European and International Law

Civil Questions Involving Customary Law as the Basis of Appellate Jurisdiction in Nigeria

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Abstract: **Objectives**: This paper examines an omnibus ground of appellate jurisdiction of the Customary Court of Appeal in Nigeria to demonstrate that this ground of jurisdiction which refers to 'questions of customary law' and the manner of interpretation by Nigerian courts has stifled the growth of customary law. **Prior Work** This work extends previous works on the nature of legal pluralism in Nigeria and how Nigerian courts interpret and develop this area of the law. **Approach**: Available literature as well as primary documents was used to the objectives of the study. **Implications**: This work is of value to academics and judges interested in the growth and development of customary law in particular and legal pluralism in Nigeria in general. **Value**: This paper suggests that a general omnibus jurisdictional clause should be expansively interpreted by Nigerian courts to recognise all issues concerning customary law as proper for appellate courts because this will tremendously assist the growth and development of customary law in Nigeria.

Keywords: Customary Court of Appeal; jurisdiction; legal pluralism

1. Introduction

This article reviews the appellate jurisdiction of customary courts of appeal in Nigeria- which along with the Sharia Court of Appeal in Northern Nigeria- express Nigeria's accommodation of her plural legal heritage and demonstrates that the judicial interpretation of the appellate jurisdiction of customary courts of appeal based on the interpretation of the requirement that appeals to customary courts of appeal and from customary courts of appeal to the Court of Appeal must be of "civil questions involving customary law".

Every plural legal order is faced with a choice between uniformity or diversity in the development of that order. Where unification is the objective, it is often

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organized through a uniform judicial structure which is assumed result in a blended national law. A further challenge that confronts a plural legal order is how to craft the appellate process of its different orders. While it is normal that appellate jurisdiction in many common law countries such as Nigeria is based on a distinction between appeals on questions of law being as of right and appeals on facts being at the leave of the court, the nature of the different legal orders demand different considerations. The challenges of a uniform judicial structure as well as the distinction between "law" and "fact" have been of considerable influence in the manner in which Nigerian appellate courts have interpreted the requirement of "*civil questions involving customary law*".

This article addresses two issues emanating from an interpretation of this requirement. The first issue is that a challenge exists that the interpretation of the jurisdictional requirement will turn on a distinction between procedural and substantive issues following the "law" and "fact" divide. This distinction ignores fundamental realities that ascertainment and proof are key ingredients of an oracular system of law such as Nigerian customary law. Procedural and substantive issues are intimately connected in the existence and authenticity of a rule of customary law and as such a distinction would shut out many appellants and thereby stultify the development of customary law. The second challenge arises from the fact customary law is subject to a number of validity tests including issues of general law which must be satisfactory before a rule customary law can be applied. Accordingly in the interpretation of civil questions of customary law, care must be taken to avoid a distinction between issues of customary law and issues of general law. A simple response to the challenges of the appellate jurisdiction of a plural legal order would be to treat appeals of each legal order as the same especially where there is a uniform judicial structure. Nigeria choice in differentiating the appellate process for customary law from the general law has led to unintended consequences that are unsatisfactory and is symptomatic of a legal system still unsure of how to deal its legal plurality.

The appellate jurisdiction over customary law issues in Nigeria articulated around customary courts of appeal within a unified common law system. At the bottom of a customary court judicial structure is a customary court from where appeals lie to customary courts of appeal. Appeals from customary courts of appeal go to common law courts first to the Court of Appeal and ultimately to the Nigerian Supreme Court. The Customary Court of Appeal is a creation of the 1979 Constitution of the Federal Republic of Nigeria as a concrete way of dealing with

the existence of customary law in Nigeria (Okany 1984). Whilst customary courts in Nigeria's plural judicial structure for the application of customary law is further defined by the part of Nigeria where customary law is sought to be applied. In the Northern part of the country consisting of 19 States, 13 of these States (Sokoto, Zamfara, Kebbi, Katsina, Kaduna, Gombe, Bauchi, Kano, Borno, Niger, Yobe Adamawa and Jigawa) have not recognized customary law because of their adoption of Islam as the basis of their State legal system in both private and public law. The other 6 Northern States (Plateau, Benue, Kogi, Kwara, Taraba and Keffi States) allow the operation of Islamic personal Law and Customary Law. The eighteen Southern States recognize and apply Customary Law in their territories. It is still an open point whether by the tenor of the 1999 Constitution customary law can still exist in the 13 Northern States where Islam is the basis of the legal system. (Oba 2002, p. 817).

This article is divided as follows. In the next part the jurisdiction of customary courts of appeal is examined through an analysis of the requirement of 'questions involving customary law'. The next part of the article examines the jurisdiction of the Customary Court of Appeal through a consideration of the interpretation by Nigerian courts of the requirement of 'questions involving customary law'. A unique aspect of this jurisdiction which are appeals from customary courts to the customary courts of appeal is highlighted as a means of demonstrating how the jurisdictional requirement of questions of customary law has challenged the growth of customary law. Concluding remarks follow in the third part.

2. The Jurisdiction of the Customary Court of Appeal

Section 280 of the 1999 Constitution provides that any of Nigeria's thirty-six states can establish a Customary Court of Appeal if it so wishes except for Nigeria's Federal Capital where the establishment of a Customary Court of Appeal is mandatory. It is therefore likely that it is the states that have established customary courts that are likely to opt to establish a Customary Court of Appeal. While many of the Southern States have established Customary Courts of Appeals, the 6 Northern States that have not adopted Islamic law as the basis of their legal system such as Plateau State[1] Benue State[1] have also established Customary Courts of Appeal.

[1] See the Plateau State Customary Court of Appeal Law 1979.

The jurisdiction of a Customary Court of Appeal can be gleaned from a combined reading of s. 245 and s 282 of the 1999 Constitution of the Federal Republic of Nigeria. Section 245 provides that: "*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*".

Section 282 of the 1999 Constitution provides that: (1) A Customary Court of Appeal of a State shall exercise appellate and supervisory jurisdiction in civil proceedings involving questions of customary law. (2) For the purpose of this section, a Customary Court of Appeal of a State shall exercise and decide such questions as may be prescribed by the House of Assembly of the State for which it is established.

It can therefore be stated that the jurisdiction of a Customary Court of Appeal is constitutionally provided for but may be enlarged by the National Assembly with respect to appeals to the Court of Appeal and by the State Houses of Assembly with respect to appeals to the Customary Court of Appeal by customary courts. It is true that the Customary Court of appeal is an appellate court whilst her decisions are subject to appeals to the Court of Appeal. In both cases the constitutional endowment of jurisdiction of a Customary Court of Appeal is governed by the phrase "Questions of Customary Law" and it is to that phrase this article turns to. The importance of jurisdiction in Nigerian law is illustrated by the fact that it can be raised before original and appellate courts where it can be fatal to a suit.[2]

2.1. Questions Involving Customary Law

As the normative framework of communities in Nigeria consisting of communal norms which members of a community feel obligated to[3] the interpretation of the

[1] See the Benue State Customary Court of Appeal Edict 1999.
[2] See *Ayman Enterprises Ltd v Akuma Industries Ltd* (2003) 13 NWLR Pt 836, 22).
[3] In *Oyewumi v Ogunsesan*, (1990) 3 NWLR (Pt 137) 182, 207, Obaseki J.S.C. defined customary law 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 lives and transaction 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 all those subject to it." *In Khairie Zaidan v Fatmah Khalil Mohssen* (1973) 11 SC 1 Elias CJN described customary law as ' …any system of law not being t common law and not being a law enacted by any

phrase "civil questions involving questions of customary law" should ordinarily be a simple exercise and not a matter of considerable controversy. As a complete system customary law should ordinarily encompass all issues concerning customary law be they substantive or procedural. In its daily application in the lives of citizens who are subject to its jurisdiction, it would appear that the nature and extent of an alleged rule of customary law would be a matter of contention. Where however organs of state law mediate the application of customary law the issue is of significant importance for three reasons. The first is that customary law is oral and requires proof. Accordingly any assertion that an alleged rule is a customary rule requires a determination by a court as to the truth of such assertion. To posteriorly determine a question of customary law appears to put the horse before the cart. It is when evidence is laid in this regard that a court would be able to determine whether an alleged rule of customary law is indeed true. It is important to remember that section 14(1) of the Evidence Act[1] provides that it can be proved by evidence unless it can be judicially noticed. Section 14(2) of the Evidence Act provides that custom may be judicially noticed if it has been acted upon by a court of superior or co-ordinate jurisdiction to an extent which justifies the court asked to apply it to assume that the persons or class of persons concerned in that area look upon same as binding. Section 59 of the Evidence Act provides that customary law can be proved by opinions of persons having special knowledge of native law and custom (Park, 1963, at p. 87);[2] opinions of native chiefs;[3] any book;[4] and any manuscript.[5] Even though it was thought for long that many cases were required to enable a court take judicial notice of a custom[6], it is now the law that one decision of a superior court of record is enough for the courts.[7] Being questions of fact the existence of a rule of customary law is entirely at the discretion of the trial court since it is at liberty to believe or disbelieve the evidence.

Thus whether a purported rule is a rule of customary law can be contested in a customary court. Accordingly parties can disagree on the number of witnesses and

competent legislature in Nigeria but is enforceable and binding within Nigeria as between the parties subject to its sway.'

[1] Cap E14 Laws of the Federation of Nigeria 2004.

[2] See *Oyewunmi v Ogunsesan* (1990) 5 SCNJ 33; *Cole v Folami* (1990) 2 NWLR (Pt 133) 445; *Nzekwu v Nzekwu* (1989) 2 NWLR (Pt 104) 373. .

[3] See *Ojemen v Momodu* (2001) FWLR (Pt 37) 1138.

[4] See the cases of *Amoo v Adigun* [1957] WRNLR 55; *Adedibu v Adewoyin* (1951) 13 WACA 411

[5] See *Adeseye v Taiwo* (1956) 1 FSC 84.

[6] See the case of *Olagbemiro v Ajagunbade III* (1990) 3 NWLR (Pt. 136) 37.

[7] See *Oyewunmi v Ogunesan*, note 2 .

other pieces of evidence that are called to establish a customary law rule. If a customary court wrongly evaluates the available evidence and decides that a customary law rule exists surely it should be the right for an aggrieved party to appeal to the Customary Court of Appeal on the ground that the evaluation of the facts that enabled a court to arrive at its decision is against the weight of evidence which is a matter of law. Unfortunately the interpretation of what is a question of customary law appears to have been heavily influenced by the common law distinction of facts and law which features prominently in constitutional and statutory provisions governing whether appeals should be of right or on the leave of court. This distinction between "facts" and "law" has had a deleterious effect on the interpretation of what a question of customary law is.

Secondly customary law is subordinated to the Nigerian common law and legislation. Thus the validity of a customary law rule is predicated on compliance with three tests. The first test is that customary law must not be repugnant to natural justice equity and good conscience.[1] This test has largely been mediated through the instrumentality as and standards of the common law. (Uchegbu, 2004, p. 75, Obilade, 1979, p. 110; Agbede, 1995, p. 407; Achimu, 1976, p. 35; Aboki, 1991-1992, p. 1, Nwabueze 2002, 153). In addition any customary law rule is subject to any written law[2] and to a test of public policy as provided for in section 14(3) of the Evidence Act. These tests are matters of evaluation contention and disagreement within any judicial structure including appellate points. Every alleged customary law rule is potentially open to such an evaluation. To seek to determine a question of customary law would appear to be meaningless since at all times the authenticity of any alleged rule of customary law is in issue and nothing is added by the test of a 'question of customary law.

Thirdly customary law applies within the context of a constitutional order that affirms the supremacy of the 1999 constitution[3] and the invalidity of all laws

[1] See for example section 45 of the Customary Court of Appeal Law of Bayelsa State , Cap. C16, Laws of Bayelsa State 2006 provides thus: (1) the Customary Court of Appeal in the exercise of the jurisdiction vested in it by the Constitution and the Law as regards both substantive law, and practice and procedure shall administer, observe and enforce the observance of the principles and provisions 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'

[2] See for example section 34(1), High Court Law, Cap 67 Laws of Kwara State 1994. See the following cases *Rotibi v Savage* (1944) 17 NLR 17 and *Adesubokan v Yinusa* (1971) NNLR 77.

[3] Section 1 (1) of the 1999 Constitution provides that the Constitution is supreme and its provisions shall have binding force on al authorities and persons throughout the Federal republic of Nigeria

contrary to its provisions[1] including a liberal Bill of Rights contained in chapter four of the 1999 of the 1999 Constitution. Every assertion of a customary law rule potentially implicates the 1999 Constitution and requires an evaluation whether the rule breaches the Bill of Rights given the fact that most customary rules given their communal orientation appear potentially contradictory to an individually oriented Bill of Rights. Nigerian courts have struck down a number of customary law rules for breaching a number of human rights including the right to freedom of association;[2] and the right to freedom from discrimination.[3] It is therefore important to contemplate all appeals concerning customary law in order to assess whether the rule will pass constitutional muster. To dwell on what constitutes "questions of customary law" misses the essence of the interaction of legal orders especially when state law mediates the reproduction and authenticity of another legal order.

These considerations have regrettably not been within the consideration of Nigerian courts as they grapple to determine what a question of customary law is within appellate court law and practice. It would appear that appellate courts are intuitively restrictive in their jurisdictional remit and thus actively seek to constrain the matters that come before them. Nigerian appellate courts are no different. Combined with an inadequate articulation of the nature of the Nigerian customary law, the issue of what a question of customary law is has led to starling interpretations by Nigerian appellate courts. Three streams of interpretation can be identified. The first line of interpretation is based on the decision of the Nigerian Supreme Court in *Golok v Diyalpwan*[4] where Court considered the meaning of 'questions of customary law'. In that case the plaintiff/respondent brought an action in the Area Court in Plateau State, claiming recovery of a piece of farmland from defendant/appellant who he alleged borrowed against the security of the land. His appeal against a judgment given against him to the Plateau State Customary Court of Appeal was allowed and the decision of the Area Court was set aside. The plaintiff appealed to the Court of Appeal grounds of appeal including one omnibus ground that alleged that the judgment is against the weight of evidence. The

[1] Section 1(3) of the 1999 Constitution provides that ' if any other law inconsistent with the provisions of this constitution, the constitution shall prevail, and that other law shall to the extent of such inconsistency be void.'
[2] See *Agbai v Okagbue* (1991) 7 NWLR (Pt 204) 391.
[3] See *Muojekwu v Muojekwu* [1997] 7 NWLR (Pt. 512) 283; *Okonkwo v Okagbue* [1994] 9 NWLR (Pt. 368) 301.
[4] (1990) 3 NWLR (Pt. 139) 411.

Supreme Court held that omnibus ground which dealt purely with facts is not a question of customary law.

It appears however that it is the cast of a ground of appeal is that often influences a court in its interpretation of what a question of customary law is. A hint of this interpretative inclination in *Golok* was confirmed by the Supreme Court in *Hirnor v Yongo*[1] where Uwaifo JSC points out that the decision in *Golok* …"provides some considerable leeway for an insightful counsel to skillfully draw up competent grounds of appeal to meet appropriate grievances within the limitation"[2] of the relevant constitutional provision. That insight is to omit an omnibus ground of appeal. Consistent with *Golok* the means of determining a question of customary law lies in the manner in which the grounds of appeal are couched and not the subject matter of the appealed decision of a customary court. On this point the Court of Appeal in *Aguele* held that it is not the subject matter of the action in the trial court that confers jurisdiction on the Customary Court of Appeal but rather the ground of appeal from the decision of the Area or Customary Court.[3]

In *Iyamu v Aigbiremwen*[4] the Court of Appeal was faced with a situation where grounds of appeal filed before it from a decision of a Customary Court of Appeal were sought to be amended. Ground one of the original grounds of appeal reads as follows: "*The learned President of the Customary Court of Appeal erred in law in allowing against the decision of the trial customary court when the facts found by the trial court were not challenged on appeal*." The amended ground one read thus: The Learned President of the Customary Court of Appeal erred in law in allowing the appeal against the decision of the trial customary law when the facts found by the trial court *which were based on the appropriate customary law*[5] were not challenged on appeal. The Court relying on the fact that the original grounds of appeal did not raise any issue of customary law held that there was nothing to amend. It is questionable whether this is correct. As the amended grounds of appeal reveal it is the addition of words to the effect that customary law is implicated that may be pivotal in determining what a question of customary law is.

Even at that, it is difficult from the cases to determine a consistent interpretation of what amounts to 'questions of law' when the basis of such a determination is based

[1] [2003] 9 NWLR (pt. 824) 77.
[2] [2003] 9 NWLR (pt. 824) 77,102.
[3] [2006] 12 NWLR (Pt 995) 545,565.
[4] [1992] 2 NWLR (pt. 222) 233.
[5] The italicized words are the addition to the ground of appeal.

on the cast of the ground of appeal. For example in *Ononiwu v Ukaegbu*[1]the Court of Appeal relying on *Golok* evaluated grounds of appeal in that case and held that ground one (1) of the appeal which alleged that the Court erred when the Customary Court of Appeal held that a pledge had been proved at customary law was a question of law while ground two (2) which alleged that a customary pledge had been proved despite the defendants contradiction introduced by traditional history was a matter of evaluation of evidence and therefore a question of fact which is not a question of customary law. In *Pam v Gwom*[2] the Supreme Court defined "questions of customary law" in terms of dispute as to the extent and manner of which such applicable customary law determines and regulates the right, obligation or relationship of the parties having regard to the facts established in the case. The Court stated however that where the decision of the Customary Court of Appeal turns on facts or on question of procedure such decision is not with respect a question customary law, notwhistanding that the applicable law is customary law. Even though the Supreme Court did not regard appeals on facts as 'questions of law' the evaluation of grounds of appeal in *Pam* point to the contrary. In *Pam* six grounds of appeal were filed. Ground three which was disallowed and ground four which was allowed are important for our analysis. Ground three alleged that "*The learned Justices of the Customary Court of Appeal, Jos erred in law when it (sic) assumed that the land in dispute was either given out as loan or gift and thus required the presence of witnesses.*" As the particulars of misdirection, it was alleged that "The decision of the Court was solely based on the presumption that it is a general custom that is applicable in Nigeria based on the authority of *Cole v Falami* .when no such evidence was led at the trial." Ground four which was allowed stated that: "

The Learned Justices of the Customary Court of Appeal erred in Law when it (sic) held that under Berom Native Law and Custom one cannot bury his dead on another man's (sic) land." Ground three which is designated a question of fact is really a question of law because what the ground really alleges is that the Customary Court of Appeal misconstrued the Berom natïve law and custom on what constitutes a loan and gift and that it requires the presence of witnesses for a valid transaction. This ground is not different from ground four which alleged a wrong interpretation of Berom Native law and Custom. This highlights the point

[1] [2001] 14 NWLR (Pt. 734) 530. See also the case of *Okoro v Nwachukwu* [2007] 4 NWLR (Pt. 1024) 69.
[2] (2000) 2 NWLR (Pt. 644) 322.

being made that all purported questions of fact about native law and custom invariable involve customary law because it is either about the existence of a rule of customary law or the extent of its application.

The second stream of interpretation revolves around assertions that a rule of customary law is in breach of a statute or even the 1999 Constitution and is not therefore a question of customary law. A good example is the Land Use Act which recognizes customary rights of occupancy and which endows jurisdiction over this right of occupancy on customary courts. In *Okhae v Governor Bendel State*[1], Salami JSC seriously doubted the possibility of a Customary Court of Appeal dealing with land matters because such appeals would involve the Land Use Act. It is to be noted that the jurisdiction of a customary court over land is further defined by the Land Use Act[2] as interpreted by the Courts. Section 41 of the Land Use Act vests on the customary court jurisdiction in respect of proceedings over customary right of occupancy[3] granted by a local government. Accordingly any ground of appeal based on the extent of the jurisdiction of a customary court over customary courts of occupancy would without question involve a question of customary law. Other legislation have been a basis of determining the absence of "questions involving customary law". Thus in *Okhai v Akpoemonye*[4] it was held that since a Customary Court of Appeal has no jurisdiction to interpret statutes such an exercise has nothing to do with questions of customary law. As stated above the 1999 Constitution is not left out. Thus in *Customary Court of Appeal v Aguele*[5] the contention that the observance of the right to fair hearing as provided for in section 36(1) of the 1999 Constitution by operation of law forms part of the proceedings of Area/Customary Court of a State and therefore raised a question of customary law was not upheld and the Court of Appeal held that grounds of appeal that alleged breach of the right to fair hearing and the service of processes on the respondent before the trial court were not "questions of customary law". With due respect questions of fair hearing are intricately linked to and are part of customary law. Fair hearing is a fundamental principle that all judicial structures charged with the application of customary law must comply with it in accordance with section 36 of the 1999 Constitution. It should therefore be open to a litigant to allege that the

[1] [1990] 4 NWLR (Pt. 144) 327. Hereafter *Okhae.*
[2] Cap L5 Laws of the Federation of Nigeria 2004.
[3] A customary right of occupancy is defined in section 51 of the Land Use Act as the right of a person or community lawfully using or occupying land in accordance with customary law and includes a customary right of occupancy granted by a local government.
[4] (1999) 1 SCNJ 73. See also *Mashuwareng v Abdu* [2003] 11 NWLR (Pt. 831) 403.
[5] [2006] 12 NWLR (pt. 995) 545. Hereafter *Aguele.*

principle has not been complied with. It cannot be the case that such an allegation will succeed. All that is required is for the appellate court to examine the complaint.

The third stream of interpretation arises out of unease with the distinction in *Golok* and subsequent cases. For example in *Aguele*, the Court of Appeal lamented the sad state of the jurisdiction of the Customary Court of Appeal and pointed out that questions of fair hearing and service of a process are questions of customary law. It was not surprising therefore when the Court of Appeal in *Anyabine v Okolo*[1] the Court of Appeal expressed a different opinion on the means of determining whether an appeal concerns questions of customary law. The Court held that in ascertaining questions raised in appeal from a Customary Court of Appeal to a Court of Appeal, a liberal approach must be taken so as to ensure that the issues in controversy in the appeal are adequately ascertained. To that end the Court held that the grounds of appeal would not prima facie be the only document to be relied upon. The Court continued that it is necessary to go through the entire record of proceedings, the issues in controversy between the parties at the trial and the controversy sought to be resolved on appeal so as to ascertain the real issues in dispute. The Court specifically held that section 247(1) of the 1979 Constitution does not stipulate whether or not grounds of appeal should be restricted to grounds involving law alone. With respect to the grounds of appeal in this case the Court of Appeal held that what was being complained about was the procedure adopted by the trial customary court and that this was connected to questions of customary law. This is a better articulation of the meaning of "questions of customary law". It cannot be correct that the procedure of courts designed to apply customary law should not contemplated as part of customary law when the procedure in that court is designed to establish facts which establish customary law. A further ray of hope can be found in the recent decision of the Supreme Court in *Nwaigwe v Okere*[2] where the Supreme Court held that since the concept of jurisdiction is of universal application and known to customary law when applied to a customary court, an error of jurisdiction by a customary court or a Customary Court of Appeal which is a defect intrinsic to adjudication, is an issue of customary law. The Court further held that the contrary would kill the development of the jurisdiction of a Customary Court of Appeal.

[1] [1998] 13 NWLR (pt. 582) 444.
[2] 2008 13 NWLR (Pt 1105) 445.

2.2. "Civil Questions of Customary Law" and the Appellate Jurisdiction of Customary Courts of Appeal

It is important to draw attention to the significance of the interpretation of the "question of customary law" to the appellate jurisdiction of customary courts of Appeal. Since only customary courts can appeal to customary courts of appeal the significance of the interpretation of "civil questions of customary law" would have been of no moment if customary courts of appeal are endowed with exclusive jurisdiction over appeals from customary courts. The fact that state high courts are of coordinate jurisdiction with customary courts of appeal inevitably leads to a delineation of the respective jurisdiction of the two courts. It is not therefore surprising that in *Usman v Umaru*[1] the Supreme Court set out the respective jurisdictions of the State High Courts and the Customary Courts of Appeal as follows: "*The unlimited jurisdiction conferred by the Constitution on the High Court is curtailed by section 242, and 247 conferring jurisdictions on the other two courts in respect of their areas of specialty. The Area Court possesses jurisdiction to administer customary law (including Islamic Law) generally. It is from this court that appeals go to any of the three superior courts, that is, High Court, Sharia Court of Appeal and Customary Court of Appeal. In my humble view, the superior court to which the appeal goes would be determined by the nature of the questions raised by the appeal. If the appeal raises issues 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 it if 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*." [2]

Many observers have commented on the difficulty inherent in such judicial forum shopping where litigants are forced to formulate grounds of appeal focused on particular courts.[3] It is easy to imagine how a litigant would first ensure that a ground of appeal does not deal with facts and also deal with determining what a question of customary law means. To understand the difficulties involved in this

[1] (1992) 7 NWLR (Pt 254) 377.
[2] (1992) 7 NWLR (Pt 254) 377, 397.
[3] See for example J.O Olubor 'Customary Court of Appeal in Nigeria: Focus on Jurisdiction' Available at www.nigerianlawguru.com/article/CUSTOMARY%20LAW%20AND20COURT%20OF%20APPEAL%20IN%20NIGERIA%20-FOCUS%20ON%20THE%20JURISDICTION.pdf (Accessed 4-11-2014).

process it is important to examine the jurisdiction of customary courts which would have a bearing on the route of an appeal.

The civil jurisdiction of a typical customary court is certainly wide. For example section 6 of the Customary Court Law of Bayelsa State provides that the Customary Court shall have jurisdiction over matters to the extent set out in the First Schedule to the Law. This schedule sets out the unlimited civil jurisdiction to include land causes and land matters meaning causes and matters relating to the ownership occupation or possession of land; matrimonial causes in respect of marriages under customary law; debt demand or damages claimed between persons married under customary law, or arising from marriage under customary law; custody of children and other causes and matters relating to children under customary law. The limited causes have a monetary ceiling in respect of causes and matters relating to inheritance upon intestacy under customary law; grant of power or authority to any person to administer the estate of an intestate under customary law and civil actions in contracts and torts at common law and at customary law. It is difficult to neatly delineate grounds of appeal relating to customary law and those pertaining to a general law from a decision of a customary court.

Many customary courts are endowed with criminal jurisdiction. For example section 11 of the Bayelsa State Customary Courts Law, provides that where there is a contravention of a customary law, a Customary Court may impose a penalty authorized by or consistent with the Customary law but no such penalty shall involve cruelty mutilation torture or other personal violence or shall be inhuman degrading or repugnant to natural justice and humanity. The imposition of a penalty clearly locates this jurisdiction as a criminal jurisdiction. It is important to remember the constitutional injunction in section 36(12) of the 1999 Constitution that no person shall be convicted of a criminal offence unless that offence is defined and the penalty therefor is prescribed in a written law made by either the National Assembly or the State House of Assembly.[1] While it would appear doubtful that section 11 of the Bayelsa State Customary Court Law is constitutionally compliant, it may be necessary to assume that it is[2] to enable an

[1] See the celebrated case of *Aoko v Fagbemi* (1961) All NLR 400.

[2] Aplausible basis of criminal jurisdiction of a customary court is the provisions of section 10(1)d of the Bayelsa State Customary Court Law which provides that the rules and by-laws made by a local government councils in Bayelsa State shall be enforced by a customary court. It is important to remember that section 7(4) of the 1999 Constitution (as amended) delimits the powers of a Local Government Council by stating that these functions should include the matters included in the Fourth Schedule to the Constitution. The nature of these functions endow regulatory powers on local

understanding of how the endowment of a criminal jurisdiction on a customary court is affected by the requirement of 'civil questions involving customary law'. To assist in this regard it is important to draw attention to the interpretation of the conferment of criminal jurisdiction on the then Bendel State Customary Court of Appeal by the Customary Court Edict of Bendel State 1984 and the Customary Court of Appeal Edict also of 1984. These two legislations were struck down as unconstitutional by the Court of Appeal in *Okhae v Governor Bendel State*.[1] The emphatic manner in which the Court of Appeal held that customary or Sharia Courts of Appeal have no jurisdiction over criminal matters means that at present Customary or Sharia Courts of Appeal can only exercise jurisdiction in civil matters. The inability of the Customary Court of Appeal to hear criminal matters means that for those criminal matters for which a customary court has jurisdiction, it is to the High Courts that appeals will lie. Thus out of one matter before a customary court, certain grounds of appeal are tenable before the state high court while other grounds of appeal are valid before the Customary Court of Appeal.

Yet another example is a controversy which lasted for long whether State High Courts exercise a concurrent jurisdiction over customary rights of occupancy with customary courts. In *Adisa v Oyinwola*[2] the Supreme Court overruled the decisions in *Salati v Shehu*[3] and *Oyeniran v Egbetola*[4] that High Courts do not have concurrent jurisdiction over customary rights of occupancy. Thus in *Osungwu v Onyeikigbo*[5] the Court of Appeal held that since a High Court has a concurrent jurisdiction over a customary right of occupancy it has jurisdiction to entertain a case for the determination of the appropriate court in respect of a customary right of occupancy. Accordingly the State High Court will entertain an appeal that does not indicate a question of customary law, while the Customary Court of Appeal will entertain grounds of appeal that pertain to questions involving questions of customary law.

As stated above the national and state legislatures can enlarge the jurisdiction of a customary court of appeal. The question is whether such an enlargement must relate to "questions of customary law". Some States of the Nigerian federation have

governments and It is often the case that these rules and by laws contain provisions which imposes penalties for acts and omissions amounting to criminal offences. See Mukoro 2011, p. 139.

[1] (1990) 4 NWLR (Pt. 144) 327.

[2] [2000] FWLR (Pt. 8) 1349.See *also Asemo v Ibrahim* (2001) 16 NWLR (Pt. 738) 20.

[3] [1986] 1 NWLR (Pt. 15) 198.

[4] [1997] 5 NWLR (Pt. 504) 122.

[5] [2005] 16 NWLR (Pt. 950) 80.

expanded the jurisdiction of their Customary Court of Appeal in accordance with the provisions of section 280(2) of the 1999 Constitution. In Imo State for example section 55 (1) of the Imo State Customary Court of Appeal Edict No 7 of 1984 endows the Imo State Customary Court of Appeal with jurisdiction over final decisions in any criminal or civil proceedings under customary law; where the ground of appeal to the Customary Court of Appeal involves questions of law alone, final decisions in any criminal proceedings in which any person has been sentenced to imprisonment and decisions on any civil or criminal proceedings under customary Law on questions as to interpretation of the Constitution.' The import of these amendments were examined by the Supreme Court in *Nwaigwe v Okere*[1] where the Supreme Court decided that section 55(1) did not introduce more than the jurisdiction conferred by the 1999 Constitution. However a close reading of section 55 indicates clearly that the jurisdiction of the Imo State Customary Court of Appeal was expanded and it would appear that a right of appeal as of right was granted in respect of criminal matters. At facial value it would appear that the Court is correct since it appears that the constitutional scheme restricts questions of customary law to civil matters especially within the context of the jurisdictional requirement of "civil questions involving customary law". It is the constitutional restriction of the appellate jurisdiction of customary courts of appeal to civil matters that also sustains the coordinate jurisdiction of state high courts who decide criminal appeals from customary courts.

3. Concluding Remarks

To sum up this paper, it is clear that the interpretation of the jurisdictional requirement of "civil questions involving customary law" is problematic both in terms of the cast of this requirement and its interpretation by Nigerian courts. While there appears to be an awareness of the need to regard matters of law and fact as involving questions of customary law, there needs to be a constitutional amendment towards an exclusive jurisdiction of customary courts of appeal in terms of appeals from customary courts to enable such courts to consider all appeals from customary courts. This amendment should also remove the word "civil" from the jurisdictional requirement as it is unnecessary and confusing. Without such an amendment it is unlikely that the true potential of customary law will be realized in Nigeria. It is even more important that the jurisdictional

[1] 2008 13 NWLR (Pt 1105) 44.

requirement of "questions of customary law" is dispensed with to enable a customary court of appeal and other appellate courts to adjudicate all appeals about customary law. The nature and extent of customary law in its interaction with state law would become clearer. This clarity is important in the emergence of a Nigerian common law (Aguda, 1989, p. 249; Elias, 1969, p. 18; Tobi, 1996, pp. 186-187) and would ensure that appropriate respect and dignity is accorded customary law.

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