of Magistrates' Courts and High Courts applying statutory criminal law in some states.

However, this rigid demarcation has increasingly been questioned, particularly in rural areas where the designated courts saddled with handling criminal matters are geographically distant, financially inaccessible, or procedurally intimidating[473]. In practice, many customary courts already engage in criminal (quasi-criminal) adjudication through the enforcement of community norms, sanctions, fines, and reconciliation processes often without formal recognition or regulatory oversight.

Advantages of Customary Courts: Cost, Informality, and Linguistic Inclusivity

One of the most enduring strengths of customary courts lies in their accessibility; proceedings are typically conducted in indigenous languages familiar to litigants, eliminating linguistic barriers

[473] "*The study finds out that a significant population at the grassroots rely on the traditional justice system, when compared with their counterparts in the cities. The rural population argues that the formal justice system is quite expensive and that the legal procedures are difficult to understand, coupled with the fact that court houses are mostly located in the cities"* O K. Opasina,' Legal Pluralism In Contemporary States: Between Traditional And Formal Justice Mechanisms In Nigeria And Côte D'ivoire'[2017] 1 *Journal Of Culture, Politics And Innovation*

that often exclude rural dwellers from meaningful participation in other courts. This linguistic inclusivity enhances comprehension, participation, and perceived legitimacy of outcomes.

Customary courts are also comparatively low-cost and procedurally flexible, Filing fees are minimal, legal representation is not mandatory, and proceedings are less formalistic. These features make customary courts particularly attractive to women, elderly persons, and economically disadvantaged groups who may otherwise be excluded from the other formal justice system.

Importantly, customary courts tend to emphasise restorative justice, reconciliation, and social harmony rather than adversarial punishment. This orientation aligns with African communitarian values and resonates with modern criminal justice debates on diversion, rehabilitation, and community-based sanctions.

Nonetheless, these advantages also present risks where procedural safeguards are weak, informality can slide into arbitrariness, linguistic flexibility may exclude legal precision, and restorative approaches may obscure individual rights especially in cases involving vulnerable persons, including those with mental health conditions.

Transitional Insight

The evolving institutional character of customary courts particularly the increasing involvement of legally trained adjudicators creates a strategic opportunity to reconsider their jurisdictional boundaries. However, any extension into criminal justice must be carefully designed to align with constitutional fair trial standards, international human rights obligations, and the mental health safeguards introduced by the Mental Health Act 2021. Without such reforms, the expansion risks reproducing structural injustice rather than enhancing access to justice

Criminal Jurisdiction of Customary Courts- Human Rights and Procedural Concerns

A crime is an act of omission which amounts on the part of the doer or omitter, to a disregard of the fundamental values of a society thereby threatening and or affecting the life limb, reputation and property of another or other citizen(s) or the safety, security, cohesion and other (be this

political, economic or social) of the community at any given time to the extent is justifies society's effective interference through and by means of its appropriate legal machinery[474].

The proposal to vest customary courts with criminal jurisdiction raises legitimate constitutional and human rights concerns. Criminal adjudication directly implicates liberty, dignity, and due process, thereby triggering the full application of section 36 of the 1999 Constitution (as amended), which guarantees fair hearing, presumption of innocence, and equality before the law. In essence crime is a grave and serious form of anti-social behaviour, it constitutes a wrong against society as a whole, rather than merely against the particular victim of the criminal act. To the man of the law, crime is the violation of a right when considered in reference to the evil tendency of such violation as regards the Community at large[475].

Historically, Nigerian courts have approached customary adjudication with caution where criminal liability is concerned. The orthodox position remains that customary law is unsuitable for defining crimes and punishments, particularly where sanctions are indeterminate or rooted in communal morality rather than codified norms[476]. This issue is further reinforced by the principle of legality, encapsulated in the Latin maxim *nullum crimen, nulla poena sine lege* "no crime, no punishment without law" which mandates that criminal conduct and corresponding penalties must be explicitly established by law before an individual can be held criminally liable. This principle is firmly entrenched in section 36(12) of the Constitution of the Federal Republic of Nigeria 1999 (as amended). This provision prohibits the imposition of criminal liability or punishment except where the offence and penalty are clearly defined in a written law. M.B Belgore in his words had a contrary view in his words, he eulogised the Criminal Procedure in Customary Court in the following words "the procedure in our traditional courts more akin to us and achieve justice once the personnel are properly trained, made independent of interference once and the odium of corruption removed from them, Innocence is Innocence under whichever system when the operations are honest"[477].

[474] Akin Ibidapo-Obe and Akeem Bello (eds), "Introduction to Nigerian Criminal Law", [Lagos: National Open University of Nigeria, 2008] 8
[475]C.A.Oputa "Crime and the Nigerian Society" in Elias T.O. (Ed.), African Indigenous Laws**,** Government Printer, Enugu,1975;< https://legalpediaonline.com/african-indigenous-law/ >accessed on 20th February,2026
[476] *Garba v FCSC* [2020] 13 NWLR (Pt 1740) 1 (SC).
[477] M B Belgore "Constraints in Administration of Justice" [All Nigeria Judges Conference in Abuja 1988]

Nigerian courts have consistently applied this principle to safeguard individuals from arbitrary prosecution, particularly where attempts are made to ground criminal responsibility on unwritten customary or traditional norms lacking statutory backing. This constitutional safeguard reinforces the supremacy of written law over customary practices in criminal adjudication and affirms the rule of law in Nigeria's criminal justice system[478].

Nevertheless, the exclusion of customary courts from criminal justice has not eliminated community-based punishment. In many rural communities, customary courts continue to resolve acts that are criminal in nature such as assault, theft, and breach of peace through fines, restitution, or reconciliation. These practices operate in a legal grey zone, often without procedural safeguards or appellate oversight especially in states that do not have expressly defined criminal jurisdiction for their customary courts[479].

The challenge, therefore, is not whether customary courts already exercise criminal-like functions, but whether these functions can be formalized and passed at the various state house of Assembly, regulated, and rights-compliant. Without reform, the informal criminalisation occurring at the grassroots level risks violating constitutional guarantees, particularly for women, children, and persons with mental health conditions who may be unable to assert their rights effectively within informal processes.

Mental Health Act 2021 and the Need for Mental Health-Sensitive Criminal Procedure

The enactment of the Mental Health Act 2021 represents a profound paradigm shift in Nigeria's approach to mental health, supplanting the antiquated colonial-era Lunacy Act with a rights-based, contemporary framework. Unlike its predecessor, which primarily adopted a custodial and institutionalized approach to persons with mental illness, the 2021 Act emphasizes dignity, autonomy, non-discrimination, and social inclusion.[480] Importantly, the Act is not confined to medical institutions but extends to all institutions engaged in care, decision-making, or adjudication affecting persons with mental health conditions, including courts and quasi-judicial bodies.[481]

[478] *Aoko v Fagbemi* [1961] 1 All NLR 400; *Okonkwo v State* [1998]4 NWLR [Pt 544]142.
[479] States like Edo,Delta,Abia,Imo,Ebonyi,Anambra,Enugu,Kaduna and Federal Capital Territory
[480] Mental Health Act,2021
[481] Ss 12 -13 and 28(13) of the Mental Health Act,2021

Part IV of the Act provides a comprehensive framework for handling persons with mental health conditions within criminal proceedings. Under section 46, courts are empowered to order the admission of a defendant into a psychiatric facility for observation where a mental disorder is suspected, subject to confirmation by two qualified medical practitioners. The provision further mandates periodic assessment, ensuring discharge upon sufficient recovery or continued detention where clinically justified, with a right of appeal to the Mental Health Review Tribunal.

Section 47 introduces compulsory treatment orders with restrictions, enabling courts to balance therapeutic intervention with public safety considerations, particularly in light of the offender's background and risk profile. Additionally, section 48 authorises the transfer of inmates with mental health conditions from correctional facilities to appropriate treatment institutions, thereby facilitating access to care within a medically appropriate environment.

Collectively, these provisions signify a shift from a predominantly punitive and custodial model to a therapeutic, rehabilitative, and rights-oriented paradigm. Unlike the Lunacy Act, which offered limited recognition of treatment and virtually no procedural safeguards, the Mental Health Act 2021 embeds clinical oversight, judicial accountability, and patient rights at the core of mental health governance within the justice system.

The implications for customary courts, particularly if they are to exercise criminal jurisdiction, are profound. Effective adherence to the Mental Health Act requires that these courts be capable of:

Identifying Potential Mental Health Conditions

Judges must be trained to recognise symptoms and behavioural indicators that suggest mental health impairments in accused persons. Early identification is crucial to prevent unfair proceedings.

Suspending Proceedings Where Capacity is in Question

Where mental capacity or understanding of proceedings is in doubt, the court must have the authority to adjourn or suspend trials until a professional assessment can determine fitness to stand trial[482].

[482] Section 47(1) of Mental Health Act,2021

Facilitating Professional Assessment and Referral

Courts must establish clear protocols for referring persons for psychiatric or psychological evaluation, ensuring timely access to mental health professionals[483].

Ensuring Fair Sentencing and Avoiding Punishment Where Responsibility is Impaired

Where mental illness affects criminal responsibility, courts must either defer sentencing or consider non-punitive, therapeutic interventions consistent with the Act.[484]

Currently, most customary courts in Nigeria lack the institutional capacity to meet these requirements. Proceedings in these courts are often rapid, oral, and highly influenced by community dynamics, prioritising conciliation over procedural safeguards. While this approach enhances efficiency and social cohesion, it leaves little room for systematic mental health screening, informed evaluation of criminal responsibility, or reasonable accommodations for vulnerable defendants. In practice, this deficit creates a risk of unlawful punishment, social stigmatization, and the inadvertent criminalisation of individuals with mental health conditions, undermining both human rights and the legitimacy of the justice system.

Embedding mental health-sensitive procedures within customary courts is therefore not an optional reform but a constitutional and statutory imperative. The integration of such safeguards would require:

Mandatory Training for Judges and Court Staff

Judges and court personnel must be equipped with knowledge of mental health law, common conditions, and the psychosocial factors that may affect legal capacity.

Collaborative Referral Networks

Customary courts should establish partnerships with primary healthcare facilities, psychiatric institutions, and community mental health services to facilitate timely assessment and treatment.

[483] Section 46.(1) of Mental Health Act,2021 "*Where a person is brought before a Court for a criminal offence, or an offence punishable on summary conviction with imprisonment, the Court may by a hospital order authorise his admission for observation in a hospital if it has cause to suspect that the person may be suffering from mental disorder"*

[484] Section 46(2) (a)-(c)

Appellate Oversight and Monitoring

The Customary Courts of Appeal should play a supervisory role, ensuring that procedural standards, mental health safeguards, and constitutional protections are consistently applied.

Development of Procedural Protocols

Standardised guidelines should govern when and how proceedings are suspended, referrals are made, and alternatives to incarceration are considered for persons with mental illness.

Such reforms would not only protect vulnerable individuals but also enhance the legitimacy and cultural responsiveness of customary criminal justice. By embedding mental health protections into customary court practice, Nigeria can create a justice system that is both rights-compliant and contextually relevant, reducing the reliance on informal or extrajudicial measures that often perpetuate harm. This approach aligns with contemporary understandings of criminal justice, which increasingly recognise that legal processes must account for psychosocial vulnerabilities to achieve fair and humane outcomes.

In sum, the Mental Health Act 2021 provides a robust legal and normative foundation for transforming customary criminal adjudication. Its provisions underscore that any expansion of customary court jurisdiction must be accompanied by concrete procedural safeguards, institutional capacity-building and sustained oversight to prevent abuse, ensure compliance with constitutional rights, and promote equitable justice for persons with mental health conditions.

Comparative Perspectives: South Africa and Kenya

Comparative experience demonstrates that grassroots courts can exercise limited criminal jurisdiction without undermining human rights, provided strong safeguards are in place.

South Africa

In South Africa, traditional courts have historically functioned as important community-based institutions for the resolution of disputes, including certain categories of minor criminal matters, particularly within rural and indigenous communities. Their continued relevance has been formally recognised and regulated under the Traditional Courts Act 9, 2022, which seeks to harmonise customary adjudicatory practices with the overarching constitutional framework.

The Act represents a deliberate legislative effort to reconcile cultural legitimacy with constitutional supremacy by expressly subjecting traditional courts to the provisions of the Constitution and the Bill of Rights.[485] In doing so, it establishes clear jurisdictional boundaries, limiting the authority of traditional courts to minor offences[486]. This restriction reflects a conscious policy choice to prevent potential abuses of power while preserving the restorative and reconciliatory ethos that characterises customary justice systems.

A defining feature of the South African model is its emphasis on restorative justice[487] principles, including reconciliation, compensation, and the restoration of social harmony[488], rather than punitive sanctions. Proceedings are generally premised on the consent and participation of the parties, thereby reinforcing notions of voluntariness[489] and communal legitimacy. Furthermore, the Act provides for rights of appeal and review, ensuring that decisions of traditional courts remain subject to scrutiny within the formal judicial hierarchy.

Critically, traditional courts in South Africa operate within a framework of judicial oversight[490] and constitutional accountability[491]. They are required to conduct proceedings in a manner that

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[485] "*AND SINCE the Constitution recognises the institution, status and role of traditional leadership in dispute resolution, as well as the application of customs and practices in traditional courts, subject to the Constitution; AND SINCE it is necessary to have a single statute applicable throughout the Republic, regulating the resolution of disputes in traditional courts in accordance with the Constitution;* – Preamble Traditional Courts Act 9 , 2022 (South Africa). <https://www.saflii.org/za/legis/consol_act/tca9o2022242.pdf >accessed on22nd March,2026

[486] Schedule 2 Section 4(2)(a), Traditional court Act 9,2022

[487] "*restorative justice"—(a) means an approach to the resolution of disputes that aims to involve all parties to a dispute, the families concerned and community members to collectively identify and address harms, needs and obligations by accepting responsibility, making restitution and taking measures to prevent a recurrence of the incident which gave rise to the dispute and promoting reconciliation;*
(b) does not extend to measures which, in good faith, purport to give effect to the objectives contemplated in paragraph (a) but which, in fact, do not meaningfully restore the dignity of, or redress any wrong-doing against any, person involved in the dispute; and
(c) results in redressing the wrong-doing in question and ensuring the restitution of the dignity of the person in question in a just and fair manner;" Section 1 , Traditional court Act 9,2022

[488] Section 6,Traditional Court Act 9,2022

[489] Section 3(2)(e) Traditional Court Act 9,2022 *"a founding value on which customary law is premised, is that its application is accessible to those who voluntarily subject themselves to that set of laws and customs."*

[490] Section 11, Traditional Court Act 9,2022

[491] *"In the application of this Act, the following principles should apply: (a) The need to align traditional courts with the Constitution in so far as they relate to the resolution of disputes, so as to embrace the values enshrined in the Constitution,including—*
(i) the right to human dignity;
(ii) the achievement of equality and the advancement of human rights and freedoms; and
(iii) the promotion of non-racialism and non-sexism and the freedom of sexual orientation and identity and religion;
-"Section 3 ,Traditional Court Act,2022

upholds fundamental rights, including equality, dignity, and procedural fairness. Of particular relevance to the present study is the recognition of vulnerable persons[492] within these processes.

This approach demonstrates that the integration of customary justice mechanisms into the formal legal order need not compromise constitutional safeguards. Rather, it illustrates the possibility of constructing a hybrid system in which culturally embedded institutions operate within clearly defined legal parameters, supported by oversight mechanisms and rights-based protections. The South African experience thus provides a compelling model for Nigeria, particularly in illustrating how limited criminal jurisdiction, restorative principles, and mental health sensitivity can coexist within a constitutionally compliant framework

Kenya

Kenya offers a similarly instructive, though distinct, model of the interaction between customary justice systems and constitutional governance. The 2010 Constitution of Kenya, widely regarded as transformative in its orientation, expressly recognises the role of traditional dispute resolution mechanisms under Article 159. However, this recognition is not unqualified; such mechanisms are only permissible to the extent that they are consistent with the Constitution and do not contravene fundamental rights or statutory law[493].

Unlike South Africa, where traditional courts are formally structured and legislatively regulated, Kenya adopts a more integrative and flexible approach, allowing customary mechanisms to function alongside formal judicial processes within a broader framework of alternative dispute resolution (ADR)[494]. While criminal jurisdiction remains predominantly within the domain of

[492] Schedule I, Section 3(3) Traditional court Act 9,2022

[493] Article 159 (3) (a)-(c) , Constitution of Kenya,2010 *" Traditional dispute resolution mechanisms shall not be used in a way that--*
(a) contravenes the Bill of Rights;
(b) is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or
(c) is inconsistent with this Constitution or any written law".< https://www.klrc.go.ke/index.php/constitution-of-kenya/133-chapter-ten-judiciary/134-part-1-judicial-authority-and-legal-system/328-159-judicial-authority> accessed on 22nd March,2026

[494] Article 159 (2) (c) of the Constitution of Kenya, 2010 "*provides for the use of Alternative Dispute Resolution mechanisms such as reconciliation, mediation, arbitration, and traditional dispute resolution mechanisms*".
"In Kenya, most e8veryday disputes are resolved outside of the formal court system, using traditional, informal and other mechanisms. The 2010 Constitution recognises the need to promote traditional, informal and other mechanisms used to access justice in Kenya commonly referred to as 'Alternative Justice Systems'. As such, it mandates the Judiciary to promote Alternative Justice Systems mechanisms using methods that meet the threshold of the Constitution and uphold international human rights standards". Danish Institute for Human Right, 'Community justice and alternative justice systems in Kenya'[2025]< <https://www.humanrights.dk/projects/community-justice-alternative-

statutory courts, there has been a growing institutional and judicial endorsement of diversionary and community-based justice mechanisms, particularly for minor offences[495].

These approaches prioritise rehabilitation, reconciliation, and reintegration over punishment, thereby aligning with contemporary trends in therapeutic and community-oriented justice[496]. Significantly, mental health considerations are gaining prominence within Kenya's evolving justice framework. Courts and justice institutions are becoming more responsive to the psychosocial dimensions of offending, recognising that certain behaviours may be rooted in mental health conditions requiring treatment rather than punishment. As a result, diversion programmes increasingly incorporate mental health assessments, counselling, and referral to appropriate support services[497], thereby reducing the risk of criminalising mental illness.

Moreover, the Kenyan approach underscores the importance of constitutional filtering, whereby all customary or community-based practices are subject to the supremacy of constitutional norms, including human dignity, equality, and fair hearing. This ensures that while cultural practices are respected, they are not permitted to operate in ways that undermine fundamental rights.

The Kenyan experience therefore illustrates a pragmatic and evolving model of legal pluralism, in which customary justice mechanisms are not granted direct criminal jurisdiction but are nonetheless integrated into the broader justice system through diversion, restorative practices, and community-based interventions. For Nigeria, this model offers valuable insights into how mental

justice-systems-kenya#:~:text=Background:,via%20the%20formal%20court%20system.>accessed on 22nd March,2026

[495] The Judiciary.Editor Feature, 'CJ Koome launches Alternative Justice Systems and Court Annexed Mediation in Marsabit'[2024]<https://judiciary.go.ke/cj-koome-launches-alternative-justice-systems-and-court-annexed-mediation-in marsab2it/#:~:text=It%20addresses%20pressing%20issues%20such,on%20punishing%20the%20wrong%20doer.&text=Also%20launched%20during%20the%20event,bridges%20formal%20and%20traditional%20systems> accessed on 22nd March,2026 . "*it addresses pressing issues such as land disputes, petty offences, intercommunity conflicts, and boundary disputes," she stated. She called on local leaders, stakeholders, and residents to embrace the initiatives, urging them to resolve inter-communal disputes through AJS mechanisms. "We expect AJS elders and practitioners to be peace champions, fostering the peaceful coexistence of Marsabit's diverse communities, she said, emphasizing that sensitive cases, such as child defilement, must be referred to formal judicial channels"*..

[496] Ibid @N43 *"Speaking at the same function, Marsabit Governor Mohamed Ali noted that a key feature of the traditional justice system is that it focuses more on righting the wrongs done to a person than on punishing the wrong doer".*

[497] Section 16 (2) of Children Act *"upholds a child's right to access mental and psychological health services. These include the employment of psychologists in statutory institutions of rehabilitation, and makes provisions for the court to make orders for children and their parents to undergo counseling"* - F. M. Muema & A. Kawałek , 'Therapeutic and non-therapeutic practices in the child justice system in Kenya: A therapeutic jurisprudence perspective'[2024] *International Journal of Law and Psychiatry*

health-sensitive, community-oriented justice can be achieved without necessarily conferring expansive criminal jurisdiction on customary courts, but rather through structured collaboration and procedural innovation.

Policy and Institutional Recommendations for Nigeria

To harmonise customary criminal justice with statutory safeguards, this article proposes the following reforms:

Statutory Limitation of Jurisdiction

Customary courts should be vested with jurisdiction over clearly defined minor offences only, with penalties limited to fines, restitution, and community-based sanctions[498].

Codified Criminal Procedure Rules for Customary Courts

States should enact procedural rules aligned with section 36 of the Constitution, including rights to notice of charge, defence, appeal, and legal representation where necessary.

Integration of Mental Health Act Safeguards

Mandatory training on mental health, referral mechanisms, and collaboration with healthcare institutions should be institutionalised[499].

Judicial Oversight and Appeals

Decisions involving criminal liability must be subject to appeal to Customary Courts of Appeal .

Linguistic and Cultural Accessibility with Legal Precision

Proceedings should retain indigenous language use while ensuring accurate legal interpretation and record-keeping[500].

[498] A O Okafor, *Human Rights and the Nigerian Legal System* (2nd edn, University of Nigeria Press 2021).
[499] United Nations Convention on the Rights of Persons with Disabilities 2006.
[500] O O, Arowosegbe 'Mental Health, Criminal Responsibility and Nigerian Courts after the Mental Health Act 2021' [2023] [9]*African Journal of Law and Society* 112.

CONCLUSION AND RECOMMENDATIONS

The question of whether customary courts should assume a more expansive role in Nigeria's criminal justice architecture is neither merely institutional nor procedural; it is fundamentally normative, engaging the deeper tensions between accessibility, cultural legitimacy, and constitutional fidelity. This study has demonstrated that while customary courts possess undeniable advantages in terms of proximity, informality, and social acceptance, any extension of their jurisdiction into the criminal domain must be approached with principled caution and doctrinal clarity.

At its core, the argument advanced in this article is not for an unqualified enlargement of customary court powers, but for a carefully calibrated, rights-sensitive hybrid model. Such a model must be anchored in clearly defined statutory limits, robust proce2dural safeguards, and sustained institutional oversight. Without these foundational elements, the expansion of criminal jurisdiction risks reproducing, rather than remedying, the very deficits it seeks to address namely, arbitrariness, lack of accountability, and uneven protection of fundamental rights.

The analysis has further underscored that the Mental Health Act 2021 provides a critical normative and operational framework for rethinking grassroots criminal adjudication in Nigeria. Its emphasis on dignity, non-discrimination, legal capacity, and community-based care introduces a transformative lens through which criminal responsibility, particularly in relation to vulnerable persons, must now be understood. In this regard, the Act is not peripheral but central to any meaningful reform of customary court jurisdiction. To ignore its provisions in the design of grassroots criminal justice would be to perpetuate a fragmented legal order in which statutory protections exist in theory but remain inaccessible in practice.

Equally significant are the risks associated with reform undertaken in the absence of adequate safeguards. As this study has shown, prevailing cultural perceptions of mental illness within many local communities often framed in spiritual or moral terms continue to shape responses that prioritise social control over therapeutic intervention. When such perceptions intersect with unregulated adjudicatory authority, the result may be the wrongful criminalisation, stigmatization, or informal detention of persons with mental health conditions. These outcomes are not only

inconsistent with the Mental Health Act 2021 but also inimical to the constitutional guarantees of dignity, fair hearing, and equality before the law.

Recent international and regional human rights developments reinforce this concern, regulatory guidance from global and African human rights bodies increasingly insists that all justice mechanisms, whether formal or customary, must conform to minimum standards of legality, non-discrimination, and procedural fairness. The implication is clear, customary courts cannot operate as parallel systems insulated from constitutional scrutiny; rather, they must be integrated into a unified legal order governed by shared rights-based principles.

The comparative experiences of jurisdictions such as South Africa and Kenya further illuminate the path forward. These systems demonstrate that it is both possible and desirable to preserve the cultural legitimacy of community-based justice mechanisms while subjecting them to constitutional discipline, jurisdictional limits, and institutional oversight. They offer practical illustrations of how restorative justice, diversion, and mental health sensitivity can be embedded within local adjudicatory frameworks without compromising fundamental rights.

In light of these considerations, this article advances the following overarching propositions. First, any extension of customary court jurisdiction into criminal matters must be expressly circumscribed by legislation, with a clear delineation of offences and sanctions consistent with the principle of legality. Second, mental health safeguards must be fully integrated into customary court procedures, including mechanisms for identification, assessment, referral, and appropriate disposition of cases involving psychosocial vulnerability. Third, institutional capacity must be strengthened through judicial training, interdisciplinary collaboration with health services, and the development of standardised procedural guidelines. Fourth, appellate and supervisory structures must be reinforced to ensure accountability, consistency, and conformity with constitutional standards.

Finally, the legitimacy of any justice system rests not merely on its accessibility or cultural resonance, but on its ability to deliver outcomes that are just, humane, and rights-compliant. A reimagined role for customary courts, grounded in the safeguards of the Mental Health Act 2021 and informed by comparative best practices, offers a viable pathway toward achieving these objectives. However, such reform must be undertaken with deliberate care, doctrinal precision,

and an unwavering commitment to the protection of vulnerable persons. Only then can Nigeria realise a system of grassroots criminal justice that is not only accessible, but also equitable, responsive, and firmly anchored in the rule of law.