

THE RELEVANCE OF THE CUSTOMARY COURT OF APPEAL IN THE DISPENSATION OF JUSTICE.

Prefatory Remarks

I must commend the initiative of the President and Judges of the Osun State Customary Court of Appeal and indeed all those who had thought it fit and proper to organize this workshop. I wish to put it on record that since my appointment as a Judge of the Edo State Customary Court of Appeal on 3rd May, 1999, this is the first time that a State is single handedly organizing a workshop for her Judges and other stakeholders on the essentials of the practice and procedure in the Customary Court of Appeal. ¹ This feat is undoubtedly a very laudable one.

Historically, the perception of customary law generally, has shown traces of lopsidedness and grudging tolerance, if not total disdain, by a majority of Nigerians vis a vis the received English common law. As an erudite scholar aptly observed:

“... post-colonial regimes have continued with the enterprise of subjugating customary law through various processes such as the abolishment of its courts, subjecting its rules and precepts to alien

¹ Workshops, Seminars & Conferences have mainly been organized jointly for States & F.C.T. Judges of the Customary Courts of Appeal. An example is the “All Nigeria Conference of Customary Court of Appeal Judges” which was last held in Makurdi Benue State from 16th – 17th November, 2000.

and incongruent standards of validity and applicability and, at times, legislating them out of existence”²

It must be emphasized that the English common law evolved from disparate local customs in England. My prognosis is that Judges of the various Customary Courts in Nigeria would similarly evolve a Nigerian common law. It behooves on us to take up the gauntlet of this prodigious assignment. When this is actualized, it will then be truly said that Nigerian Customary Court of Appeal Judges have left their foot-prints on the sands of time.

CONSTITUTIONAL RECOGNITION.

Both the Customary Court of Appeal and Customary law have been accorded a measure of recognition in the Constitution of the Federal Republic of Nigeria. The first constitution that recognized the Customary Court of Appeal was that of 1979. All the relevant provisions of that Constitution relating to both the Customary Court of Appeal and customary law general have been replicated in the 1999 Constitution of the Federal Republic of Nigeria.

The 1999 Constitution (like that of 1979) makes the establishment of the Customary Court of Appeal mandatory for the Federal Capital Territory but optional for the states:

Section 265 of the 1999 Constitution provides as follows:

“There shall be a Customary Court of Appeal of the

² See Dr. Auwalu Yadudu in “Customary Law and the Nigerian State: Policies, Dilemmas and Options” published in “Towards a Restatement of Nigerian Customary Laws” a publication of the Federal Ministry of Justice, Nigeria.

Federal Capital Territory, Abuja”

On the other hand, Section 280 (1) of the same Constitution provides as follows:

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

The composition of a Customary Court of Appeal is also expressly set out in the Constitution. For the States, Section 280(2) of the 1999 Constitution provides thus:

The Customary Court of Appeal of a State shall consist of –

- (a) a President of the Customary Court of Appeal of the State; and
- (b) such number of Judges of the Customary Court of Appeal as may be prescribed by the House of Assembly of the State.”

Furthermore, the mode and qualifications for the appointment of a person to the office of the President or Judge of a Customary Court of Appeal are clearly spelt out in section 281 of the 1999 Constitution. It must be emphasized that the Constitution lists the Customary Court of Appeal as a superior court of record.³

Moverover, our grundnorm – the 1999 Constitution – expressly provides for the appointment of Justices who are learned in customary law at both the

³ See Section 6(5) of the 1999 Constitution wherein the Customary Courts of Appeal of the Federal Capital Territory, Abuja and that of a State are listed as superior courts of record.

Court of Appeal the Supreme Court. See Section 247 (1) (b) and 288 (1) of the Constitution.. It will argued later on in this paper that “persons learned in customary law” referred to in these Sections ought to be persons who have been Judges of the Customary Court of Appeal.

EVOLUTION OF THE CUSTOMARY COURT OF APPEAL

It has been said that it was to aid the special development of customary law that the Customary Court of Appeal was introduced in the 1979 Constitution.⁴

The first Customary Court of Appeal in Nigeria is the Plateau State Customary Court of Appeal which was established on the 2nd October, 1979 by the Customary Court of Appeal Law 1979 of Plateau State. Since then, Customary Courts of Appeal have been established in the following State, to wit; Edo, Delta, Benue, Imo, Abia, Kaduna, Ebonyi, Nassarawa, Taraba, Rivers, Bayelsa and Osun.

It is also noteworthy that plans have reached advance stage to establish a Customary Court of Appeal in Akwa Ibom State and many other States of the Federation.

JURISDICTION.

Section 282(1) of the 1999 Constitution provides as follows:

“A customary Court of Appeal of a State shall exercise appellate

⁴ Paul R.V. Belabo, Dean of Law, Benue State University recounting his experience whole in the Constituent Assembly in 1977/78 and contained in his paper “The Development of Customary Law : The interpretative jurisdiction of the Court of Appeal and the Supreme Court under the 1999 Constitution.”

and supervisory jurisdiction in civil proceedings involving questions of Customary Law”⁵

It is also necessary to quote in extensor Section 282 (2) which provides:

“For the purposes of this section, a Customary Court of Appeal of a State shall exercise such jurisdiction and decide such questions as many be prescribed by the House of Assembly of the State for which it is established”

Section 284 authorizes the President of the Customary Court of Appeal to make rules for regulating the practice and procedure of the State Customary Court of Appeal. Undoubtedly, jurisdiction whether territorial or personal is fundamental. It is imperative that a court must satisfy itself that it has jurisdiction before proceeding to entertain any matter brought before it. Consent or acquiescence of parties cannot invest a court with jurisdiction which it does not have ⁶ And as Niki Tobi J.S.C. observed in the case of Arjay Ltd. v. Airline Management Ltd.⁷

“... Jurisdiction is a land matter of law which is donated by the Constitution and the statute establishing the court. Where a trial judge goes on an unguarded journey in search of jurisdiction, appellate courts will call him to order.”

⁵ For the Federal Capital Territory, Abuja, the relevant Section is Section 267 of the 1999 Constitution.

⁶ See Western Steel Works Ltd & Anor. v. Ikron and Steel Workers Union of Nigeria (1986) 3 NWLR (Pt.30) 617 at 618.

⁷ (2003) 108 LRCN 1173 at 1224

A Customary Court of Appeal must ensure that the lower courts under it keep within the boundaries of their jurisdiction. It must nonetheless be stressed that a court must guard its jurisdiction jealously.

Having regard to the fact that our organic law – the constitution – provides that a Customary Court of Appeal shall exercise appellate and supervisory jurisdiction in civil proceedings involving questions of Customary law, it is appropriate to say a few words about customary law itself.

DEFINITION AND APPLICATION OF CUSTOMARY LAW

Academics and jurists have proffered several definitions. According to Okany⁸ It is a body of customs and traditions which regulate the various kinds of relations between members of a given community while Elias⁹ posited that for any given community, it is “the body of rules which are recognized as obligatory by its members.”

The Supreme Court in Zaidan v. Mohssen¹⁰ defined customary law from the Nigerian perspective as:

“Any system of law not being the common law and not being a law enacted by any competent legislature in Nigeria but which is enforceable and binding within Nigeria as between the parties subject to its sway”

⁸ M.C. Okany: The Role of Customary Courts in Nigeria (1984) p.39

⁹ T.O. Elias: The Nature of African Customary Law p.5

¹⁰ (1973) 11 S.C. 1

In the same vein, Obaseki J.S.C. in *Oyewumi v. Ogunesan*¹¹ defined it as:

“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 live 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 customary law goes further and imports justice to the lives of those entire subject to it.”

Another definition of customary law which I find very illuminating is that contained in the customary Courts Edict 1984 of Imo State which is as follows:

“A rule or body Customary rules regulating rights and imposing correlative duties being Customary rules or body of Customary rules which obtains and is fortified by established usage and which is appropriate and applicable to any particular cause, matter, dispute, issue question ”¹²

It is safe to conclude from all the definitions set out above that the customary laws of a people form the substratum on which their socio-cultural superstructure rests. The matters with which customary law is principally concerned are simple case of contract (mainly debt) torts, land, family law and succession. These are matters which the predominant rural people of this country

¹¹ (1990) 3 NWLR (Pt.137) 182 at 207

¹² Customary Courts Edict 1984 of Imo State

are primarily concerned with and which the Customary Court of Appeal must develop.

And as A.E.W. Park further observed:

“... the vast majority of the inhabitants of Nigeria conduct most of their activities in accordance with and subject to customary law; and if all courts of whatever status are considered, far more cases are decided under customary law than under any other laws in force in the country.”¹³

It is usual to include Islamic law under the term “Customary law.”

Strictly speaking, customary law is distinguishable from Islamic law as the latter is not indigenous to any ethnic group in Nigeria.¹⁴

For any rule of customary law to be applicable, it must be recognized and accepted as obligatory by the members of a specific community.

Bairamian F.J. put the matter succinctly when he defined customary law as “a mirror of accepted usage”¹⁵

To be enforceable, a rule of customary law must satisfy three basic tests.

Firstly, it must not be repugnant to natural justice, equity and good conscience.

Secondly, it must not be incompatible either directly or by implication with any

¹³ A.e.w. Park : The Sources of Nigerian Law (1963) p. 65

¹⁴ See the views of Professor Akintunde Emiola in the Principles of African Customary Law (1997) p.7. where the erudite author remarked as follows:

“It is sometimes assumed – erroneously so-that Islamic law is a form of customary law. This assumption is based on the fact that in certain areas of the northern part of Nigeria, Islamic law has been adopted to regulate the day to day affairs of the people of these parts of the country.”

¹⁵ Owonyin v. Omotosho (1961) 1 All N.L.R. 304 at 309.

written law for the time being in force and thirdly, it must not be contrary to public policy.

It is pertinent to mention that the origin of the statutory provisions containing the repugnancy clause was the Supreme Court Ordinance No. 4 of 1876. Because of the training and orientation of colonial judges of the British type courts who had only a threadbare knowledge of the rule of our indigenous laws, the repugnancy test has been applied occasionally in a manner detrimental to the continued existence of our customary laws. Nigerian judges of the British type courts have tended to follow the footsteps of the colonial judges. The repugnancy doctrine, instead of being broken into its component parts, is considered by many judges as one. In Lewis v. Bankole¹⁶ Speed Ag. C.J. said inter alia that he was not sure of the meaning of the *exparte* expression “natural justice and good conscience.” It is submitted that the criterion for the application of any customary law is that it should be fair, justifiable and reasonable in accordance with the moral norms of the community at the material time.

PROOF OF CUSTOMARY LAW IN CUSTOMARY COURTS

The original position in Edo State was that the provisions of the Evidence Act did not regulate the proof of issues in Customary Courts. As a matter of fact, the need to adduce evidence to establish a particular custom was dispensed with

¹⁶ (1908) 1 N.L.R. 81 at 100 - 101

as customary law was said to exist in the breast of the Judges of Customary Courts. This was particular so when a party to a case was relying on the customary law of the area of jurisdiction of the Court. Sub-rule 3 of Rule 6 of Order X of the Customary Court Rules, 1978 of Bendel State (applicable in Edo State) provides as follows:

“Where in any cause or matter before a customary court any party wishes to rely on the customary law of the area of jurisdiction of the Court there shall be no need to prove the customary law before the Court”¹⁷

However, by a Legal Notice dated 21st day of October, 2001 the Executive Governor of Edo State conferred upon all District Customary Courts Area Customary Courts and the Customary Court of Appeal in Edo State of Nigeria, the power to enforce any of the provisions of the Evidence Act Cap. 112, Laws of the Federation of Nigeria, 1990. The Order of the Executive Governor of Osun State dated 18th day of July, 2010 has the same effect.

No doubt, the Executive Governors acted pursuant to subsection © of Section 2 of the Evidence Act 1990 (as amended) which provides as follows:

¹⁷ See also the case of Ogiugo v. Ogiugo (1999) 73 L.R.C.N. 3681 at 3715, where the Supreme Court held inter alia that members of the trial Customary Court can state the appropriate customary law from their personal knowledge.

“This Act shall apply to all judicial proceedings in or before any court established in the Federal Republic of Nigeria but is shall not apply ... to judicial proceedings in any civil case or matter in or before any Sharia Court of Appeal, Customary Court of Appeal, Area Court or Customary Court unless the President, Commander-in-Chief of the Armed forces or the Military Governor or Military Administrator of a State by order published in the Gazette, confers upon any or all Sharia Court of Appeal, Customary Courts of Appeal, Area Courts or Customary Courts in the Federal Capital Territory Abuja or a State, as the case may be power to enforce any or all the provisions of this Act.”

The implication of the Edo State Legal Notice and the Order of the Osun State Governor is that proof of customary law is now governed by the provisions of the Evidence Act. Section 14 of the Act provides as follows:

“(1) A custom may be adopted as part of the law governing a particular set of circumstances if it can be noticed judicially or can be proved to exist by evidence; the burden of proving a customary shall lie upon the person alleging, its existence.

(2) A custom may be judicially noticed by the court of it has been acted upon by a court of superior or co-ordinate jurisdiction in the same area to an extent which justifies the court asked to apply it in

assuming that the persons or the class of persons concerned in that area look upon the same as binding in relation to circumstances similar to those under consideration.”

The application of the Evidence Act in the ascertainment of customary law in Customary Courts may have some salutary effects. In contemporary times, it is true that native Chiefs and elders still sit within their locality to adjudicate cases on customary issues which are an integral part of their lives. However, this is not the position in most customary courts today as the judges and members may be posted to courts outside their own environments and cultures. They may therefore not know the customary law of such area . There is therefore some justification in the necessity to prove customary law in customary courts. It is however, doubtful whether the application of the Evidence Act would obviate the problem of proof. Section 59 of the Act provides as follows:

“In deciding questions of native law and customs, the opinions of native Chiefs or other persons having special knowledge of native law and custom and any book or manuscript recognized by natives as a legal authority are relevant.”

But as Professor Allot observed, it has become increasingly difficult in modern times to determine persons who are likely to be knowledgeable in customary law. According to him:

“The mere fact of being an indigenous Chief or leader is not enough in these days when more and more traditional functionaries are educated men with no necessary knowledge of customary law nor does the mere fact of being a President of a local Customary Court make a man an expert in customary law, since these courts are non-tradition in staff and function.”¹⁸

There is no doubt that most Customary Courts today have become anglicized as the super-imposed English legal system have stunted the growth of customary law in many ways. It is submitted that until the customary laws of the various ethnic groups in Nigeria recorded by way of a Restatement (not codified) the problem of proof of customary law would continue to remain with us. A code is not recommended since a principal feature of customary law is its flexibility as rightly observed by Osborne C.J. in Lewis v. Bankole¹⁹ It is the responsibility of the Judges of the Customary Courts of Appeal to take the lead in this regard.

DISPENSATION OF JUSTICE.

It is crystal clear that the dispensation of justice is the primary aim of establishing a court of law. The Customary Court of Appeal could not have been an exception.

¹⁸ See Allot's Essays in African Law (1970) Butterworth's Publishers Ltd. at pp. 264 -265

¹⁹ Supra Note 16

The Advanced Learner's Dictionary of Current English by A.S. Hornby (1962 Edition) at page 533 defines justice as “just conduct; the quality of being right and fair.”

Without delving too far into the realm of jurisprudence, I consider it apposite to proffer a few other definitions and comments of great legal minds.

In Kwajaffa v. Bank of the North,²⁰ Pats – ACHOLONU j.s.c. Observed as follows:

“... Indeed the beauty and greatness, nay, the purity of justice, in all its consuming allure and essence is to ferret out from the mass of facts and law before it, relevant points in order to give remedy to anyone who comes for that I believe that it is not only the litigants in this case but million of our country men ... who have access to the Courts to seek justice, not adulterated justice of justice shrouded in clouds of euphemisms,”

Again, the immortal Lord Denning pointed out in Re Vandervels Trusts (No. 2)²¹

“Every unjust decision is a reproach to the law or judge who administers it.”

Professor H..L.A. Hart in The Concept of Law says²²“justice is a distinct segment of morality.”

²⁰ (2004) 5 S.C. (Pt.1) at 132.

²¹ (1974) Ch.D. 269 at 322

²² (1967Edition) The Clarendon Press, Oxford at page 153.

Justice has also been defined as the “award of what is due to the claimant or the impartial resolution of disputed over conflicting claims.”²³

Oputa J.S.C. in Bello v. A.G. Oyo State²⁴ posited as follows:

“The picture of law and its technical rules triumphant and justice prostrate may no doubt have its admirers. But the spirit of justice does not reside in forms and formalities, nor in technicalities, is the triumph of the administration of justice to be found in successfully picking one’s way between pitfalls of technicality. Law and all its technical rules ought to be but a handmaid of justice and legal inflexibility (which may be becoming of law) may, if strictly followed, only serve to render justice grotesque or even lead to outright injustice ...”

In a similar vein, Kayode Eso J.S.C. in State v. Gwonto²⁵ postulated that:

“The Court is more interested in substance than in mere form. Justice can only be done if the substance of the matter is examined. Reliance on technicalities lead to injustice.”

Hon. Justice I. O. Aluyi, the pioneer President of the Edo State Customary of Appeal observed that:

²³ Curzon’s Dictionary of Law

²⁴ (1986) 5 NWLR (Pt. 45) 828 at 886

²⁵ (1983) 1 S.C.N.L.R. 142 at P.160

“Our Customary Courts are bracing up to the task in their commitment to mete out substantial justice to every comer, untrammelled by considerations of undue technicalities, discarding the circuitious rules of practice and procedure of the ‘English’ Courts, justice as the Courts of Equity prevailed over common law courts in their bid to correct the excess of rigid formality of the common law Customary Courts do not adopt this approach in an irresponsible spirit of vandalism or of iconoclasm but with a sense of mission to do substantial justice to all manner of men..”

Indeed, the approach of the apex Customary Court, the Customary Court of Appeal, in dealing with appeals from the lower Customary Courts epitomizes the apt observation of the pioneer President of the Edo State Customary Court of Appeal.

Thus, the Customary Court of Appeal of Edo State has always given effect to the Customary Courts Edict, 1984 which provides as follows:

“No proceedings in a Customary Court and no summons, warrant, process, order or decree 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 Edict shall decide matters according to substantial justice without undue regard to technicalities.”

In considering the proceedings of the District and Area Customary Courts, the Customary Court of Appeal places great premium on substance and not the form. This was also the approach recommended by Anigolu J.S.C. in Ben Ikpany & Ors. v. Chief Edoho & Anor.²⁶ Indeed, the authorities are legion to the effect that all appellate courts are enjoined to adopt broader altitudes towards the proceedings of Customary Courts.²⁷ In particular, it is not every mistake or error in a judgment of a District or Area Customary Court that will result in the appeal being allowed, it is only when the errors is substantial and has occasioned a miscarriage of justice that the Customary Court of Appeal will interfere. The Customary Court of Appeal has always been guided by the admonition of Idigbe J.S.C. in Chief Karimu Ajagunjeun & 5 ors. v. Sobo Osho of Yeku Village & 13 ors.²⁸ That claims before trial Customary Courts must be elicited not from write or claim as filed but from the entire evidence adduced before the court. Moreover, in tandem with another admonition of Idigbe J.S.C. in the same case, it has always been borne in mind that a Customary Court does not lose its character as such simply because it is presided over by a legal practitioner or because members of the legal profession are today granted audience therein.

Nonetheless, Customary Courts' proceedings must manifest substantial justice and accord with common sense. The rules of court are designed to ensure

²⁶ (1978) 6 - 7 S.C. 221

²⁷ 27 – See the following cases: Udofia v. Apia 6 WACA 216; Ajayi v. Aina (1942) 16 NLR 6 1 at 71; Kuusuu v. Udom (1990) 1 NWLR (Pt. 127) 434; Olubode v. Salami (1985) 2 NWLR (Pt.7) 282 at 294; Amadasun & Ors v. Ohenso & Ors (1966) N.M.L.R. 179

²⁸ (1977) 5 S.C. 89

fair hearing. A breach of this fundamental right entrenched in the extant constitution of the Federal Republic of Nigeria would render the proceedings of any Customary Court a nullity. Commenting on this fundamental right, Oputa J.S.C. in Otapo v. Sunmonu²⁹ stated as follows:

‘... a hearing that is tantamount to a travesty of justice cannot by any stretch of imagination be described as fair for justice herself is fair and even handed. Almighty God gave us two ears. So we have to hear both sides. To hear one side to a dispute and refuse to hear the other side is a flagrant violation of the principles of eternal justice. It offends against the “*audi alteram partem*” rule of natural justice. It is radical and intrinsic in the concept of fair hearing that both sides to any dispute should be given a hearing.’”

CONSTRAINTS IN THE DISPENSATION OF JUSTICE

There is no doubt that the apex Court in the customary courts hierarchy, that is, the Customary Court of Appeal has infused a new life into the entire customary court system. The rationale for its establishment is to systematically develop our customary laws and enhance the status of customary courts. As a court of coordinate jurisdiction, the Customary Court of Appeal has the status of a High Court. Appeals in customary law matters flow from the Customary Court of Appeal to the Court of Appeal and ultimately to the Supreme Court.

²⁹ (1987) 2 NWLR (Pt.58) 587 at 592

It is, however, most disturbing to note that since its inception in 1979, the Customary Court of Appeal has been besieged by a spate of objections to its jurisdiction by legal practitioners. These objections, which continue to come in droves have been engendered by the very restrictive interpretation of its jurisdiction by the Supreme Court and the Court of Appeal.

Whereas in other common law jurisdictions, the appellate courts have been known “to give life to even dead bones of legislations,” the Nigerian Court of Appeal and the Supreme Court have consistently interpreted the relevant sections of the constitution dealing with stultifying narrowness.

It is intended in this part of the paper, to enumerate instances where the restrictive interpretation has produced outlandish and ridiculous results. The proper approach to the interpretation of the relevant sections is suggested while proposals for circumventing the restrictive interpretation and the resultant dilemma by a careful drafting of grounds of appeal by legal practitioners are proffered.

Section 282 (1) had earlier on been reproduced in this paper. It deals with the jurisdiction of a State Customary Court of Appeal. A cursory look at that Section shows that nothing is said about grounds of appeal therein. It is amazing that both the Court of Appeal and the Supreme Court have consistently held that in determining whether questions of customary law are raised in any matter

before the Customary Court of Appeal, it is the grounds of appeal alone which must be examined. They have held that it is not material whether the subject matter of the case which gave rise to the appeal relates to purely customary law matters like customary law marriage, succession under customary law, customary land law. They have also held that it is immaterial that the matter on appeal emanated from a trial Customary Court.

Cases where the narrow and restrictive interpretation were adopted include Golok v. Diyalpwan³⁰ Pam v. Gwom,³¹ Subor v. Asemakeme³² Hirnor v. Yongo,³³ Nwaigwe v. Okere³⁴ and many others.³⁵ These cases decided that where an appeal from a trial Customary Court complains about the applicable customary law in some of the grounds while some other grounds complain about procedure, weight of evidence, and other ancillary matters, only the grounds of appeal complaining about the only the grounds of appeal complaining about the applicable customary law would be cognizable in the Customary Court of Appeal while the other grounds would be cognizable in the High Court.

As a single appeal cannot be heard partly at the Customary Court of Appeal and partly at the High Court, the appellant would be in a dilemma as to where and how to pursue his appeal fully. If he goes to either court, he would only get half

³⁰ (1990) 3 NWLR (Pt. 139) 411

³¹ (2000) 74 L.R.C.N. 22

³² (1997) 4 NWLR (Pt. 502) 617

³³ (2003)_9 NWLR (Pt.824) 77

³⁴ (2008) 13 NWLR (Pt.1105) 445

³⁵ For a fuller discussion of the import of these cases, see my paper titled "Revisiting the Jurisdiction of the Customary Court of Appeal: The Interpretation Dilemma" presented at the Nigeria Bar Association, Benin Branch Law Week in 2009.

or part judgment. The Supreme Court warned against this scenario in Alhaji Umaru Abba Tukur v. Government of Gongola State³⁶ where it held that it was improper to approach a Court that is competent to determine only some of the issues. It went on to stress that, “there should be no room for half-judgment in any matter brought before either Court.” It is submitted that it is only proper that an appeal from a Customary Court in respect of a customary law matter should go to the Customary Court of Appeal where all complaints about the applicable customary law and other ancillary matters like procedure, misdirection and weight of evidence can be exhaustively dealt with.

Expounding the jurisdictions of the three Courts, that is, the High Court, the Sharia Court of Appeal and the Customary Court of Appeal under the 1979 Constitution, Ogundare J.S.C. (of blessed memory) had posited in Ahamdu Usman v. Sidi Umaru³⁷ as follows:

“The unlimited jurisdiction conferred by the Constitution on the High Court is curtailed by sections 242 and 247 conferring jurisdictions on the other two courts in respect of the areas of specialty In my humble view, the superior court to which the appeal goes would be determined by the nature of the question raised

³⁶ (1989 4 NWLR (Pt. 117) 517

³⁷ (1992) 7 NWLR (Pt. 254) 377

by the appeal. If the appeal raises the issue of general law, it goes to the High Court. But if it raises questions of Islamic personal law, it goes to the Sharia Court of Appeal. And if it raises questions involving customary law, the appeal goes to the Customary Court of Appeal ... I can hardly, however, visualize a case where any two of these three courts will have concurrent jurisdiction to entertain an appeal.”

Admittedly the approach suggested by Ogundare J.S.C. above is rather simplistic as an appellant who is aggrieved by the decision of an inferior Customary may find it compelling to formulate his grounds of appeal to straddle more than one sphere of the divide. For instance, questions of general law are often added to questions customary law in order to bring into focus all the complaints of an appellant.

It is submitted that since the relevant or applicability of customary law is deponent on conformity with the general principles of justice and compatibility with the law, having regard to the repugnancy and incompatibility doctrines, it is neither sensible nor practicable to make any rigid distinction between customary law and general law. A court deciding questions of customary law must also be in a position to decide questions relating to the general principles of law and justice. Furthermore, it is outlandish to deny a Customary Court of Appeal of the right to evaluate evidence since any court properly so called must be in a position

to weight evidence in order to arrive at the justice of a case. A Customary Court of Appeal in order to function effectively must have incidental powers to deal with all ancillary or associated matter in so far as the subject matter relates to customary law. This submission is reinforced by Section 10(2) of the Interpretation Act which provides as follows:

“an enactment which confers power to do any act shall be construed as also conferring all such other powers as are reasonably necessary to enable that act to be done or are incidental to doing it.”

The stance of the Supreme Court has become irksome and irritating because fundamental principles of law like fair-hearing, service of process and locus standi are said not to be questions relating to customary law. Thus, in the case of Customary Court of Appeal, Edo State v. Aguele,³⁸ the Benin Division of the Court of Appeal held inter alia:

“In the instant case, grounds one to three in the appeal to the Customary Court from the trial court all related to questions of fair hearing and the service of process on the respondent before the trial. None of them related to question of customary law.”

³⁸ (2006) 12 NWLR (Pt. 995) 545

It is, however, salutary to note that the Supreme Court recently held that the issue of jurisdiction is cognizable in the Customary Court of Appeal.³⁹ In the instructive words of Onnoghen J.S.C:

“... It follows therefore that since the concept of jurisdiction is of universal application and known to customary law when applied to Customary Court, an error of jurisdiction by a Customary Court or a Customary Court of Appeal which is a defect intrinsic to the adjudication, is an issue of customary law within the meaning of sections 247(1) and 224(1) of the 1979 constitution and there appealable as an issue of customary law up to the Supreme Court. To hold otherwise is to kill the development of that branch or system of adjudication in this country, as there would be no means of checking the excess or absence of jurisdiction in the relevant courts and hereby encourage adjudication far in excess or absence of jurisdiction in the relevant customary courts, be it of first instance or appellate.”

³⁹ In Nwaugwe v. Okere (Supra).

THE OMNIBUS GROUND OF APPEAL

In is common knowledge that an omnibus ground of appeal is normally filed before the receipt of the record of appeal by counsel. But the Supreme Court has held that this is not permissible in app appeal to the Customary Court of Appeal. For instance, in Golok v. Diyalpwan (supra) and in the more recent case of Hirnor v. Yongo (supra), the Supreme Court held that an omnibus ground of appeal which complains that a judgment is against the weight of evidence deals purely with facts and has no connection with customary law. A motion to file and argue additional grounds of appeal will also not be cognizable in the Customary Court of Appeal as something cannot be added to nothing or to use the latin maxim – “ex nihilo, nihil fit.”

Uwaifo J.S.C. put the matter pointedly when he warned thus in the Hirnor’s case:

“... Legal practitioners should therefore understand the futility of filing omnibus grounds of appeal from judgments of Customary Courts since it will only lead to a ‘*cul de sac*’ in the judicial process to develop customary law precedents even by the highest court of the land.”

It is difficult to fathom why issues of fact have been jettisoned from the purview of customary law since customary law itself has been held to be an issue of fact to be proved by evidence.⁴⁰

THE NEED FOR A LIBERAL INTERPRETATION

In the case of Rabiu v. The State⁴¹ Udo Udoma J.S.C. laid down the correct approach to the interpretation of a Constitution as follows:

“... My Lords, it’s my view that the approach of this Court to the construction of the Constitution should be, and so it has been one of liberalism, probably a variation of the theme of the general maxim ‘cut res magit valeat quam pereat,’ I do not perceive it to be the duty of this so to construe any of the provisions of the constitution as to defeat the obvious ends the constitution was designed to serve where another construction equally in accord and consistent with the words and sense of such provisions will serve to enforce and protect such ends.”

This approach is akin to the purposive approach recommended by Lord Denning in his Discipline of law at page 15 and which is how the vogue in most common law jurisdictions. In the words of Lord Denning:

⁴⁰ See in particular Section 14 of the Evidence Act.

⁴¹ (1981) 2 NCLR 293

“The literal method is now completely out of date and has been replaced by what Lord Diplock called the purposive approach in order to promote the general legislative purpose underlying the provision Whenever the strict interpretation of a statute gives rise to an absurd and unjust situation, the judges can and should use their good sense to remedy by reading words in, if necessary, so as to do what parliament would have done had they had the situation in mind.”⁴²

One very wishes that our Lordships of the Court of Appeal and the Supreme Court would adopt the laudable approach propounded above in their interpretation of the jurisdiction of the Customary Court of Appeal in order to make the Court more relevant in its dispensation of justice.

It is further suggest that in order to make the Customary Court of Appeal more functional and remove the perceived ambiguity in Section 281(1) of the 1999 Constitution, the section should be amended to read as follows:

“A Customary Court of Appeal of a State shall exercise appellate and supervisory jurisdiction in civil proceedings involving questions of customary law and other ancillary matters in so far as the subject matter relates to customary law.”

⁴² See also Seaford Court Estates Ltd v. Asher (1949 2 K.B. 498 – 499).

ELEVATION TO THE COURT OF APPEAL

We have noted earlier on in this paper that the Constitution provides that at least three Justices of both the Court of Appeal and the Supreme Court must be learned in customary law. Section 288(2) (b) further provides as follows:

“... a person shall be deemed to be learned in customary law if he is a legal practitioner in Nigeria and has been so qualified for a period of not less than fifteen years in the case of a Justice of the Supreme Court or not less than twelve years in the case of a Justice of the Court of Appeal and has in either case and in the opinion of the National Judicial Council considerable knowledge of and experience in the practice of customary law.”

(Underlining Supplied).

Since the Customary Court of Appeal is a specialized court and most its Judges are legal practitioners groomed in the practice of customary law, the positions should be exclusively reserved for them in order to develop customary law precedents more effectively.

SUPERVISORY JURISDICTION

The Constitution mandates the Customary Court of Appeal to exercise supervisory jurisdiction over the lower customary courts. It may be argued that a separate treatment of this is otiose as the appellate jurisdiction of the Customary Court of Appeal envelopes the supervisory jurisdiction. The better view is that

the supervisory jurisdiction is also administrative. In order to ensure that the lower customary courts are properly administered, the various Customary Courts Laws of the States contain provisions for the making of procedural rules by the President of the Customary Court of Appeal. The purpose is to ensure that the lower customary courts follow the law and that they perform their judicial functions effectively and efficiently.

On the supervisory role of the President of the Customary Court of Appeal, Hon. Justice Yusufu Yakubu⁴³ noted as follows:

“I wish to seriously observe that unless the President delegates his powers to some of his serving officers, it may be difficult to have effective control over his {lower} Customary Court Judges. The control does not only involve the Judges but also their supporting staff. It is in the light of this that all Area Courts⁴⁴ in the Northern State are placed under the immediate supervision of Inspections of Area Courts. For instance, in Plateau State, supervisory powers of Inspections are contained in Sections 48 – 50 of the Area Courts Edict, 1968.”

⁴³ Former President of the Plateau State Customary Court of Appeal in his commentary on a paper titled “*The customary Courts in our Judicial System*” presented at the 1988 All Nigeria Judges Conference

⁴⁴ In the Northern States, Area Courts are the Customary Courts

It is recommended that the Customary Courts in the Southern State should similarly be supervised by Inspectors of Customary Courts.

DRAFTING GROUNDS OF APPEAL

Until the Court of Appeal and the Supreme Court resort to the enlightened/purposive approach suggested by Udo Udom J.S.C. and Lord Denning in the interpretation of Section 282 (1) of the 1999 Constitution, or that Section is amended as proposed above, legal practitioners should be very careful in drafting their grounds of appeal.

The following suggestions are proffered. Firstly, legal practitioners should avoid using general principles of English Law expressed in Latin such re judicata, Locus standi, Lis pendens, jus tertii, Stare decisis, res ipsa Loquitur, restitution in integrum, non est factum etc. in their grounds of appeal of appeal. Lawyers raising preliminary objections may readily contend erroneously that such principles are unknown to customary law. Even English common law doctrines like the doctrine of standing by laches and acquiescence etc. should be ordinarily explained and preceded by the formula:

“The trial Court or Court below erred in customary law...”

Secondly, recognized issues of customary law like inheritance under customary law, customary land law, custody and guardianship of children under customary law etc. should be made the primary focus.

Thirdly, in the case of the omnibus ground of appeal, it is expedient to heed the advice of Uwaifo J.S.C. in *Hirnor v. Yongo* (supra). The learned jurist had

advised that the omnibus ground of appeal can be avoided by merely stating that the learned trial Court or the Customary Court of Appeal erred in law in holding that the plaintiff failed to prove his case. He relied on Ground 3 in Golok v. Dyalpwan (supra) which was similarly held to be a ground of appeal raising a question of customary law. According to him, “such a formulation provides some considerable leeway for an insightful council to skillfully draw up competent grounds of appeal to meet appropriate grievances within the limitation imposed by Section 245(1)⁴⁵ of the Constitution.

CONCLUSION

Undoubtedly, the establishment of the Customary Court of Appeal by the 1979 has infused a new life into the Customary Court system. I have tried in this paper to canvass the need to remove all the bottlenecks impeding the lofty goals of its founding fathers whose primary aim was to ensure that precedents developed in the Customary Court of appeal for the proper guidance of the lower customary courts. In this regard, I have made a strong case for all procedural matters to be cognizable in the Customary Court of Appeal.

One wonders how a Court of justice can operate without procedure. Section 282(1) has been interpreted without regard to Section 284 of the 1999 Constitution which empowers the President of a Customary Court of Appeal of a State to “make rules regulating the practice and procedure of the Customary Court of

⁴⁵ This section governs the jurisdiction of the Court of Appeal in entertaining appeals from the Customary Court of Appeal and is almost in pari material with Section 282(1) of the 1999 Constitution. It should be similarly construed or amended to cover all appeal where the subject matter relates to customary law as suggested above.

Appeal of the State.” It is submitted that by shutting our all matters relating to procedure, the Court of Appeal and the Supreme Court want the Customary Court of Appeal to operate ‘in vacuo,’ that is, in a vacuum.

It is a recognized canon of interpretation that a Court in interpreting the provisions of any statute, and more importantly a Constitution, must read together related provisions in order to discover the true meaning.⁴⁶

My sole aim in this presentation is to make the Customary Court of Appeal more relevant in the dispensation of justice. I hope I have managed to set the stage for a fuller discussion of this very important topic at this workshop. I thank you all for allowing me to take your time for so long.

⁴⁶ For a fuller import of this canon of interpretation, See the cases of Obayawana v. Governor of Bendel State (1983) 4 NCLR 96; Awolowo V. Shagari (1976) 6-9 SC 51 and Amaechi v. INEC (2008) 5 NWLR (Pt.1080) r. 26 at P. 255.

