

**JURISDICTIONAL ISSUES IN THE APPLICATION
OF CUSTOMARY LAW IN NIGERIA**

**A PAPER DELIVERED AT 2007 ALL NIGERIA JUDGES
CONFERENCE**

THEME

**“THE JUDICIARY AND THE CHALLENGES OF NATION
BUILDING”**

ON

5th – 9TH NOVEMBER, 2007

BY

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INTRODUCTION

May I first and foremost proffer my sincere appreciation to the Organisers of this very important Conference – the National Judicial Institute, particularly the Administrator of the Institute, the Hon. Justice T. A. Oyeyipo, OFR, for the singular opportunity given to me to present a paper at this gathering of eminent Justices and Judges of our Superior Courts.

The topic for my presentation is “Jurisdictional Issues in the Application of Customary Law in Nigeria”. Being the Head of the youngest Customary Court of Appeal in Nigeria today, you would all agree with me that doing justice to this topic would be a very intimidating task for me. The choice of this topic for presentation of a paper at this august gathering underscores the important and significant role Customary Law is playing and assuming in our Country’s Legal System today.

To do justice to this very important paper, I had to seek for, and rely on contributions from some of my Learned Brothers. May I therefore at this juncture acknowledge with immense appreciation the invaluable contributions I received from the following Learned Brothers.

1. Hon. Justice Joseph Otabor Olubor, Hon. PCCA, Edo State
2. Hon. Justice S. O. N. Ogene, Hon. PCCA, Delta State
3. Hon. Justice M. M. Igbetar, Hon. PCCA, Benue State
4. Hon. Justice G. A. Sha, Hon. PCCA, Plateau State

I remain ever grateful to them all. The fact that Customary Law is now taking its pride of place in the Country's Legal System is highly commendable. In the past, Customary Law was disliked, ridiculed and discouraged by the colonial masters because it did not form part of their culture as it was alien to them. Hitherto, Customary Law was steadily and systematically eroded and replaced with imported Laws. But for now, no African Leader would be justified in having a strong aversion to the applicability of Customary Law within his domain.

BRIEF HISTORICAL DEVELOPMENT OF CUSTOMARY COURTS IN NIGERIA

In treating this topic I have found it necessary to briefly discuss the historical development of customary courts as well as the meaning and nature of customary law generally before treating the jurisdiction of these courts.

Customary Courts as we all know them today had their origin in what was called "Native Courts" Thus, it is necessary to examine succinctly the evolution and role of Native Courts in our judicial system before the advent of the modern customary courts.

Before the arrival of the colonial legal system, there was already in operation a system of Law in Nigeria. In 1900, however, the Colonial Legal System in Nigeria permitted natives of the Colony of Lagos and its Protectorates to operate their Native Law and custom as far as they were not repugnant to natural justice, equity and good conscience and not incompatible with relevant statutes. While natives were allowed to administer their own native laws and customs, special arrangements were made under traditional leaders to ensure that dispute involving natives and

non-natives were referred to the Governor. A clear distinction was drawn as to who was a “native” and “non-native” for administrative purposes. But because there were glaring injustices found in the native courts the colonial administrators had to bring the Native Courts within statutory ambit to ensure for a greater measure of surveillance or supervision. In 1906 therefore, the Native Courts Proclamation was made and it provided for a dual system of Native Courts namely – “minor Courts” and “Native Courts”. Each category of court had its defined limits and could hear both civil and criminal cases between “natives” and consenting “non-natives”. The same 1906 Northern Nigeria was occupied by the British who introduced the Native Courts Proclamation that reviewed the Native Courts in Northern Nigeria.

With the amalgamation of Northern and Southern Nigeria on 1st January, 1914 the Native Courts Ordinance, 1915 – 18 which ushered in a system which was consistent with, and enhanced the amalgamated political structure. By these enactments Warrant Native Courts were established by Residents subject to the Governor’s approval and were graded with varying powers and jurisdiction.

By the Native Courts Law, 1956 (N. R. No. 6 of 1956) 600 Native Courts were established in Northern Nigeria with civil and criminal jurisdiction spelt out in the warrants establishing these Courts. Later new guidelines were made providing for operating the reformed and reconstituted Native Courts with political officers i.e. District Commissioners and Residents who supervised them by way of Appeals.

So at best, the Northern Nigeria had a system whereby men of good conduct were made judges of Native Courts whose decisions were reviewed by administrative officers who were men of common sense but

not learned in the law but fully imbued with the colonial system policy of indirect Rule in Nigeria. In these Courts where colonial administrative officers sat in judgment, Native Customary Law was regarded more or less as foreign law and had to be proved by evidence. This was the position of customary courts up till 1967 when the Area Courts were established and replaced the Native Courts in Northern Nigeria.

Also in Eastern Nigeria, Native Courts were established with warrant chiefs and judicial officers at village and community level. In the Western part of the country the story was very similar, Native Courts developed into Customary Courts too so that by 1957 there was the Customary Courts Law 1957 (Cap 31) Laws of Western Nigeria; (see also) Customary Courts Law (Eastern Region No. 21 of 1956).

When the Mid – West Region was created in 1963 out of old Western Region the Laws of the former became applicable in the new Region and continued to function until the promulgation of the Customary Courts Edict No. 38 of 1966.

It is these native courts that metamorphosed into Area Courts throughout the Northern States in 1967. These same courts later again metamorphosed into Customary Courts in some states in the North. In 2001 Kaduna State for example the Government established Customary Courts and the Customary Court of Appeal by law No. 9 and 14 2001 respectively.

THE MEANING AND NATURE OF CUSTOMARY LAW

Customary Law has been variously described by academicians, jurists practitioners of the Law and judges. But generally, and simply put, Customary Law is the law relating to the custom and traditions of the people. With reference to Nigeria, it has been defined as, any rule or

body of rules of human conduct regulating the rights and duties of a particular indigenous Nigerian Society whether by immemorial custom or usage or not but which are sanctioned by external force particular to such indigenous group⁽¹⁾

Okany⁽²⁾ described customary law of a community as a body of customs and traditions which regulate the various kinds of relationship between members of the community.

Elias⁽³⁾ on his part defined customary law as the body of rules which are recognized as obligatory by its members. While Obaseki, JSC (as he then was) in the case of OYEWUMI V OGUNSESAN⁽⁴⁾ defined customary law as follows:-

“The organic or living law of the indigenous people of Nigeria regulating their lives and transactions. It is organic in that it is not static. It is regulatory in that it controls the lives and transactions of the community subject to it. It is regulatory in that it controls the lives and transactions of the community subject to it. It is said that custom is a mirror of the culture of the people. I would say that the customary law goes further and imports justice to the lives of all those subject to it.”

Thus from these definitions there is no single uniform set of customs prevailing throughout the country. The term customary law therefore used is as a blanket description covering many different systems. There are as many customary laws as there are ethnic groups, although in certain cases

different groups may have the same customary law with little or no variations⁽⁵⁾.

Validity of Customary Law

Judges have been enjoined to apply customary law if and only if, such customary laws are valid. The proviso to section 14 of the Evidence Act Cap. 112 Laws of the Federation of Nigeria 1990, has the following:

“Provided that in case of any custom relied upon in any judicial proceedings it shall not be enforced as law if it is contrary to public policy and is not in accordance with natural justice, equity and good conscience”.

But by the provision of section 1 of the Evidence (Amendment) Decree No. 16 of 1991, the Evidence Act has been made inapplicable in civil causes or matters before a Sharia Court of Appeal, Customary Court of Appeal, Area Court or Customary Court in Nigeria. The inapplicability of the Evidence Act in the Courts under discussion has not changed the application of the repugnancy doctrine in most jurisdiction where these courts exist. For example section 24(a) of Kaduna State Customary Courts Law, No. 9 of 2001 provides –

Subject to the provision of this Law, a Customary Court shall administer.

- (a) The appropriate Law specified in section 25 of this Law in so far as it is not repugnant to natural justice, equity and good conscience nor incompatible either directly or by necessary implication with any written Law for the time being in force.

Similarly section 48 (1) of the Kaduna State Customary Court of Appeal Law 2001 provides:-

“The Customary Court of Appeal, in the exercise of the jurisdiction vested in it by this law as regards both substantive law and practice and procedure shall administer, observe and enforce the observance of the principles and provisions of every customary law which is applicable and is not repugnant to natural justice, equity and good conscience nor incompatible either directly or by implication with any written Law for the time being in force, and nothing in this Law shall deprive any person of the benefit of any such Law”.

Meaning, nature and importance of Jurisdiction

Jurisdiction may be defined as the power of a court of Law to adjudicate on a cause or matter brought before it. Black’s Law Dictionary defines jurisdiction as:

“The power of the court of decide a matter in controversy and presupposes the existence of a duly constituted court with control over the subject matter and the parties. It also defines the powers of courts to inquire into facts, apply the law, make decisions and declare judgment.”⁽⁶⁾

It must be noted, however, that jurisdiction and the competence of a court are inter-related.

A court without jurisdiction also lacks competence. In *Madukolu & ors. V. Nkemdilim*⁽⁷⁾ the Supreme Court held that:

“ A Court is competent when –

- (a) It is properly constituted as regards numbers and qualification of the members of the bench, and no member is disqualified for one reason or another; and
- (b) The subject matter of the case is within its jurisdiction, and there is no feature in the case which prevents the court from exercising its jurisdiction; and
- (c) The case comes before the court initiated by due process of law, and upon fulfillment of any condition precedent to the exercise of jurisdiction⁽⁸⁾.

In other words, jurisdiction is an aspect of the competence of a court.

The concept of jurisdiction is a very radical and crucial issue, as it is basic and fundamental to all judicial proceedings and must be clearly shown to exist at the commencement of, or during the proceedings. Where a court lacks jurisdiction, its proceedings no matter how well concluded and any judgment arising therefrom, no matter how well considered or beautifully written will be a nullity and waste of time. Similarly, no waiver and no acquiescence can confer jurisdiction on a court where none exists. The authorities are prolific on this principle.⁽⁹⁾

Practice and Procedure in Customary Courts

The First Schedule to the Customary Courts Law, 2001 of Kaduna State provides the limits and powers of the Law to be administered in section 21 as follows:-

Types of causes or matters

1. Land matters - Subject to Land Use Act or any other written
2. Matrimonial causes or matters under Customary Law - Unlimited
3. Causes or matters under customary law, whether or not the value or debt, demand, including dowry or damages is liquidated - Unlimited
4. Guardianship and Custody of children under Customary Law - Unlimited
5. Inheritance upon intestacy under Customary Law and grant of power to administer the estate on an intestacy under customary law - Unlimited
6. Other causes or matters under Customary Law - Unlimited

As can be seen, adjudicating in land matters is subject to Land Use Act and by Section 41 of that Act which provides –

“An Area Court or Customary Court or other court of equivalent jurisdiction in a State shall have jurisdiction in respect of proceedings in respect of a

customary right of occupancy granted by Local Government under this Decree; and for purposes of this paragraph proceedings include proceedings for a declaration of title to customary right of occupancy and all laws including all rules of court regulating practice and procedure of such courts shall have the effect with such modifications as would enable effect to be given to this section.”

It is obvious from the contents of the First Schedule to the Kaduna State Customary Courts Law, 2001, that the jurisdiction of the Customary Courts is quite wide. For adjudication on Land Matters, the appropriate Customary Court Law to be applied shall be the Customary Law of the place where the land is situate.

As for inheritance, the appropriate Law shall be that of the deceased. Where both parties are not natives of the area of jurisdiction of the court or the transaction is not entered into in the area of jurisdiction of the court or one of the parties is not a native of the area of jurisdiction of the court and the parties agreed that their obligation shall be regulated by customary law applying to the party, the appropriate Customary Law shall be the customary law binding between the parties.

As for all other civil causes or matters the appropriate customary law shall be the one prevailing in the area of jurisdiction of the court. By section 59 of the 2001 Customary Courts Law of Kaduna State – No proceedings in the Customary Courts and no summons, warrants, process or order issued or made thereby shall be varied or declared void upon appeal solely by reason of any defect in procedure or want of form but every court

exercising powers of appeal under this Law shall decide all matters according to substantial justice without undue regard to technicalities.

And by section 53 (i) of same law it is provided - Any party, in a civil case or matter, who is aggrieved by a decision or order of a customary court, may within thirty days of the date of such decision or order appeal to the Customary Court of Appeal.

JURISDICTIONAL ISSUES IN THE APPLICATION OF CUSTOMARY LAW IN THE CUSTOMARY COURT OF APPEAL

Customary Law is applied primarily in the customary courts or Area Courts as well as the Customary Court of Appeal. There is no much of jurisdictional issues in the application of customary law at the Customary Courts/Area Courts, which are inferior courts of records. The jurisdictional issues are centred on appeals from the Area Courts to the Customary Court of Appeal and from Customary Court of Appeal to the Court of Appeal.

It is worth mentioning here that prior to 1979 all superior courts in the country were the English type of courts. Under 1979 Constitution of the Federal Republic of Nigeria, two additional superior Courts of record were established namely the Sharia Court of Appeal and the Customary Court of Appeal. These courts were made specialized courts to deal exclusively with Islamic Law and Customary Law matters. This was a deliberate effort by the government of the day to develop Sharia and Customary Law especially and thereby enhance their growth in the Nigeria Legal System. However, developments in these two areas particularly that of customary

law has left much to be desired as we shall discover in a number of decisions of the Higher Courts in due course.

S. 245 (1) of the 1979 Constitution provides:

“There shall be for any state that requires it a Customary Court of Appeal for the State”.

Section 247(1) provides –

“A Customary Court of Appeal of a state shall exercise appellate and supervisory jurisdiction in civil proceedings involving questions of customary law.

247 (2) for the purpose of this section a Customary Court of Appeal of a state shall exercise such jurisdiction and decide such questions as may be prescribed by the House of Assembly of the state for which it is established”.

Similarly, S 280 (1) of the Constitution of the Federal Republic of Nigeria 1999 (herein after referred to as the 1999 Constitution) provide that:

“There shall be for any state that requires it a Customary Court of Appeal for that state”.

S. 282 (1) of the said constitution provides:-

“A Customary Court of Appeal of a State shall exercise appellate and supervisory jurisdiction in civil proceedings involving questions of Customary law”.

Another constitutional provision which is relevant in considering the jurisdiction of the Customary Court of Appeal and which is extricably linked to S. 282 (1) referred to above is section 245 of the 1999 constitution.

“S. 245 (1) An appeal shall lie from decisions of a Customary Court of Appeal to the Court of Appeal as of right in any civil proceedings before the Customary Court of Appeal with respect to any question of customary law and such other matters as may be prescribed by an Act of the National Assembly”.

Under the 1979 Constitution, the case of GOLOK V DIYALPWAN⁽¹⁰⁾ came up for consideration, the facts of which are as follows:-

In the Area Court Grade 1 of Ron-Kulere sitting in Bokkos in Plateau State, the plaintiff, now respondent brought an action against the defendant now appellant, claiming recovery of a piece of farmland which the plaintiff alleged that the defendant borrowed from him about fifteen years ago. Judgment was given against the defendant who appealed against the decision to the Customary Court of Appeal of Plateau State. The appeal was allowed and the decision of the Area Court was set aside. The plaintiff appealed to the Court of Appeal on the following grounds of appeal.

1. The judgment is against the weight of evidence
2. The learned President and justices of the Customary Court of Appeal, Jos erred in law by quashing the judgment of the trial court.

The issue raised by this appeal is whether under the 1979 Constitution of the FRN, is there a right of Appeal to the Court of Appeal from a decision of

Customary Court of Appeal on a ground of appeal which does not pertain to any question of customary law?

The Supreme Court held that omnibus Ground which deals purely with facts and has no connection with customary law is not within the jurisdictional competence of the Customary Court of Appeal⁽¹¹⁾

Consequently, a ground of appeal such as judgment against the weight of evidence is incompetent. The question is whether traditional evidence of proof of title to land under customary law cannot be raised on an appeal in an omnibus ground such as “judgment is against the weight of evidence”. The evidence referred to is traditional evidence under the customary law.

The Chief Justice of Nigeria, Hon. Justice Mohammed Bello (as he then was) commented on this issue on 28th October, 1994 at the Judicial Lectures for senior Judges under the auspices of the National Judicial Institute held in Sokoto 24 – 28th September 1994 to the effect that:-

When a judgment of a customary court is said to be against the weight of evidence, all that it is querying is the weight of evidence of custom adduced in support of the customary law claim set out to be proved⁽¹²⁾

Similar decisions were made under the 1999 Constitution by the Supreme Court⁽¹³⁾

All that needs be said here is that a matter or case before a court is made up of several issues. There is therefore the need to resolve all issues in one court in order to do justice properly. For example, where there are five issues and two issues involve customary law while the remaining three are outside customary law, the judgment delivered will amount to piecemeal

justice hence the need for leave to appeal on all other issues not involving customary law.

PRACTICAL CHALLENGES FACING THE CUSTOMARY COURTS

There are lots of challenges facing practice in the Customary Courts generally in Nigeria today. This is because the feeling is that any matter in any court in Nigeria is presumed to be appellate until it gets to the Supreme Court being the final Court but recent decisions of the Supreme Court and Court of Appeal as touching Customary Law and its application has proved otherwise.. Elsewhere in this paper cases decided in Plateau and Benue States Customary Courts of Appeal have shown clearly that not every matter can go up to the Highest Court. The decision as to whether one can approach a superior court will depend not so much on the fact that the appeal raises a question of Customary Law.

In the Edo State Customary Court of Appeal, for example, an attempt was made to resolve this problem in the case of *Osaretin Almuem Wosa V. Madam Esowaye Joshua* (1 CCA LR 184).

The Court was of the view that the pronouncement of the Supreme Court in *GOLOK's* case (supra) in respect of Section 245 (1) of the 1999 Constitution could not be extended to the provisions of section 282 (1) of the same Constitution. This was posited on the fact that appeals from Customary Courts to the Customary Courts of Appeal were not one tier but two tiers that is, appeals as of right and appeals with leave. The Court held *inter alia* at page 190 of the report as follows:-

In order to determine whether or not the jurisdiction of this court is ousted the following should be considered:-

- (a) Whether the action is civil

- (b) Whether it involves question of Customary Law, that is, whether the matter involves a land, matrimonial causes or matters, causes or matters under Customary Law, inheritance upon intestacy under customary law and grant of power to administer the estate on intestacy under customary law.

If the above criteria are present in the action before the trial court, any issue arising therefrom on appeal to this court (CCA) can be entertained without undue emphasis.

By the above pronouncement, the Customary Court of Appeal was of the view that the determining factor as to whether or not it had jurisdiction to entertain an appeal brought before it was whether or not the claim before the trial court raised any issue of Customary Law. In determining this the Customary Court of Appeal is enjoined to look at what the parties are fighting for, the reliefs sought to obtain and the matters on which the issues are joined as earlier highlighted in the Supreme Court case of Ben Ikpong and others V. Chief Sam Edoho (1978) 6 – 7 section 221.

But the Supreme Court decided otherwise or differently in the case of Ahmadu Usman V. Sidi Umaru (1992) 7 NWLR (pt 254) p. 377.

By the Supreme Court decision it is now clear that what determines whether or not an appeal is competent before the Customary Court of Appeal is the issue raised in the grounds of appeal and NOT the subject matter of the claim at the trial Customary or Area Court.

In GOLOK's case (supra) the Supreme Court decided among others that the omnibus ground of appeal deals with fact and has no connection with Customary Law and, therefore, incompetent in the Customary Court of

Appeal. Although the claim before the trial Area Court were purely civil proceedings involving question of Customary Law.

In the case of Thomas Borbokhai Ebede V. Braimoh Igiadegbo (1 CCA LR 64) the appellant brought an action against the respondent in Customary Court in Essako area of Edo State against the respondent for being called a “slave” contrary to the Customary Law of Ayogwiri people. The trial court dismissed the claim. The appellant appealed to the Edo Customary Court of Appeal and filed only the omnibus ground of appeal as follows:

“That the decision of the court is against the weight of evidence”

Counsel for the appellant subsequently brought a motion for leave to file and argue additional grounds of appeal. Counsel for the respondent objected and submitted that the omnibus ground of appeal was incompetent and therefore not arguable in the Customary Court of Appeal. That being so, he submitted that nothing can be added to nothing. Counsel for the appellant submitted that the Customary Court of Appeal must look at the claim as filed before the trial Court together with the evidence adduced in order to know whether or not it was proper to call an Ayogwiri man a ‘slave’ under the Ayogwiri customary law. But the court, relying on the decision of GOLOK’s case supra, upheld the objection of counsel for the respondent and struck out the omnibus ground. Having done that, the court further held relying on the case of Akanbi Enitan V. the State (1986)3 NWLR (pt. 30) 604 at 609 that – “The motion filed by the appellant for leave to file and argue additional grounds of appeal can no longer be entertained as there is nothing to add to”.

It is common knowledge that lawyers and litigants file omnibus ground of appeal at the trial courts early in order to initiate an appeal within the

statutory period. Most of the Customary and Area Courts do not produce copies of records of appeal until much later and that is usually when parties decide on what additional grounds of appeal to file at the appeal court.

One of the consequences of the foregoing is that cases founded on purely Customary Law with some additional grounds of appeal raising questions of customary law more often cannot be argued before the Customary Court of Appeal established for that purpose.

Earlier in Usman's case *supra* where it was decided among others that what determines whether or not an appeal is competent before the Customary Court of Appeal is the issue that was raised in the grounds of appeal not the issues raised in the claim at the trial court.

It is my humble view that this interpretation is fraught with problems. Suppose a decision in a case based purely on customary law was appealed against from the Customary or Area Court to the Customary Court of Appeal with five grounds of appeal, three raising questions of customary law and two raising questions of general law. Assuming the grounds struck out are the potent grounds and the three grounds argued failed for want of merit, then the appellant would have suffered incalculable injustice because he cannot go to another court with competent jurisdiction to relitigate the two potent grounds already struck out. Again, one wonders whether the result has satisfied the intention of the lawmakers in promulgating section 282 (1) of the Constitution.

At page 397 of Usman's case (*supra*), the Supreme Court held, among others, that:

“The unlimited jurisdiction conferred by the Constitution on the High Court is curtailed by section 242 and 247 conferring jurisdiction on the other two courts in respect of their areas of specialty, (please note that they are now sections 277 and 282 as per 1999 Constitution).”

At page 398 the learned Justice, delivering the lead judgment, said:

“I can hardly, however visualize a case when any two of these courts will have concurrent jurisdiction to entertain an appeal...”

At page 401 of the same case. Bello, C. J. N pronounced as follows:

“Firstly, it should be appreciated that the Constitution envisages division of appellate jurisdiction on state matters between the High Court, Sharia Court of Appeal and Customary Court of Appeal in States where the three courts have been established”.

The Learned Chief Justice went further on the same page and said:

“In my view, the provisions of the Constitution relating to the divisions of appellate judicial powers between the three courts are clear and one court has no concurrent jurisdiction with one or the other”.

In other words, the Supreme Court has said that grounds of appeal from Customary or Area Courts which raise, for example, questions of

customary law cannot be entertained in the High Court or Sharia Court of Appeal in a State that has established the Customary Court of Appeal.

This again, it is humbly submitted, has to be reconciled with an earlier decision of the Supreme Court in the case of **Alhaji Umaru Abba Tukur V. Government of Gongola State**⁽¹⁴⁾ where it said:

“If there is a court with jurisdiction to determine all the issues raised in a matter including the principal issue, it is improper to approach a court that is competent to determine only some of the issues. The incompetence of the court to entertain and determine the principal question is enough to nullify the whole proceedings and judgments as there is no room for half judgment in any matter brought before the court.”

In other words, as regards the Customary Court of Appeal, which this paper is focusing on, the court should not entertain any ground of appeal if it is not competent to entertain all grounds filed and brought before it because if it does so, the court would be giving room to “half judgment”. Also the judgment of the court may be declared a nullity by a superior court especially if the Customary Court of Appeal strikes out the more potent grounds and proceeds to entertain the less potent grounds that raise questions of customary law.

Another problem arising from the interpretation of the Supreme Court regarding appeals from the Customary Court of Appeal to the Court of Appeal is that **it makes the Customary Court of Appeal the final court in some matters.**

Assuming an appeal, subject to customary law, which raises issues of customary law is decided by the Customary Court of Appeal and dissatisfied party appeals further to the Court of Appeal on a complaint of bias on the part of the court. Going by the decision in Golok's case (supra) which interpreted the provisions of section 224 of the 1979 Constitution, now section 245 of the 1999 Constitution, the Court of Appeal would lack jurisdiction to entertain the matter as it can be argued that complaint of lack of fair hearing does not raise any question of customary law.

The implication is that the Customary Court of Appeal becomes the final court as far as that case is concerned.

This obviously is not the intendment of the legislators while promulgating the provisions of that section of the Constitution.

It is, therefore, clear that the Supreme Court's interpretation of the Provision of Section 224 and 247 of the 1979 Constitution, now section 245 and 282 of the 1999 Constitution is, with due respect, too restrictive and it is making the judicial process of appeals from Area and Customary Courts to the Customary Court of Appeal unworkable. Also appearing unworkable is the judicial process of appeals from the Customary Courts of Appeal to the Court of Appeal going also by the aforementioned restrictive interpretation.

I believe that justice can only be done when channels of appeals are open to parties that are aggrieved by or dissatisfied with the judgment of any court and are allowed to exhaust all avenues of appeal up to the Supreme Court.

Section 245 and 282 stipulate that the appeals should raise questions of customary law. They did not state that the grounds of appeal should raise questions of customary law as interpreted by the Supreme Court. There is a world of difference between the appeal and the grounds of appeal. The appeal, in my humble view, is the entire case being presented by the appellant including the reliefs sought, while grounds of appeal accentuate specific defects in the judgment of the lower court. It is submitted that what the Constitution specified is that the entire case, that is, the appeal and NOT grounds of appeal that should raise questions of customary law. To narrow it beyond that would, in my humble view, lead to absurdity. It would also lead to various problems as now being experienced in virtually all the Customary Courts of Appeal established by the 1999 Constitution of the Federal Republic of Nigeria.

What appears obvious from the foregoing analysis is that what should determine the competence of an appeal from the Customary Court of Appeal to the Court of Appeal should be the subject-matter of the claim from the trial court. It is submitted that once the subject-matter is one of customary law, all grounds of appeal from the trial Area or Customary Court to the Customary Court of Appeal and further to the Court of Appeal should be cognizable.

This paper will be incomplete without reference being made to the case of Customary Court of Appeal V. Chief Engr. Aguele and 2 ors. (2006) 12 NWLR part 995, 545 dealing with the appellate jurisdiction of Customary Court of Appeal.

It was held –

For an appeal to be competent before the Customary Court of Appeal, the grounds of appeal must relate to and raise questions of customary law. It is

not the subject matter of the action in the trial court that confers jurisdiction on the Customary Court of Appeal. It is rather the ground of appeal, how the decision of the Area or Customary Court that will confer the necessary jurisdiction on the Customary Court of Appeal. In the instant case, grounds one to three in the appeal to the Customary Court of Appeal from the trial court all related to question of fair hearing and the service of process on the respondent before the trial court. None of them related to question of customary law. In the circumstance, the appeal from the Esan South – East Area Customary court to the Customary Court of Appeal, Edo State was incompetent.

In the instant case, Hon. Justice Uwani Musa Abba Aji had this to say:-

“Let say here that the position as it is now is rather sad. Sad in the sense that Customary Court of Appeal while exercising its appellate jurisdiction is precluded from looking at incidental issues that may arise in the exercise of its constitutional jurisdiction, simply because these incidental issues do not raise questions of customary law to which the Court exercise its appellate jurisdiction just as in the instant case where the questions raised relate to fair hearing and service of process.

I believe even in Customary Law there is fair hearing. There is therefore the need to develop the law in this respect by allowing Customary Court of Appeal to hear such incidental matters and/or to allow for appeal in such matters with the leave of the Customary Court of Appeal to the Court of Appeal.

While it is the position that section 245 (1) is intended to narrow the right of appeal from enhancing the finality of judgments of the Customary Court of Appeal as much as possible, in the same vein it ought to be seriously appreciated that there is the need to expand the scope of the law which is dictated by modern day changes in our society brought about by democratic settings which the law must now fully address.”

The decision of the Learned JCA is in total agreement with the view expressed by the Chief Justice of Malaysia, Rt. Hon. Dato Bin Chin in his speech of 13th September, 1999 at the opening ceremony of the 12th Commonwealth Law Conference held in Kuala Lumpur, Malaysia when he said inter alia at page 3 as follows.

”In Malaysia, like other Commonwealth countries, we apply the English legal system, while the bulk of the laws are statutory, the Courts in Malaysia also apply the Common Law of England, we do not follow it blindly, because by law, we have also to considered the Malaysian circumstances, the culture, the customs and religions of the various races in Malaysia. So it is not surprising if, on a given subject, a Malaysian court may come to a different conclusion from an English Court”.

A similar voice was added to this call on the need to promote customary law by Hon. Justice (Dr.) G. W. Kanyeihamba of the Supreme Court of Uganda. In his paper titled “Criminal Law Administration – Historical and

Institutional Constraints” presented at Commonwealth Magistrate and Judges Conference held at Edinburgh, Scotland from 10th – 15th September, 2000 where he stated at pages 12 – 13 as follows:

“The non-recognition of some finer points of African Customary Law was based partly on ignorance and partly on the incidents of imperialism and colonialism... However, the main reason for denying African Customary Law its sanctity and value was colonialism. The policy of colonial rule was based on the theory of the superiority of the imperial race and its culture and laws over the subjugated peoples and their own cultures and laws..... If the latter were to be allowed to believe in their own culture and values and deem them to be equal with those of their masters, they could challenge the right of the imperialists to govern them”.

The Learned jurist gave example on page 14 of his paper where colonial masters forced African wives to give evidence in criminal cases against their husbands unlike in their own countries where their wives were not compellable witnesses.

One therefore looks forward to a day when the Nigerian Courts would disagree with the principles of the common law that are in direct conflict with aspects of our customary law.

The Hon. Justice I. O. Aluyi, the Retired President of the Customary Court of Appeal of Edo State expressed the same view in 1991 at the All Nigeria

Judges Conference held in Abuja 4th – 11th September, 1988 at page 517 where he said.

“The derogatory attitude towards our law has ironically persisted with the present day educated Nigerians. He now has excessive and conspicuous appetite for imported rather than made in Nigeria goods. The implication of this sense of value is that our economic, political and social development has become stagnated and almost ruined”.

It is my humble submission therefore that efforts should be made to develop the indigenous laws so that they can truly develop just as the English people developed their customary law into what it is today and which we are all crazy about.

Our major task as judges and jurists should be to bequeath a more cohesive customary courts systems to prosperity which will make greater impact on our judicial system. We cannot continue to blame our colonial masters for the low level development of our customary law. Having been independent for over forty years now, we should by now develop a more elitist and prestigious indigenous laws that can move the country forward rather than the continued application of the English Common Law.

CONCLUSION

Talking about jurisdictional issues in the application of customary Law in Nigeria is talking about how the apex courts have allowed customary law application to fare in the Nigerian legal system. If given the chance to see the proper light of the

day customary law may grow and be a preferred legal system as it is indigenous to a greater majority of populace.

Currently, customary law remains a whipping child in the Nigeria legal system. Section 288 (1) of the 1999 Constitution of the Federal Republic of Nigeria provides –

- (1) In exercising his powers under the foregoing provisions of this chapter in respect of appointments to the offices of Justices of the Supreme Court and Justices of the Court of Appeal, the President shall have regard to the need to ensure that there are people among the holders of such offices persons learned in the Islamic personal law and persons learned in customary law.

Despite the above provisions, since the coming into effect of the 1999 Constitution, despite several appointments with one or two exceptions in favour of the Sharia Court of Appeal, this Section has been observed more in the breach.

It is my humble submission that this posture by the powers that be definitely works against the growth and development of the customary law vis-avis the received common law and Islamic law. Some one somewhere should take the bull by the horn and break from this lopsided tradition in appointments.

Similarly, there is the need by the State Houses of Assembly to amend some existing laws and give some more jurisdictions to the customary Court. Fortunately for this presenter, the Kaduna State House of Assembly did just that in its law that created the Customary Courts Law No.9 of 2001

Even the International Court of Justice gives recognition to customary law. Article 38 describes Customary International Law as: -

- (b) International customs, as evidence of general practice if accepted as law;

Customary international law develops from customary law. In the case of SWITZERLAND V UNITED STATES the International Court of Justice held that:

The rule that local remedies must be exhausted before international proceedings may be instituted is a well-established rule of customary international law.

As customary law is gaining international recognition, no one should blame the present low level of the development of our customary law on our erstwhile colonial masters. Nigeria became independent politically forty-seven years ago. The blame in my view is ours as many legal practitioners including some jurists regard English Law as elitist and our customary laws as primitive. No true Nigerian should have such mentality.

There is certainly a need for us all to seek to move this country forward by the development of our customary law. To this end, I wish to suggest –

- (1) The need to give broad constitutional interpretation to Section 282(1) of the 1999 Constitution rather than the current restrictive interpretation.

Any matter that “includes” customary law should be within the jurisdiction of the Customary Court of Appeal.

- (2) Omnibus ground of appeal should be allowed to be within the jurisdiction of the Customary Court of Appeal in that traditional evidence is both fact and evidence.
- (3) There is the need for Constitutional amendment to enable appeals to proceed to the court of Appeal with leave on matters not involving customary law.

I thank you all for listening.

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