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A Historical Re-Examination of Customary Arbitration and the Administration of Justice in Nigeria

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Abstract As a phenomenon, dispute has become an integral part of human existence, and dispute resolution has also become an essential requirement for peaceful co-existence of members of a given society. It provides opportunity for the examination of alternative pay-offs in a situation of positioned disagreements, and restores normalcy in a society by facilitating discussions and placing parties in dispute institutions in which they can choose alternative positive decision to resolve differences. Dispute exists on many different levels including international, intra-group, inter-group, interpersonal, and intrapersonal. It does also exist in relation to different subject matters namely, ideational or beliefs, values, material resources, emotions, roles and responsibilities. Dispute varies in terms of the social contexts in which they are located, and the traditional societies had always found solution to such conflicts by way of arbitration, subject to the native Laws and Customs of the particular society, with a view to engendering social harmony and equilibrium. This paper thus examines the role of customary arbitration in the administration of justice in Nigeria, putting into consideration the historical origin and relationships therein. The paper however derives it strength from both primary and secondary materials.
Keywords: Customary Arbitration, Administration, Justice, Nigeria.

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Introduction

One of the basic functions of law in human societies is to establish a formal mechanism for settlement of disputes. Such institutions are usually in the form of law Courts, judicial and administrative tribunals etc. Law also seeks to provide appropriate remedies where a party has suffered due to the action or in action of another. The living Law of society, according to Eugen Ehrlich (1936) has to be sought outside the confines of formal legal materials, but in society itself.

Human societies can be broadly classified as: underdeveloped or community-based, and developed or complex. In the former, social relations tend to be fairly permanent. Indeed, the continued existence of the community group depends upon the continued closeness of the

societal ties and consequently where disputes arise in such groups, the type of dispute settlement is often based on compromise. Since the affected parties do anticipate future relations, there is always the spirit of reciprocity. This is also applicable in contemporary commercial spheres in relation to settlement of commercial disputes.

The practice of dispute settlement through the process of arbitration is never a new phenomenon among the various peoples in Nigeria as it has been with man from creation.

Arbitration had been with the indigenous communities in Nigeria before the advent and the introduction of English legal system of Court litigation into the Country (Gadzama, 2004).The invasion of the indigenous organized system of dispute resolution and the gradual and deliberate attempts of the colonialists had succeeded in relegating this customary system of dispute resolution to a Second-Class status, if not totally jettisoned for Court litigation in dispute settlement. The seminar paper, however, examines customary arbitration practice in Nigeria as applicable to the administration of justice. The study becomes relevant in view of the currency and global acceptance of alternative dispute resolution mechanism and the need to maintain standards and canons of practice across culture areas or jurisdictions.

Conceptual Discourse

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 also defines customary law as law consisting of customs that are accepted as legal requirements or obligatory rules of conduct, practices and beliefs that are so vital and intrinsic a part of a social and economic system that they are treated as if they were laws. According to Kolajo (2001):

Customary law can also be described as a usage or practice of the people which by common adoption and acquiescence and by lone and unvarying habit has become compulsory and has acquired the force of a law with respect to the place or the subject-matter to which it relates (Kolajo, 2001).

The Nigerian Evidence Act did not define customary law but it did define custom as a rule, which in a particular district, has, from long usage, obtained the force of law (Section 258 (1) Evidence Act, 2011). In Olubodun v. Lawal (2009) the Supreme Court of Nigeria defined custom or customary law to mean a set of rules of conduct applying to persons and things in a particular locality. It went further to state that it is of the characteristics of a custom or customary law that it must be recognized and adhered to by the inhabitants of the community to make it binding. To emphasis the unwritten content of customary law, the Court stated that it is a well-established principle of law that documentary evidence is unknown to native law and custom. In Owoniyin v. Omotosho (1961) the Court described customary law as a mirror of accepted usage. Whereas we agree with the above definitions in various degrees, we think that the one offered by the Supreme Court in Nwaigwe v. Okere (2008) is more comprehensive and commands wider acceptance. It proceeds:

What is customary law? Customary law generally means relating to custom or usage of a given community. Customary law emerges from the traditional usage and practice of a people in a given community which by common adoption and acquiescence on their part, and by long and unvarying habit, has acquired, to some extent, element of compulsion, and force of law with reference to the community. And because of the element of compulsion which it has acquired over the years by constant, consistent and community usage, it attracts sanctions of different kinds and is enforceable. Putting it in a more simplistic form, the customs, rules,

relations, ethos and cultures which govern the relationship of members of a community are generally regarded as customary law of the people (Per Niki Tobi J.S.C.).

The argument whether traditional African societies possessed laws no longer arises in contemporary times in the light of the volume of literature and case law that has developed on the subject, for as Umoh summarized any rule that resolves conflict and stabilizes society is law, however crude (Umoh, 2013).

The next issue to resolve is the relationship between customary law in traditional African societies and the common law of England. It is necessary to clarify this point here because in the colonial era African customary law was generally regarded by the euro-centric colonial operators as barbaric, inordinate and inapplicable save those ones that have passed the repugnancy tests set by them whereas several aspects of the common law of England were transported to apply directly to the colonial territories as statutes of general application without let or hindrance. If the common laws of England were nothing more than the customary laws and principles of morality of the English people then the supercilious condescension on African customary laws would have been unjustified. According to Black's Law Dictionary, common law is the body of law derived from judicial decisions, rather than from statutes or constitutions (Supra p. 313).

Throwing more light on this in a description of the England customary law, Devlin wrote that:

Historically, (the common law) is made quite differently from the continental code. The code precedes judgments; the common law follows them. The code articulates in chapters, sections and paragraphs the rules in accordance with which judgments are given. The common law on the other hand is inarticulate until it is expressed in a judgment. Where the code governs, it is the judges' duty to ascertain the law from the words which the code uses. Where the common law governs, the judge, in what is now the forgotten past, decided the case in accordance with morality and custom and later judges followed his decision. They did not do so by construing the words of his judgment. They looked for the reason which had made him decide the case the way he did, the ratio decidendi as it came to be called. Thus, it was the principle of the case, not the words which went into the common law. So historically the common law is much less fettering than a code (Op.cit, p.313).

From the foregoing analysis, it is clear that both the common laws of England and African customary law enjoy the same origin and history and none is superior to the other. This position finds support in Nwaigwe v Okere (Supra at p. 1357) where Onnoghen who read the lead judgment emphasized that we should not forget that English law also includes English common law which does not enjoy a higher legal status than our customary law (Walter and Onnoghen).

Legal justice is a much more restrictive term than social justice for social justice encompasses in general terms the capacity of the political and legal system to secure and guarantee to each and to all, deserving, fair and equal treatment in the scheme of things within a given society. Social justice ensures in an entity that minority rights are protected; that women, children and the vulnerable are cared for, protected and fairly treated; that the economic system does not only benefit the few while the majority languish in penury; that economic equilibrium is as much as possible sustained; that citizens have equal and unhindered access to governance by equal access to franchise and participation; that citizens are equal beneficiaries of government

patronage and of the nation's natural endowments; and that the laws of the land are made and the Courts poised respectively to offer these distributive and corrective justices. In contradistinction to social justice, legal justice is justice according to law. Whereas social justice answers to moral questions, legal justice answers only to the hard cold letters of the law.

Legal justice is an outgrowth in a large measure of what legal scholars describe as the positive law sharing common features with modern realism of which Holmes described as the prophecies of what the Courts will do in fact and nothing more pretentious and subsequently presented as the embodiment of the fears of a bad man who suspected what the Courts would do to him (Holmes, 2013).

In many respects, legal justice does not correspond to social justice. Take as instance Sections 14-18 of the 1999 Constitution which confers various social, economic, and educational entitlements on the citizens. Social justice demanded that the citizens seized of these rights should be able to consummate the rights by calling in aid the apparatus for the administration of justice. But this is not the case for section 6 (6) (C) of the same Constitution states unequivocally that the judicial powers vested on the Courts by the Constitution shall not extend to any issue or question as to whether any act or omission by any authority or person or as to whether any law or any judicial decision is in conformity with the fundamental objectives and directive principles of state policy set out in Chapter II of the Constitution. This blanket ban, of course, includes Sections 14-18 earlier mentioned. By this development, the window of opportunity for the citizens to obtain a wide range of social justice by accessing vital economic and educational opportunities and facilities has been shut behind their face.

Conversely, Sections 33-46 of the same Constitution make provisions for several classes of civil and political rights. Unlike the previous scenario, section 46(1) authorizes any person who alleges that any of the rights he is entitled to under the sections has been, is being, or is likely to be contravened to apply to the appropriate High Court to seek redress. The High Courts are further empowered under Section 46(2) to hear and determine any such application made to it and to make any orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any right to which the applicant may be entitled. To practicalize the exercise of these rights Section 46(3) empowers the Chief Justice of Nigeria to make rules with respect to the practice and procedure of the relevant Court for the purpose of enforcing the rights. These civil guarantees are good but in practice, not many people are in a position to access the rights due to a multiple of reasons. Foremost of these reasons is the large economic divide existing between the Country's few rich and its vast army of the poor. With overwhelming majority of the citizens living below poverty line only a minute percentage of the population can go through the back-breaking processes of enforcing their rights. Most people prefer not to raise formal complaint while others resign to fate. Yet a significant obstacle aside of poverty is ignorance. The illiterate population in Nigeria is still predominant. Illiteracy is concomitant with ignorance. With these people working all day as subsistence farmers, artisans, small-scale traders and unskilled labourers struggling to keep body and soul together questions of human rights and their enforcement seem to be out of reach.

The corrupt, brutal and over-bearing attitudes of the security forces are also unhelpful. Most times the police constitute themselves into a pest eating away at an undernourished human population. To ameliorate this, and pave the way for progressive social development, the

government, both at the Federal and State, has in fairness put in place some programmes aimed at bridging the gap between the rich and the poor and reducing the level of social inequality. These are poverty alleviation programmes, soft loans for agricultural production and for small-scale businesses and entrepreneurs aside of subsidies in energy, education and transportation services. There has also been a deliberate effort to provide legal aid services to the indigent. Section 46(4) (b) (i) of the 1999 Constitution mandates the National Assembly to make legislations for the rendering of financial assistance to indigent citizens of Nigeria where there rights have been infringed or with a view to enabling them to engage the services of a legal practitioner to prosecute their claims. Section 7 of the Legal Aid Act11 makes provision for the offering of legal assistance to indigent persons in both civil and criminal matters. With regard to civil matters, such assistance will only relate to civil claims in accident cases and cases of breach of fundamental rights as guaranteed under Chapter IV of the 1999 Constitution.

In criminal matters, among the cases covered are allegations of murder, manslaughter, grievous bodily harm, affray, stealing and rape as well as aiding and abetting or counseling or procuring the commission of, or being an accessory before or after the fact to, or attempting or conspiring to commit any of the above offences. In spite of these legislative provisions, a number of problems still trail the scheme in practice significant among which is funding. The scheme is poorly funded by the government to the end that there are not only scanty services to be accessed by those who need them but even those who succeed in accessing them find that most of the lawyers who operate the scheme are either inexperienced or are not motivated to give their quality time and services to the programme. Furthermore, sometimes the assistance is not available to those who really need them whereas those who do not need them take advantage of the programme due to false claims and official corruption. Apart from these, the legal aid scheme in Nigeria is by far not a comprehensive one for it covers only two areas of civil claim and a scanty number of allegations.

A predominant percentage of all the things that can bring an indigent person before the Court to be able to obtain legal justice are untouched. And considering the overwhelming percentage of the poor as against the rich in the Country today a conclusion may be drawn that only an infinitesimal size of the population are able to obtain legal justice and this impinges highly on the balancing of social justice in the Country. The following discourse focuses on the practical application of customary law in Nigeria.

The History and Nature of Customary Arbitration in Nigeria

Arbitration as a mechanism of settlement of dispute has been with Nigerians from time immemorial, as it has been with mankind from the beginning of creation. The existence of this means of dispute resolution is based on the fact that conflicts and controversies are, from time immemorial, inevitably a daily occurrence in society. They exist in the form of personal disagreements, religious crises, political, ethnic, marital disputes, chieftaincy matters, land and community boundary disputes, and even economic conflict, and are settled one way or the other through an organized traditional dispute resolution mechanism like arbitration. Historically, therefore, arbitration and other mechanisms are adopted in the process of dispute resolution in most ethnic groups in Nigeria, as in other communities in African countries. Thus, arbitration is a traditional arrangement in Nigeria for resolution of dispute, by way of abiding by the judgment of selected persons in the community, on disputed matters, as opposed to reference to the regular court for litigation. This situation is aptly captured in the words of Ezediaro (1971) as follows:

Arbitration as a method of settling dispute is a tradition of long standing in Nigeria. Referral of a dispute to one or more laymen for decision has deep roots in the customary law of many Nigerian communities. Such method of dispute resolution was only reasonable, for the wise men or the chiefs who were the only accessible judicial authorities. This tradition still persists in certain villages and communities, despite the centralized legal system and the attendant efforts at modernizing and reform of legal system.

As earlier indicated above, the jurisprudential history of customary arbitration in Nigeria as a mechanism for dispute management, and dispute resolution extends far back into the pre-colonial era and this was recognised by the western styled judicial institutions of the colonial government.

Among the earliest examples of judicial recognition accorded the concept of customary arbitration were the decisions in the Gold Coast (presently-day Ghana) by the West African Court of Appeal (WACA) which became binding on Nigerian courts and still form part of Nigerian case law (Assamong V. Amuaku, 1932).

The West African Court of Appeal (WACA) in the case of Assampsong V. Amuaka and Ors (1932) held that:

Where matters in dispute between parties are by mutual consent, investigated by arbitrators at a meeting held in accordance with native law and custom and a decision given, it is binding on the parties and the Supreme Court will enforce such decision.

The same position was adopted by the court in a long string of authorities including Foli V. Akese, Kwasi V. Larbe, and Abinabina V. Enyimadu. This line of authorities was followed by the Nigerian courts in a long string of decisions including Iyang V. Essien, Njoku V. Felix Ekeocha, Mbagwu V. Agochukwu, and Idika V. Erisi.

However, the above tide was changed in late 1980s when the Court of Appeal denied the existence of customary law in Nigeria. In the case of Okpuruwa V. Ekpokam (1988) per Uwaifa, JCA (as he then was), the court pronounced that:

I do not know of any community in Nigeria which regards the settlement by arbitration between disputing parties as part of its native law and custom.

The above holding per Uwaifo, JCA found an ally in the earlier published opinion of Allot, A.N; a scholar in traditional African law who had suggested thus:

The term arbitration…in the mouth of the African refers to all customary settlement of disputes other than by the regular courts. The aim of such a transaction is not the rigid decision of the dispute and the imposition of penalties, so much as reconciliation of the two parties and removal of the disturbance of the public peace (Allot, 1960).

Following the above position of Allot and Uwaifo respectively, it does appear that they failed to take due cognizance of the various existing arbitration custom in Nigeria, one which is undoubtedly the Islamic customary arbitration. For example, in Arabic, the term “Tahkim” which is arbitration, is recognized in Islamic law and provided for by all its sources including the writings of all the major Islamic Schools of Thought, albeit with slight variations as to practice and procedures (Fathy).

It is pertinent to note that arbitration as a concept in dispute resolution has been assimilated by Islamic law and these Islamic law scholars point to a couple of passages in the Noble Quran as the basis for the recognition of arbitration by Islamic law. For example, it is declared in the Quran as follows:

If you fear a breach between them twain (the man and his wife), appoint (two) arbitrators one from his family and the other from hers, if they both wish for peace, Allah will cause them reconciliation (Surah 4:35).

Notwithstanding, the above, however, the Supreme Court had subsequently, in a string of decisions, namely Agu V. Ikewibe, Ojibah V. Ojibah, Okere V. Nwoke, etc. had confirmed the existence of customary arbitration in Nigeria. Thus, in Odinigi V. Oyeleke, the Supreme Court held that:

The decision of the Court of Appeal in Okpuruwa V. Ekpokam (1988) 4 NWLR pt. 90 p. 554 that our legal system does not recognize the practice of elders or natives constituting themselves as customary arbitration to make binding decisions between parties in respect of land or other disputes cannot in all cases be correct.

In defining customary arbitration Karibi-Whyte, JSC in Ohiaeri V. Akabueze (1992) had said that: Customary arbitration is arbitration in dispute founded on the voluntary submission of the parties to the decision of the arbitrators who are either the chief, or elders of the community, and the agreement to be bound by such decision or freedom to resile where unfavorable.

One very important feature of customary arbitration is that the agreement to conduct it is essentially oral, and the arbitral proceedings and decisions are usually not written and therefore do not come within the provisions of the Act. Unlike the arbitration under the Act which is irrevocable except by agreement of the parties or by leave of the court or a judge, customary arbitration agreement is not irrevocable. It could be revoked by the parties any time before the constitution of the tribunal and before the commencement of the arbitral proceedings.

In spite of its informality, its unwritten nature, and the fact that it is not practiced in accordance with a structured body of rules or laws, customary arbitration still remains one of the dispute resolution methods of the Nigerian rural folks from ancient time to date. Sometimes while those who assume jurisdiction or authority as arbitrators are usually elders, chiefs and prominent leaders in the communities, there are times when traditional institutions such as traditional rulers in their council or established bodies that are vested with adjudicatory authority over rural dwellers perform this task. Although customary arbitration is largely unwritten, writing or documentation is no longer alien to customary transactions. In present times, it is possible for customary law arbitration agreement to be in writing and thus falling under the Act and the definitions accorded such terms as party, tribunal, commercial etc. in the Act may not ipso facto exclude customary arbitration where it is not expressly excluded. Parties to a customary arbitration agreement, if they so desire, can avail themselves of the practices and procedures under the Act. Where this happens, the victorious party may seek to enforce the award made at the tribunal in a court of law.

It has been argued, and it is also important to note that a decision or an award of a customary arbitration, though binding on the parties and their privies, is not a judgment of a court of

law, and therefore its decisions cannot be equated with those of court of law capable of creating judicial precedent. Thus in Ufomba V. Ahucahoagu, Niki Tobi, JSC noted that:

A customary arbitration does not qualify, as a court of law within the constitution. It is not even an inferior court outside the constitution, as for example, the magistrate court. Apart from the fact that the members of the body are not learned in the law, it is a notorious fact that the procedure adopted in adjudication is simple, and clearly outside the technical procedure of courts of law. This apart, the decisions they give do not qualify as judgments in our jurisprudence and therefore, cannot pass the test of judicial precedent. Decisions of magistrate courts in Nigeria do not come within the purview of Stare Decisis, not to talk of decisions of native or customary arbitration. A customary arbitration is essentially a native arrangement by selected elders of the communities who are versed in the customary law of the people and take decisions, which are mainly designed or aimed at bringing some amicable settlement, stability, and social equilibrium to the people and their immediate society or environment. Native or customary arbitration is only a convenient forum for the settlement of native disputes and cannot be raised to the status of a court of law.

Customary arbitration, from the foregoing, therefore, lacks intrinsic force, and it cannot be enforced like the judgment of the regular court until it is pronounced upon by competent judicial authority. Where this is done, it can create estoppel per rem judicatam or issue estoppel, especially when it is specifically pleaded and proved in subsequent proceedings before the court, involving the parties to the arbitration or their privies.

The Relationship between Customary Law and Justice

The picture of customary law in a traditional society is one in which the people are in harmony with the norms of their society. Norms that reward good conduct, punish abominations and misconduct and continuously guarantee stability in the society. This system for the administration of justice was in place and accessible to all that approached the temple of justice. In Igbo land this system was well regulated from the family level through the village level up to the clan or community level. There were two vertical paradigms for accessing justice. The one lane approximated what today is referred to in the Afikpo areas of Ebonyi State, Nigeria as the Ekpuke Eto, Ekpuke Essa and Nde Ichie Traditional Councils in ascending order whereas the other lane captured the family, village, community and clan levels in ascending order as well (The Igbo). Every judgment presented an opportunity for appeal up to the peak of the lane chosen by the aggrieved party. But there was no rivalry between the two lanes for where a matter was tried for instance in the village or community assembly all the actors on the other lane where participants in the panel and vice versa. If there is any distinction, it is only in the area of age set or age grade for members of Ekpuke Eto up to Nde Ichie belonged to different classes of age grades whereas the village or community assembly accommodated all adults. Apart from the availability of the structure for adjudication, Nde Ichie the apex point of appeal were versed in the culture and tradition of the people and were forthright and spoke the truth in honour of, but above all for fear of, the gods and the ancestors. These were the days that men gloried in truth and integrity and would never be identified with the subversion of the cause of justice for whatever reason(s). Both legal and social justice was administered concurrently and the society was the better for it.

But this picture has been blurred for the right and wrong reasons. From the colonial times, the value system of traditional African societies became increasingly invaded, adulterated and dislocated to the end that respect for wealth and the rich replaced the value for truth and

honesty and the fear of the gods that invariably punished evil and abominable behaviour. Adherents of the new Christian religion knew that their God was forgiving and longsuffering and can forgive any offence unlike the gods of the traditional society who struck any offender instantly. That is why in the modern Courts people quickly and enthusiastically swear by the Bible knowing that it is a mere ceremony and then proceed to lie blatantly in their testimonies. Experience has shown that when such people chose to swear by the gun or machete they are overwhelmed by superstition and become more cautious about lying on oath. The corruption of the value system has direct impact on the dispensation of justice in contemporary times even under traditional as against statutory arrangements. People now think more of what they can gain in a particular circumstance than what society can gain by a fair dispensation of justice. Among the Ekpuke Eto, Ekpuke Essa and even in village assemblies there have arisen judgment syndicates who ply their trade for money's worth. When things do not work in harmony people become more fearful for themselves and of others.

That is partly why in proceedings in these traditional assemblies quite a number of people do not want to voice the truth they know for fear of offending someone or group of people who have vested interest in the matter under trial.

Viewed differently, customary law was by no means a perfect one. There were elements of it that were crude, barbaric and unconscionable and they were enforced with the same vigour as the good aspects. We call to mind such issues as the killing of twins, Osu caste system and repressive widowhood practices. But modern customary law has been refined and whatever one may hold against the repugnancy test, and they are many, it takes the credit for such refinement (The repugnancy test). Take for instance, the Osu caste system, such social segregation can make for neither legal nor social justice as we understand it today. It is encouraging therefore that both the Federal and the various State Governments have enacted statutes abolishing such practices in those jurisdictions where they hitherto obtained. Section 3 of the Abolition of the Osu System Law (2009) stipulates that:

Notwithstanding any custom or usage each and every person who on the date of the commencement of this law is Osu shall from and after such date cease to be Osu and shall be free and discharged from any consequences thereof, and the children thereafter to be born to any such person and the offspring of such person shall not be Osu, and the Osu system is hereby utterly forever abolished and declared unlawful.

Overlooking the presumptuousness of this law which we conceive to be a technical error, its overall impact and purport is indeed a welcome one. To drive the message home, Section 7(2) of the law bars any court from recognizing any custom or usage, which implies any disability on any person on the grounds of the Osu system. Similarly, Section 3 of the Abolition of Harmful Traditional Practices against Women and Children Law (Cap 2 Laws of Ebonyi State, 2009) abolished and declared unlawful all customary traditional practices that were prejudicial to the legal rights and wellbeing of women and children. Such practices were enumerated in Section 2 to include those of a scandalous or disgraceful nature which amounted to a failure to observe the fundamental rights of a woman or any child; allowed for a female genital mutilation or circumcision; were harmful to a widow including any practice which required the confiscation of her husband's property; child labour; or encouraged child abuse and neglect, and forced and early marriage of girls before the age of eighteen. Again, Section 7 bars any Court from recognizing any custom that encouraged these unjust practices. There are also laws which limit the minimum age of marriage to sixteen years CAP 9 Laws

of Ebonyi State, 2009). The abolition of these negative customary practices has not only made customary law more humane but has enabled it to deliver both legal and social justice. And its overall impact on social development is indeed salutary.

To this end, these are a multiplicity of effects that customary law can have on social development. For one, it is the law that applies to a great majority of the Nigerian people and so its enhancement, or otherwise enforcement, will guarantee a smooth and progressive dispute resolution and social and individual transactions can become much more effective. Secondly, customary law is the law that governs and regulates almost all informal transactions in Nigeria such as marriage and inheritance issues as well as land tenure in rural societies. As such, its refinement and enforcement would definitely achieve some social stability and progress. Thirdly, most of the vices that inherent under the received English adjudicatory process such as prolonged delays in litigation, corruption resulting in flawed judgments and high cost of litigation are minimized or nearly absent under the customary system of adjudication. There is a general perception that the customary adjudicatory system is more trustworthy and reliable than the received English system and people are much more willing to imbibe it.

Notwithstanding the forgoing, there is need to employ more practical approaches to the implementation of customary law. The validity tests earlier discussed are good to eliminate retrogressive, archaic and even primitive or otherwise unconscionable aspects of the law. But hanging the fate of customary law on the validity tests alone is unproductive and cannot achieve the desired social progress urgently needed in the country's legal system. It is therefore urged that deliberate and concerted steps be taken along the path of restatement, codification and unification of customary laws in Nigeria. A restatement of customary laws would have them produced in a text or document and can achieve a number of purposes (Collection and systematic arrangement of customary laws). If the restatement is produced under the authority of Government, it becomes part of, and may be cited as, a public document under Section 102(a) of the Evidence of Act (Cap. E14 Laws of the Federation of Nigeria, 2010). If it becomes a public document, it is easier to attract judicial notice by the courts under Section 16(1) of the Evidence Act. However, this judicial notice can only be consummated when the custom has been adjudicated upon once by a superior court of record (Section 17 of the Evidence Act, 2010). Again, codification would make customary law much more effective and enforceable since they would have been enacted by the legislature into statutory law. However, it is necessary to regularly amend the codified law to reflect the progressive changes and social and legal realities that continuously occur not only in the society but with the customs of the people. Another practical step to achieve social development through customary law is by unification. A unified customary law would definitely answer to the needs of an industrialized, socially mobile, and progressively enlightened and educated society, which is the ultimate destination of the Nigerian society. Customary arbitration exemplifies some of the areas in which unification can prove to serve some practical purpose.

The Link between Customary Law and Arbitration

This does not envisage arbitration under the statutes or one powered by the statutes (Cap 14 Laws of Ebonyi State, 2009). Customary arbitration is an informal arrangement generated from and by the customs and practices of the people from time immemorial whereby people submitted their disputes to the family, village, community, clan or other classes of authority for settlement.

According to Kolajo (2001): Customary arbitration is a common method of settling disputes in all indigenous Nigerian societies. Costmary law arbitration is arbitration of dispute founded on the voluntary submission of the parties to the decision of the arbitrators who are either chiefs or elders of their community.

By a long line of judicial authorities, customary arbitration is valid and enforceable in Nigeria if it meets the threshold for validity set by the Courts. In Okoye v. Obiaso, one of the recondite issues which the Supreme Court determined was whether customary arbitration pleaded by both parties was proved and, if so, what was the legal consequence of such proof. In resolving the issue the Court held that a party can prove the existence of a customary arbitration by pleading and establishing that there was a voluntary submission of the matter in dispute to an arbitration of one or more persons; that it was agreed by the parties either expressly or by implication that the decision of the arbitrators will be accepted as final and binding; that the said arbitration was in accordance with the custom of the parties or of their trade or business; that the arbitrators reached a decision and published their award; and that the decision or award was accepted at the time it was made. When these conditions are fully met, according to the Court, such arbitral judgment or ruling is as binding as the judgment of any Court. It is instructive to observe here that by necessary implication where such arbitral ruling no matter how unanimously made falls short of any of the requirements, it is invalid and of no legal effect. And further that these requirements are a safeguard against manipulated arbitral judgments, for it is common knowledge that sometimes judgments are won in village, community or traditional councils not on the merits but on the wings of power peddlers and influential actors supporting the cause of the victorious party. A unified and codified customary law on arbitration could enhance certainty and transparency in arbitral proceedings.

Conclusion

This work has ex-rayed the essence, merits and shortcomings of customary law. It has shown, by adducing statutory and judicial authorities, its legal status in the contemporary Nigerian justice system; among them, that customary law is no law except it can pass the repugnancy tests set for it by the statutes. The ideal customary law operating in the traditional society has been evaluated alongside the content and validity of customary arbitration. The paper has equally made out a case for the restatement, codification and unification of customary laws. Above all, the work has highlighted the capacity of customary law to evoke both legal and social justice and its potentials for social development and the administration of justice in Nigeria. It is expected that the work will be useful particularly to the legislature and the judiciary, which ought to be keen on the legal but most importantly on the social content of justice delivery.

References

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2. 2 NWLR, 1992, pt. 221 pg 7

3. 3 ECSLR, 1973, pg 90

4. 3 NWLR, 1991, pt. 180 pg 385

5. 4 NWLR, 1988, pt.90 pg 554

6. 5 NWLR, 1991, pt. 191 pg 296

7. 6 NWLR, 1991, pt. 708 pg 12

8. 8 NWLR, 1991, pt.209 pg 317

9. Abinabina V. Enyimadu

10. All NLR, 1961, 304. The Supreme Court also adopted the definition in Zaiden vs. Mohssen (1973) 11 SC 1 and Kindley vs. Military Governor of Gongola State (1988) 2 NWLR (Pt 77) 445 p.

11. Allot, A.N. 1960. Essays in African Law. London: Butterworth, pg 126.

12. Assamong V. Amuaku, 1932. IWACA pg. 192

13. By Restatement we mean the collection and systematic arrangement of customary laws.

14. Cap 2 Laws of Ebonyi State, 2009.

15. Cap 3 Laws of Ebonyi State, 2009.

16. Cap. E14 Laws of the Federation of Nigeria, 2010.

17. Devlin, P. cited in Black's Law Dictionary, Op.cit. p.313. It is noted here that aside of the Statutes of General Application, English case law which had built up as judicial precedent had direct application in Nigeria before independence and became persuasive authority in Nigerian Courts after independence till date.

18. ECSLR, 1972, 2 pg 90

19. Eugen Ehrlich, 1936. Fundamental Principles of Sociology of laws. London: Harvard Univ. Press.

20. Ezediaro, E. 1971. Guarantee and Foreign Investment in Nigeria (1971) 5 International Law 770 @ 775 qtd in Ibrahim Iman. The Legal Regime of Customary Arbitration in Nigeria. Unpublished Paper.

21. Fathy, H.M. Arbitration According to Islamic Law. Arab Arbitration Journal 1. Qtd in Oluwafemin A Ladapo "Where does Islamic Arbitration fit into Judicially Recognized Ingredients of Customary Arbitration in the Nigerian Jurisprudence" Unpublished Paper.
22. Foli V. Akese

23. FSC, 1957, 2, pg 29

24. FWLR, 2003. (Pt.157)1013 at 1038

25. Gadzama, J.K. 2004. Inception of ADR and Arbitration in Nigeria. NBA Conference paper, Abuja, 2004.

26. Garner, B.A. Ed. 2009. Black's Law Dictionary. 9th Edition, Minesota: West Publishing Co, 443 p.

27. Holmes, W. 2013. The Path of the Law. In: Nwocha, M.E. (Ed.), Human Rights and Criminal Justice in Nigeria. Abakaliki, CE Darrolls Publishers.

28. Kolajo, A.A. 2001. Customary Law in Nigeria through the Cases. Ibadan: Spectrum Books Ltd.

29. Kwasi V. Larbe

30. NSCOR, 2008,34 1325.

31. NSCQR, 2009, 35, 570.

32. NSCQR, 2010, 41, 955.

33. Per Niki Tobi J.S.C.

34. Section 17 of the Evidence Act, Cap. E14 Laws of the Federation of Nigeria, 2010.

35. Section 258 (1) Evidence Act, 2011. The definition was restated in Okafor vs. Okafor (2005) 2 SMC 416 ratio 5. Section 2 of the Ebonyi State Customary Court Law CAP. 47 Laws of Ebonyi State, 2009, defines customary law as a rule or body of customary rules regulating rights and imposing correlative duties being customary rules which obtain and are fortified by established usage and which are appropriate and applicable to any particularcause, matter, dispute, issue or question.

36. See for instance the Age of Marriage Law, CAP 9 Laws of Ebonyi State, 2009.

37. See for instance the Arbitration Law Cap 14 Laws of Ebonyi State, 2009; the Arbitration Law of Lagos State, and the Arbitration Act applicable throughout the Federation of Nigeria.

38. See Njoku v Ekeocha and Anor (1972) 2 ECSLR 199; Mgbagbu v. Agochukwu (1993) 3 ECSLR (Pt.1) 90; Ofomata v Anoka (1974) 4 ECSLR 251; Ojibah v Ojibah (1991) 22 NSCC (Pt.2) 130; Ohiaeri v. Akabeze (1992) 23 NCC (Pt.1) 139; Nkado v. Obiano (1993) 4 NWLR 6; Igbokwe v. Nlemchi (1996) 2 NWLR (Pt.429) 185.

39. Supra, 313 p.

40. Supra, at 1357 p.

41. Surah 4:35 (The Noble Qur‟an)

42. The Igbo is one of an estimated one hundred native tribes in Nigeria but one of the three largest ones, the other two being the Hausa and the Yoruba. The Ekpuke Eto; Ekpuke Essa, and Ndichie Traditional Councils each constitute a distinct Traditional Arbitral Panel. Ekpuke refers to Council and Eto refers to three. In the same token Ekpuke Essa is

a native panel made of seven age grades where Essa refers to seven. Ndi Ichie refers to the Council of Elders.

43. The repugnancy test has been examined in detail earlier in the work.

44. Umoh, P.U. 2013. Law in African Context, cited in M. E. Nwocha (2013). Human Rights and Criminal Justice in Nigeria .Abakaliki, C.E. Darrolls Publishers.

45. WACA, 1932. pg 192

46. Walter S.N. and Onnoghen J.S.C.