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

**A PAPER DELIVERED AT THE INDUCTION COURSE FOR NEWLY APPOINTED JUDICIAL OFFICERS OF THE SUPERIOR COURTS OF RECORD WITH THE THEME:**

***“REPOSITIONING THE COURT FOR BETTER JUSTICE DELIVERY”***

***BY***

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***“JURISDICTIONAL ISSUES IN THE APPLICATION OF CUSTOMARY LAW IN NIGERIA”*, AT THE INDUCTION COURSE FOR NEWLY APPOINTED JUDICIAL OFFICERS OF THE SUPERIOR COURTS OF RECORD WITH THE THEME, *“REPOSITIONING THE COURT FOR BETTER JUSTICE DELIVERY”***

***PROTOCOL …***

***INTRODUCTION***

In the vast and multidimensional legal landscape of Nigeria, the application of Customary Law has become a fertile ground for unending debates and dissections ranging from its relevant in the Nigerian State to its inherent challenges with applicability. A critical aspect of this paper revolves around jurisdictional issues inherent in the application of customary law for better justice delivery in Nigeria. This paper also embarks on an odyssey to unravel the intricate jurisdictional issues that cast a shadow over the realm off customary law in Nigeria shading light on the implication that ripple through the legal landscape.

Customary law is a cornerstone of indigenous justice system that echoes the voices of generations past yet this ancient legal tradition grabbles with the complexity of modern legal framework where jurisdictional blur and clash with statutory and common law mandate. (See OJO M. 2018, Customary Law and Legal Pluralism in Nigeria: Problems and Prospects. Journal of African Law, 62 (1) page 123 – 145).

The nature of Court in those days when we had Native Court was what resembles ADR today (Alternative Dispute Resolution). It was more settlement and most Customary Laws today encourage ADR in mostly civil cases but not criminal cases. See Section 13 (1) and (2) of the Bayelsa State Customary Courts Law, 2022:

***“A Customary Court having jurisdiction in civil or criminal cause or matter shall, as far as there is proper opportunity, promote reconciliation among persons over whom the Court has jurisdiction, and encourage and facilitate the settlement in an amicable way without further trial of the matter in dispute. When a suit or proceeding is pending, a Customary Court having jurisdiction in that suit may promote reconciliation among the parties thereto and encourage and facilitate amicable settlement thereof”***

Colonial Masters came and tried to assist us. If we remember the old NTA Sitcom, “Icheoku” where the Colonial Master would read his rulings and the Registrar, “Courtma” as its called in local parlance would interpret same to the best of his ability.

In some cases, we see words like, “Evidence” interpreted as, “Ewu dance” to benefit the interpreter so the parties would bring a goat to his house (ewu is goat in Ibo Language). Then we notice the interpreter gives interpretation to his benefit.

We then realize the need for the inclusion of characteristics of Members of Customary Court, I.e. good character, high moral and common sense, ostensibly to guide against members taking advantage of the peoples ignorance of the law. With the growth in the knowledge of the law we included Lawyers in the panel of Judges, so we see one Chairman or Magistrate seated with two laymen.

To further assist the growth of the Customary Court, the addition of the Customary Court of Appeal and Sharia Court of Appeal came into being

***DEFINITION OF TERMS***

1. CUSTOM – The Black’s Law Dictionary defines Custom as a practice that by its common adoption and long, unvarying habit has come to have the force of Law. It is refers to the long established practice and life style of a people resident in a given community.
2. CUSTOMARY LAW – Black’s Law Dictionary defines Customary Law as the law that captures the norms, traditions and rules of behaviour of the people. Customary Law constitutes of the law or custom and rites recognized by the rural community which have their inceptions from the traditions of the people and which are not usually reduced to writing but are recognized and known and respected amongst the natives and communities as unwritten rules and regulations which regulate their lives before the advent of the white man who brought in the common law. See MADUKAJI NANDI V VINCENT NJOKU (2008) 15 NWLR (PT. 1110) 283 @ 303 – 304.

Moreover, OBASEKI JSC in OYEWUMMI V OGUNSESAN, “***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 said that custom is a mirror of the culture of the people”***

1. ***JURISDICTION*** – Jurisdiction is basically the power of a court to adjudicate on a cause or matter. The issue of Jurisdiction is very fundamental as it goes to the competence of the court or tribunal. If a court or tribunal is not competent to entertain a matter or claim or suit, it is a waste of valuable time for the court to embark on the hearing and determination of the suit, matter or claim. It is, therefore, an exhibition of wisdom to have the issue of jurisdiction or competence determined before embarking on the hearing and determination of the substantive matter. The issue of jurisdiction being a fundamental issue can be raised at any stage of the proceedings in the court of first instance or in the appeal courts. It is therefore necessary that a Court is clothed with the requisite jurisdiction to entertain a suit before it delves into the determination of the suit because once it is shown, by a party, a court of law or tribunal either before, during or after a proceeding, lacks the jurisdiction to entertain or adjudicate on a matter the whole proceeding no matter how brilliantly conducted will be null, void and of no legal effect whatsoever. See the celebrated case of MADUKOLU V NKEMDILIM (1962) 1 ALL NLR 587; (1962) 2 SCNLR 341 and Black’s Law Dictionary.

***THE NATURE AND APPLICABILITY OF CUSTOMARY LAW***

For a custom to be acceptable as a Law, its generally should not be contrary to natural justice, equity and good conscience. See ***section 10 (1) of the Bayelsa State Customary Courts Law, 2022, “Subject to the provisions of this Law, a Customary Court shall administer***

1. ***The appropriate Customary 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 in Nigeria.***
2. ***Any written Law which the Customary Court may be authorized to enforce under this Law or by an Order made by the Governor under section 9 of this Law***
3. ***Any enactment in respect of which jurisdiction is conferred on the Court by that enactment***
4. ***The rules and Bye Laws made by a Local Government Council or having effect as if so made under the provisions of any enactment in force in the area of jurisdiction of the court; and***
5. ***Common law relating to actions in contracts and torts.”***

Every State in Nigeria has similar provisions in their Laws and it governs proceedings in Customary Courts and Area Courts where necessary.

The men that man these customary courts are usually above thirty (30) years old and are expected to be men of good conduct, common sense and well seized with the Custom of the place where these courts are located. See section 2 of the Customary Courts Law of Bayelsa State, 2022.

Some States in the Federation are known to have pegged their age limit to fifty (50) years. (In my personal opinion those that have pegged the age limit from 50 years upward ought to consider a downward review since lawyers are now manning these courts to enable them to have a future in that career path.

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

***ESTABLISHMENT OF THE CUSTOMARY COURT OF APPEAL***

CONSTITUTIONAL PROVISIONS – SECTIONS 280 (1) of the Constitution of the Federal Republic of Nigeria 1999 as amended, ***“There shall be for a State that requires it a Customary Court of Appeal for that State”.***

Section 282 (1) of the Constitution of the Federal Republic of Nigeria 1999 as amended, ***“A Customary Court of Appeal of a State shall exercise appellate and supervisory jurisdiction in Civil Proceedings involving questions of Customary Law” Section 282 (2)*** of the 1999 Constitution supra, ***“For the purpose of this section, a Customary 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”.***

Ordinarily, it is expected that in the 36 States of Nigeria there ought to be Customary Courts, Area Courts where required Sharia Courts and then Customary Court of Appeal. But we know that there are States that, “do not need” the Customary Court of Appeal even when Customary Courts exist in that State. Reason is not too far from the fact that the President usually follows immediately after the Chief Judge.

***APPOINTMENT OF JUDGES***

In some States the Customary Court of Appeal in appointing Judges, “make do with who applies”. We ourselves feel the Customary Court of Appeal is inferior to the High Court which affects our desire or ability to put weight behind this arm of the Judiciary to move it forward.

It further even affects the recommendation expected from the House of Assembly, then the Customary Court is left as it is when no appeal lies from it

The issue that rises is that latitude the constitution gives to each State of the Federation to choose to establish the Customary Court of Appeal. But for the High Court it simply says, ***“There shall be a High Court for each State of the Federation”. “Section 270 (1) There shall be a High Court for each State of the Federation. (2) The High Court of a State shall consist of:***

1. ***a Chief Judge of the State; and***
2. ***Such number of Judges of the High Court as may be prescribed by a Law of the House of Assembly of the State”***. See section 270 of the 1999 Constitution of the Federal Republic of Nigeria as amended.

Thankfully, appointments require same qualifications in all superior Court of the State. The appointing strategy should be redrafted to give the person or Judicial Officers in the Customary Court of Appeal the same strength to run in the Customary Court of Appeal.

I hear colleagues say, ***“Since there was no option I decided to go to the Customary Court of Appeal”*** as if it was some leftover for Judicial Officers. The establishment of the Customary Court of Appeal should be mandatory and clothe with requisite jurisdiction to run the office. Closely behind the constitutional itch is the shared jurisdiction between Customary Court of Appeal and the High Court.

***SHARED JURISDICTION***

In Bayelsa State recently the House of Assembly gave the Customary Court of Appeal the jurisdiction to hear appeals in Chieftaincy matters. See Section 90 (Part 15) Chieftaincy Matters Bayelsa State Customary Courts Law 2022:

***“The Court shall have original jurisdiction to entertain and determine a civil cause or matter pertaining to - a dispute with regard to the declaration of vacancy, presentation, selection, appointment, installation, recognition, withdrawal from recognition, deposition or abdication of a person as a Government recognized, family, compound, village, town, community, traditional, personal or honorary Chief or title holder according to the custom, tradition and usages of the family, compound, village, town or community.***

***Decision of the Governor either of his own motion or based on the report of the Commissioner in respect of the recognition of a person to be the Chief of a recognized Chieftaincy stool contrary to the custom, tradition and usages of his family, compound, village, town or community.”***

The Customary Court has original jurisdiction in Chieftaincy Matters. However, the appeals from Customary Court on Chieftaincy matter go to both High Court in Bayelsa State and the Customary Court of Appeal. When the State House of Assembly included it in such largesse it ought to have given the Customary Court of Appeal the sole right of Appeal.

This jurisdiction shared greatly reduces the workload of three Judges and increases that of a Single Judge of the High Court in Bayelsa State. Imagine a situation where Judges are not meeting up, NJI query for return of cases would it not seem more appropriate for the Court that deals with such a matter on the original Summon have the sole right to appeal.

**LAND MATTERS**

Land in urban areas is within the sole purview of the High Court to determine while the Customary Court enjoys unlimited jurisdiction in land within rural areas. See section 39 (1) of the Land Use Act 1978 and Section 6 (1) of the Bayelsa State Customary Courts Law, 2022. This leaves Parties to find or trace their lands at the Registry to ascertain whether it is situate in an Urban Area or Rural Areas even though the lands are situate in their Local Government Area. If the Customary Court had original jurisdiction in Rural Areas but not exclusive. Can the draftsman give us a good reason for this difference.

***OMINIBUS GROUND***

This is when one of the grounds of appeal reads, “The decision is against the weight of evidence” See Evidence Act. This ground is usually seen to remove the appeal entirely from the hand of the Customary Court of Appeal as it means the evidence Act comes into play which is not applicable in the Customary Court of Appeal.

Earlier in the establishment of the Customary Court of Appeal Bayelsa State once this ground is stated in the grounds of appeal, Respondent’s Counsel immediately files that the Customary Court of Appeal has no jurisdiction to hear the case. At a point in time, we would agree but as I heard a Learned Jurist once say, “Judging is common sense” we had two options, strike out the appeal so Counsel can redraft and return or the Judge goes through the grounds and where it finds five grounds containing issues of Customary Law as in our legal right and two questions of facts with omnibus ground, we strike out two grounds and assume jurisdiction.

We discover that most time we have even answered that the decision is against the weight of evidence as the evidence adduced contains issues of Customary Law. We, with everything else, validating our existence in the Country’s Judiciary, had required the Customary Court of Appeal to approach the House of Assembly and educate them on the need to expand jurisdiction of the Customary Court just for the sole reason of reducing the work load of the High Court.

***ENGLISH TERMINOLOGIES***

1. FAIR HEARING
2. CERTIORARI
3. JURISDICTION

Let me quote here our locus classicus in our Customary Jurisprudence in Bayelsa State,ODOEMENA NWAIGWE & ORS V EZE EDWIN OKERE & ORS (2008) LPELR – 2095 (SC), ***“Surely a Customary Court must have the power to determine whether or not it has jurisdiction to entertain the matter brought before it. Such Court being a creature of statute … it must have therefore possess the inherent power to determine whether the matter brought before it for adjudication is within the Jurisdiction conferred on it. Without such power it cannot properly function as a Court of Law or of Justice. If the Customary Court can determine whether or not a given matter is within its competence then the Courts which hear appeals from it must surely have jurisdiction to determine indeed such matters within the Jurisdiction of the Lower Court … I hold the considered view that a question of jurisdiction of a court or tribunal is of universal application to every civilized society or community whether Customary or English”.***

Most times, if not all the time use of certain phrases warrants Legal Practitioner appearing before a Customary Court to certain pronouncement. For example Jurisdiction is an issue of Law not Customary Law, Fair Hearing is an issue of English Law, Certiorari is under English Law and so forth.

As we evolve in this race we have indeed come to realize no matter how the Laws are drafted, Judging requires a lot of common sense. (I cite with respect the words of Hon. Justice B. B. Kanyip, President National Industrial Court during the last Refresher Course for Superior Court Judges, “Judging is Common Sense”)

I had the privilege of reading the paper presented by Hon. Justice S. H. Makew, President of the Customary Court of Appeal Kaduna State. A paper presented at All Judges Conference 2007 titled: Jurisdictional issues in the application of Customary Law in Nigeria. The 2023 present day this paper still rings true. He made the following recommendation

1. Broad Constitutional interpretation to section 282 (1) of the 1999 Constitution of the Federal Republic of Nigeria as amended rather than restrictive.
2. Any matter that includes Customary Law should be within the Jurisdiction of the Customary Court of Appeal; (And I would make bold to request that all Civil Matters should come on appeal before the Customary Court of Appeal.
3. Ominibus Ground should be allowed to be within the Jurisdiction of the Customary Court as traditional evidence is both fact and evidence.
4. Our brothers at the High Court may need a mental reset cum even some of the Judges in the Customary Court of Appeal, to the effect that we are all Superior Court of Record, our nomenclature notwithstanding. After all we are all in pursuit of a vibrant Judiciary.

While concurring with my Lord, I would add that for now we as Judges of the Customary Court of Appeal indeed need a mental reset and always tell ourselves the following:

1. ***I am not an inferior court***
2. ***I can do as good if not better***
3. ***I can also be a candidate for the appeal court***
4. ***I am not here because its leftover***
5. ***I am here because I matter***
6. ***I am a strong arm in the Judiciary***
7. ***The jurisdictional issues will not overwhelm me***
8. ***I can transcend all limits***
9. ***I will do justice: the Heaven will not fall***
10. I am a Judge of the Superior Court of Record in Nigeria.

In conclusion, the best way for now is to do justice one case at a time and know that these issues, though long standing, will with time gradually give way to better justice delivery in our Customary Court.

Thank you my Lords for your attention.