SCOPE AND RELEVANCE OF CUSTOMARY ARBITRATION AS MECHANISM FOR SETTLEMENT OF DISPUTE IN THE 21ST CENTURY*

Abstract
This paper examines the scope and relevance of customary arbitration proceedings in Nigeria prior to the advent of modern arbitration practice. The paper argues for the relevance of customary arbitration in this 21st century. It discusses the basic characteristics and requirements of a valid customary arbitration. The paper submits that the validity of customary arbitral award is determined by voluntary submission of dispute by parties to traditional arbitrator(s) recognised under native law and custom and that in the absence of any vitiating elements that may affect the voluntariness or otherwise of such an arbitral process, the arbitration is binding on the parties and would operate as estoppel to bar subsequent proceedings between the parties. The paper advocates for the adoption of customary arbitration as dispute settlement mechanism in Nigeria along-side the statutory arbitration to give parties the option of choosing either of the two mechanisms for resolution of their disputes.

Keywords*: Relevance, Customary Arbitration, Mechanism, Settlement and Dispute.*

1. Introduction

Man is a social animal who without his consent, is born into a society. In the traditional African society, dispute may generally occur whenever or wherever incompatible events occur. So, in the process of socialising in the community man belongs to, he comes in contact both with individual and group of individuals of varying backgrounds, orientations and temperaments who have goals and targets which are sometimes in diametric opposition. Even when such goals are identical, the methods of achieving them are sometimes varying and antagonist. Thus, in the course of man's interactions with other social beings, dispute is inevitable and when disputes occur, they must be resolved one way or the other. In traditional African society and in deed Nigeria, the natives had their own system for the settlement of economic and social disputes before the advent of the British around 1861 and subsequent introduction of Arbitration and Conciliation Act.[1] Arbitration practice is as old as the history of human civilization. It is as old as man himself and has a history that goes as far back as the middles ages and can be found in the most primitive societies as well as in modern civilisations.[2] In pre-colonial African societies, most communities have their peculiar structures of government in various forms and in varying degrees of perfection irrespective of their level of political and social development.[3] Arbitration, during this era, were conducted in accordance with

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[1] The first statute on Arbitration in Nigeria was the Arbitration Ordinance of 1914 which was an adaptation of the English Arbitration Act of 1889. The Ordinance was later incorporated into the 1958 edition of Laws of the Federation of Nigeria as Chapter 13 applicable to the regions and later the states. This law was amended to redress the arbitration problems associated with the international trade which had started to boom and the Arbitration and Conciliation Decree 1988 was promulgated and became operative on 14th March 1988. The Arbitration and Conciliation Decree 1988 has been incorporated into the 2004 Edition of the Laws of the Federation of Nigeria and christened Arbitration and Conciliation Act. The Act applies throughout the federation and lays down the law and procedure for arbitration proceedings. The Act adopted the model law developed for International Commercial Arbitration by the UNCITRAL Model Law. UNCITRAL Model Law was established by the United Nations General Assembly by Resolution 2205. See the case of *C. N. Onuselogu Enterprises Ltd. v. Afribank (Nigeria) Plc* (2005) 1 NWLR (Pt. 940) 572, 582. See also Godwin Obla SAN, 'Arbitration as a Tool for Dispute Resolution in Nigeria: How Relevant Today', in Jide Olakanmi, *ADR: Alternative Dispute Resolution Cases and Materials,* (Abuja: LawLords Publication, 2013) 2.

[2] C. G. Nwakoby. 2014. *The Law and Practice of Commercial Arbitration in Nigeria* (2nd Edition, Enugu: Snap Press Nigeria Limited, 2014), 1.

[3] A. A. Daibu & L. A. Abdulrauf. 2014. 'Challenges of the Practice of Customary Arbitration in Nigeria' Vol. 12, *Nigeria Juridical Review,* 106; A. Okekeifere. 2002. 'The Recent Odyssey of Customary Law Arbitration and Conciliation in Nigeria's Apex Court' *Abia State University Law Journal,* p. 40; A. Emiola, *The Principles of African Customary Law* 2nd ed., (Emiola Publishers Ltd Nigeria, 2005), 1; M. M. Akanbi, 2006. 'A Critical Assessment of the History and Law of Domestic Arbitration in Nigeria,' in Kwara State College of Arabic and Islamic Legal Studies Ilorin: 40-41

the customs and traditions of the people.[4] For instance, commercial activities do sometimes generate disputes which may result from the default of one party or the other, they are usually resolved through alternative dispute resolution processes including customary arbitration which are faster, cheaper and devoid of unnecessary and avoidable technicalities associated with litigation.[5] Disputes such as personal disagreements, religious crises, political rivalry, marital disputes, chieftaincy matters, land disputes, commercial disputes and boundary disputes are usually resolved by the elders or chiefs of the various Nigerian communities through an organised traditional dispute resolution mechanism called customary arbitration.[6] The main objective of customary arbitration was to promote communal welfare by reconciling divergence interests of people. Hence, customary arbitration is premised on the principle of accommodation, compromise and genuine reconciliation, as opposed to the principle of winner-takes-all characteristics of court system.[7] Premised on the foregoing, arbitration is clearly not a modern phenomenon and in deed not new to the Nigerian indigenous societies. However, the legality of the practice of customary arbitration in Nigeria has been a subject of intense debate by jurists and legal scholars.

The aim of this paper is to examine the scope and relevance of customary arbitration proceedings in Nigeria prior to the advent of modern arbitration practice. To this end, the paper is divided into six parts. Following this introduction, part two of the paper analyses the nature and scope of customary arbitration in Nigeria. In part three, the paper explains characteristics and requirements of a valid customary arbitration. Part four of the paper deals with the status and legality of customary arbitration, while part five discusses the recognition and enforcement of customary arbitral award. The concluding part recommends the adoption of customary arbitration in Nigeria along-side the modern statutory arbitration to give parties the option of choosing either of the two mechanisms for resolution of disputes.

2. Nature and Scope of Customary Arbitration in Nigeria

Customary arbitration has been defined as 'arbitration of dispute founded on the voluntary submission of the parties to the decision of the arbitrators who are either the chiefs or elders of their communities, and the agreement to be bound by such decision.[8] Whereas the western type arbitration is attractive because of its private nature, customary arbitration is not private but it is organised to socialise the whole society, therefore, the community is present. Another distinction is that the process is gender sensitive, hence, women were excluded from male driven communal dispute resolution. Parties could arise from the whole process and maintain their relationship and where one party got an award the whole society was witness and saw to it that it was enforced.

Dispute resolution by means other than courts predated written history and was practiced by almost all societies.[9] Evidence of the historical origins and use of arbitration and adjudication appear in the Bible and

[4] A. T. Bello. 2014. 'Customary and Modern Arbitration in Nigeria: A Recycle of Old Frontiers' *Journal of Research and Development,* vol. 2, No. 1, 50

[5] A. A. Daibu & L. A. Abdulrauf, (n 3)*;* A. A. Daibu. 2013. 'Application of the Rules of Natural Justice in Arbitral Proceedings in Nigeria' vol. 1, *Ife Juris Review*, p. 60; A. A. Oba. 2008. 'Juju Oath in Customary Arbitration and their Legal Validity in Nigerian Courts', vol. 52, No. 1, *Journal of African Law* p. 140; V. C. Igbokwe. 1997. 'Law and Practice of Customary Arbitration in Nigeria: *Agu v. Ikewibe* and Applicable Law Issues Revisited', vol. 41, No. 2, *Journal of African Law,* 201.

[6] A. A. Daibu, 2012. 'An Examination of the Rules of Natural Justice and Equal Treatment of Parties in Arbitration,' LL.M Thesis, Faculty of Law, University of Ilorin, 2012, 101-102.

[7] E. J. Alagoa. 1998. 'Conflict Management, Traditional Models from Pre-Colonial Times to the Present in the South-South Zone'. Paper presented at the South-South Zonal Conference on Peaceful Co-existence in Nigeria. Organised by the Centre for Peace Research and Conflict Resolution, National War College, Abuja, September, 1993, 3; J. F. Rapu. 2012. Alternative Dispute Resolution of Indigenous African Dispute: An Irrelevant Myth Catalyst for Modern Global Relations in Azinge, E and Awah, A. (Eds). *Legal Pluralism in Africa: A Compendium of African Customary Law,* (Lagos: Nigeria Institute of Advanced Legal Studies, 2012), pp. 268-269.

[8] C. G. Nwakoby. 1995. 'Enforcement of Customary Law Arbitration Awards in Nigeria Civil Litigation', *International Legal Practitioner,* vol. 20, p. 142; B. Owasanoye. 2001. 'Dispute Resolution Mechanisms and Constitutional Rights in Sub-Saharan Africa'. *United Nations Institute for Training and Research (UNITAR)* p. 18.

[9] E. N. Torgbor. 2013. A Comparative Study of Law and Practice of Arbitration in Kenya, Nigeria and Zimbabwe, with Particular Reference to Current Problems in Kenya. Dissertation presented for the degree of Doctor of Law in the Faculty of Law at the University of Stellenbosch, p. 36; B. A. Bukar and M. A. Adamu. 1999. 'Legal

the Quran.[10] According to Torgbor,[11] in African societies, customary law arbitration were in much more frequent use than customary litigation. Customary arbitration was generally conciliatory and aimed at preserving existing relationships rather than the mere declaration of rights and liabilities that did not necessarily achieve enduring justice. Customary and traditions arbitration, conciliation and negotiation are more in consonance with African cultural life, disposition and beliefs than adversarial litigation.[12] Thus, the pre-colonial societies had constant recourse to arbitration, mediation, conciliation and negotiation for resolving domestic, commercial, political, land, communal and boundary disputes etc. This practice ensured less litigation than is the position today. [13]

The Nigerian traditional methods of dispute resolution are well structured and geared towards reconciliation, maintenance and improvement of social relationships. The methods are deeply rooted in the customs and traditions of peoples that have gradually developed over a long period of times. The importance of these methods is the fact that they strive 'to restore a balance to settle conflict and eliminates disputes'.[14] In the Nigerian traditional communities, extra-judicial settlement of disputes by arbitration is very popular and an important feature of the customary law. Although, there is no single definition of custom and customary law agreed to by writers, lawyers and jurists. However, the *Osborn Concise Law Dictionary*[15], defines 'custom' as 'a rule of conduct, obligatory on those within its scope, established by long usage'. Obilade,[16] explained the concept of customary law as law consists of customs accepted by members of a community as binding among them.[17] Sokefun *et al*[18] described it as a means of resolving conflict with a view to maintaining harmony between parties in a dispute. In the case of *Zaidan v Mohassen,*[19] the term "Customary law" has also been defined as: 'Any system of law not being the common law and not being a law enacted by any competent legislature in Nigeria, but which is enforceable and binding within Nigeria as between the parties subject to its sway. In the case of *Agu v. Ikewibe*[20] the Nigerian Supreme Court held *inter alia* that customary law included customary arbitration and was saved as an 'existing law' by virtue of section 274 (3) (4) (b) of the 1999 Constitution (as amended). While describing the nature of customary arbitration, Honourable Justice Karibi-Whyte said *inter alia*: 'customary arbitration is a dispute resolution mechanism founded on the voluntary submission of the parties to the decision of the arbitrators who are either the chiefs or elders of their community, and the agreement to be bound by such decision or freedom to resile where unfavourable'.[21]

Framework for the Resolution of International Commercial Disputes' *Journal of International Arbitration,* vol. 16, No.1. pp. 47-53.

[10] For example: Isaiah Chapter 2:4; the Quranic basis of arbitration is found in 4:35 and 49: 9-10.

[11] E. N. Torgbor, (n 9).

[12] F. Snyder. 1981. 'Colonialism and Legal Forms: The Creation of Customary Law in Senegal'. *Journal of Legal Pluralism* vol. 19, 49-90; A. I. Okekeifere. 2003. 'Salient Issues in the Law and Practice of Arbitration in Nigeria' Paper delivered at Arbitration Colloquium, London University (June 4 – 5, 2003); J. Van Velsen. 1969. 'Procedural Informality, Reconciliation, and False Comparisons' in Gluckman M (ed) *Ideas and Procedures in African Customary Laws,* 137-149; W.B. Harvey. *Introduction to the Legal System in East Africa* K29MIH37: comment on arbitration 348-352, reconciliation 385-390, native law and custom 425-428; R. Wilson. 2000. 'Reconciliation and Revenge in Post-Apartheid South Africa' *Current Anthropology*, vol. 41, No.1, 75-98.

[13] see K. Avruch. 1998. *Culture and Conflict Resolution,* 39-41; S. F. Moore. 'History and the Redefinition of custom on Kilimanjaro' in Starr J & Collier J (eds.) *History and Power in the Study of Law* (1989) 277-301; L. Nader. 1992. 'From Legal Processing to Mind Processing' *Family and Conciliation Courts Review*, vol. 30, 468-473.

[14] R. B. G Choudree. 1999. 'Traditions of Conflict Resolution in South Africa'. *African Journal on Conflict Resolution,* 67

[15] S. Bone. (Ed). *Osborn Concise Law Dictionary,* (9th Edition, Sydney: Sweet & Maxwell, 2001), 121

[16] A. O. Obilade. *The Nigerian Legal System.* (Ibadan: Spectrum Books Limited, 1979), 51

[17] *Lewis v Bankole* (1908) 1 N.L.R 81 at 100.

[18] J. A. Sokefun and S. Lawal. *Customary Arbitration, International Arbitration, and the need for Lex Arbitri.* <www.nigerianlawguru.com/.../arbitration/customary%20ARBITRAT...> accessed on 2nd March, 2018 at 10.30am. 2.

[19] (1973) 11 SC 1 at 12

[20] *(supra).*

[21] A. Oriola. 2000. 'Commercial Arbitration under Customary Law: What Prospect?' *MPJFIL* Vol. 4, No. 2: 272-273. The right of parties to resile from an unfavourable arbitral award is a major disadvantage of customary arbitration. However, under the modern arbitration, parties can challenge the jurisdiction of arbitrators and even

Customary arbitration is a reference to the decision of one or more person either with or without an umpire, of a particular matter in difference between the parties.[22] Customary arbitration is therefore an exception to section 1 of the Arbitration and Conciliation Act, which states that every arbitration agreement shall be in writing. Thus, customary arbitration may be by oral arbitration agreement between the parties or implied by conduct and the award too may be oral unless there is an express provision of the law that requires the resulting award to also be in writing.[23] Customary law arbitration is an important institution among the non-urban dwellers in the country and the rural people often resort to it for the resolution of their differences because it is cheaper, less formal, speedy and less rancorous than litigation and modern mechanism for dispute resolution. Hence, its adoption for resolution of commercial and other forms of dispute will guarantee harmony and eschew all forms of technicality, anarchy and misunderstanding characteristics of litigation and modern arbitration.

3. Characteristics and Requirements of a Valid Customary Arbitration

According to Akanbi *et al*,[24] the legal status of customary arbitration as a dispute resolution mechanism has gone through a tortuous journey in the Nigerian courts–from its initial acceptance to its denial to a reconfirmation of its validity as an authentic dispute resolution mechanism under Nigerian jurisprudence. From the outset, the practice of dispute resolution by elders of the community was recognised under Nigerian Jurisprudence. Customary-law arbitration is a distinct form of arbitration in traditional African societies, particularly in West Africa. The historical antecedent of customary arbitration in Nigeria as a device for conflict management and dispute resolution stretches far back as the pre-colonial era and this was recognised by the Western-styled judicial institutions of the colonial government.[25] One distinguishing feature of customary arbitration is that it is usually oral. This feature takes it outside the ambit of statutory arbitration. From a long line of decided cases, it has been established beyond doubt that arbitration is not alien to customary jurisprudence.[26] For instance, starting from Ghana, courts had given judicial recognition to customary arbitration in several lines of cases decided. In the case of *Asampong v Amuaka &Ors*,[27] the West African Court of Appeal 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 was given, it is binding on the parties, and the Supreme Court will enforce such decisions'.[28] Surprisingly, the above position was contradicted by the Nigerian Court of Appeal in the case *Okpuruwa v. Ekpokam*,[29] where in the lead judgment delivered by Uwaifo JCA (as he then was), he denied the existence of customary law in Nigeria and held that 'I do not know any community in Nigeria which regards the settlement by arbitration between disputing parties as part of its native law and custom'.[30] However, contrary to this pronouncement, Honourable Justtice Oguntade (JCA) dissenting judgment in the same case summarised the correct position of customary arbitration in Nigeria in the following terms:

> In pre-colonial times and before the advent of regular courts, our people certainly had a simple and inexpensive way of adjudicating their disputes between them. They referred

an arbitral award in appropriate circumstances. They can also make a recourse to an arbitral award to defeat its enforcement. Hence, no system of law is perfect without disadvantage(s). see S. A. Fagbemi. 2017. Contextual Analysis of the Principles and Procedures for Making Recourse against International Arbitral Award *ABUAD Journal of Public International Law (AJPIL)* Vol III, No 1: 45-67.

[22] See *Awonusi & Anor v. A. O. Awonusi* (supra), 52-53; *Philip Njoku v Felix Ekeocha* (1972) 2 ECSLR (Pt. 1) 199.

[23] *Olina & Ors v. Obodo & Ors.* (1958) NSCC 61; *Agurodo Eke & Ors v Ben Oke & Ors.* (2001) 10 NWLR (Pt. 721) 341; *Ehoche v Ijewa* (2003) FWLR (Pt. 154) 587 at 602 and *Ojiba v Ojibah* (1991) 5 NWLR (191) 296.

[24] M. M. Akanbi, L. A. Abdulrauf and A. A. Daibu. 2015. Customary Arbitration in Nigeria: A Review of Extant Judicial Parameters and the Need for Paradigm Shift *Afe Babalola University: J. of Sust. Dev. Law & Policy,* vol. 6: No. 1, 209

[25] A.O. Ladapo. 2008. Where does Islamic Arbitration fit into the Judicially Recognised Ingredients of Arbitration in Nigerian Jurisprudence. *African Journal of Conflict Resolution,* vol. 8, No. 2, 106

[26] G. K.Gadzama. 2004. *Inception of ADR and Arbitration in Nigeria.* A paper presentation at the NBA conference Abuja.

[27] (1932) 1 WACA, 21.

[28] See further the cases of *Foli v Akese* (1930) 1 WACA, 1; *Kwasi v Larbe* (1952) 13 WACA, 76; *Inyang v Essien* (1975) 2 FSC p. 39 and *Idika v Esiri* (1988) 2 NWLR (Pt. 78) 563.

[29] (1988) 4 NWLR (PT. 90) 554; M. M. Akanbi *et al,* (n 24)

[30] *Njokwu v. Felix* (1972) 2 ECSLR 90.

> them to elders or a body set up for that purpose. This practice has over the years become so strongly embedded in the system that they survive today as customs. I do not share the view that natives in their own communities cannot have customs, which operate on the same basis of voluntary submission. The right to freely choose an arbitrator to adjudicate with binding effect is not beyond our native communities.

The position of Oguntade JCA appeared to have later found support in the opinion of Allott,[31] as well as string of cases later decided by the Nigerian Supreme Court. For instance, Allott position is that 'The term 'Arbitration'…in the mouth of the African, refers to all customary settlements of dispute other than by regular courts. The aim of such a transaction is not the rigid decision of the dispute, and the imposition of penalty, so much as reconciliation of the two parties and the removal of the disturbance of public peace'.[32]

The basic features of customary or traditional methods of dispute resolution received further impetus from the report of Penal of Reform International,[33] which listed characteristics of customary arbitration among others as follows:

i. The promotion of a volunteer involvement in the justice process and not coercive measures;
ii. The promotion of a collaborative and cooperative process;
iii. The emphasis on the role of religious institutions in aiding justice among people and to promote moral and ethical values within communities;
iv. An emphasis on reconciliation and restoring social harmony;
v. Traditional arbitrators are appointed from within the community on the basis of status in lineage;
vi. There is no professional legal representation;
vii. The process is voluntary and the decision is based on agreement; and
viii. The enforcement of decisions is secured through social pressure

From the foregoing features, it is certain that customary dispute settlement method looks beyond the legal rights of the parties, but considers as essential, the relationship likely to prevail between the disputants after the award. The convenience, simplicity and informality associated with settlement of dispute in customary and traditional ways fortifies the recognition of customary arbitration, so much so that case laws are now laced with decisions on customary arbitration being a viable alternative dispute resolution mechanism.[34] For instance, it derives its validity from customary law of the indigenous community and by extension the Constitution of Nigeria.[35] Sections 315(3) and (4)(b) of the 1999 Constitution (as amended) recognises customary law as an "existing law" and by implication upholds the validity of customary arbitration since it is derived from customary law. The validity of customary arbitration is further fortified by section 35 (b) of the Arbitration and Conciliation Act, which provides that 'this Act shall not affect any other law by virtue of which certain disputes: *(a) may not be submitted to arbitration; or (b) may be submitted to arbitration*

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[31] A. N. Allott. *Essay in African Law*, (London: Butterworth, 1960), 126

[32] See further the pronouncement of Honourable Justice Karibi Whyte JSC in the case of *Agu v Ikewibe (supra).* Premised on this case, the Nigerian Supreme Court has laid to rest any doubt about the validity or existence of customary arbitration in Nigeria in the cases of *Odonigi v Oyeleke* (2001) 6 NWLR (Pt. 708) 21; *Ohiara v Akabueze.* (1992) 2 NWLR (Pt. 221) 28 and *Eke v Okwaranyia* (2001) 4 SC (Pt. II) 71 at 89

[33] Penal Reform International (PRI). 2000. Access to Justice in Sub-Saharan African: The Role of Traditional and Informal Justice System. London, November, 22; J. H. P. Golwa. 2013. Overview of Traditional Methods of Dispute Resolution. A paper presented at a One-day International Conference on Traditional Methods of Conflict Resolution: Chinese and Nigerian Perspective, 14th November, 2013, Abuja, Nigeria, 14.

[34] See *Awonusi & Anor v. A. O. Awonusi* (2007) 33 WRN 43 at 52053; *Ieka v. Tyo* (2007) 11 NWLR (Pt. 1045) 385 at 399, *Olunta Alibo & 0rs .v. Okusin & Ors* (2010) 3-5 SC (Pt. I) 41 at 81; *Achor v. Adejoh* (2010) 6 NWLR (Pt. 1191) 537; *Okereke v. Nwanko* (2003) 9 NWLR (Pt. 826) 592; *Egesimba v. Onwuzurike* (2002) 15 NWLR (Pt. 791); *Onyege v. Ebere* (2004) 6 SCNJ 126; *Ufomba v. Ahuchaogu* (2003) 4 SC (Pt. II) 65.

[35] M. M. Akanbi. *Domestic Commercial Arbitration in Nigeria: Problems and Challenges* (Germany: Lambert Academic Publishing, 2012), 22. See the case of *Oyewumi v Ogunesan* (1990)3 NWLR 182 at 20; M. E. Nwocha. 2016. Customary Law, Social Development and Administration of Justice in Nigeria. *Beijing Law Review*, vo. 7: 430-442.

only in accordance with the provisions of that or another law". The implication of this provision is that the reference to 'any other law' implies that customary arbitration is not prohibited by the operation of the Act.[36]

The requirements, usually accepted as constituting the essential ingredients or characteristics of a binding customary arbitration, include voluntary submission of the dispute to the arbitration of the individual or body; agreement by the parties either expressly or by implication that the decision of the arbitrators will be accepted and binding; the arbitration was in accordance with the custom of the parties; the arbitrators reached a decision and published their award; neither of the parties rescind from the decision so pronounced.[37] Of course, as non-judicial body, customary arbitrator did not have the power to issue summons to compel appearance of the parties before them. Hence, the party then has the right to go to court for adjudication of their dispute. However, where parties voluntarily submit their dispute to customary arbitration, they have elected to be bound by their decision. Furthermore, for the decision of customary arbitration to be valid there shall be an agreement binding the parties. The early judicial authorities were consistent in holding that a prior agreement whether expressed or implied was an essential ingredient where the parties choose the arbitrators to be their judge; they cannot reject the award/judgment whether it is good or bad.[38]

It should be noted that the arbitrator(s) must be the recognised person(s) under customary law and capable of settling disputes by arbitration. Such persons are usually family heads, chiefs and elders of the community who by virtue of their positions are knowledgeable of their custom to perform judicial functions and settle disputes between their subjects.[39] Once the above requirements are complied with, none of the parties can reject the award made by the arbitrator following the submission made to him just because the award is not favourable to him.[40] In the case of *Folic v. Larbi*[41], the arbitration was not conducted by an elder, chief or members of the indigenous society in the traditional judicial process but by a judge, the award was consequently rejected as customary arbitration.

4. Status and Legality of Customary Arbitral Award

Generally, an arbitral award is a final judgment or decision made by arbitrator(s) or by a jury assessing damages.[42] In the case of *Winter v. Winter,*[43] an award was defined as the determination of a dispute by a third party, who is the judge of disputes arising between two or more, to submit to the judgment of such third person giving him power to decide, and the duty incumbent, upon the parties to obey the decision arising from the contract of the submission. An award from the foregoing simply implies adjudication and a decision by the arbitrator upon the dispute submitted to him. In other words, it is a final adjudication by consent of parties' own choice and until impeached upon sufficient grounds in an appropriate proceedings, an award which is on the face of it regular is conclusive on the merits of the controversy unless possibly the parties have intended that the award shall not be final.[44] The agreement to be bound by arbitral award is fundamental to the validity of an arbitral award under English arbitration. The above criteria, which was borrowed from the English common law system has now been made requirements for customary arbitration.[45] English arbitration is strictly contractual, based on agreement of both parties. The criteria are inextricably connected with the requirement of voluntary submission.[46] The decision of a customary

[36] V. C. Igbokwe, (n 5) 205.
[37] O. T. Abia and I. T. Ekpoattai. 2014. Arbitration as an Alternative Method of Conflict Resolution among the Ibibio of South-East Nigeria *American Journal of Social Issues and Humanities,* vol. 4, Issue 1, 31; C. Ezejiofor. *The Law of Arbitration in Nigeria*, (Lagos: Longmans, 1997); I. Udofa. 2010. Customary Arbitration in Land Dispute and Doctrine of *Res Judicata:* Need for Judicial Consistency. *Uniuyo Journal of Commercial and Property Law*. 1: 17; *Agu v. Ikewibe (supra)* 583 and *Abasi v Onido* (1989) NWLR (Pt. 548) 89
[38] O. T. Abia and I. T. Ekpoattai, *ibid*, p. 32
[39] *Ibid*,
[40] C. G. Nwakoby (1995) (n 8)
[41] (1930) I WACA I.
[42] Bryan A Garner. *Black's Law Dictionary,* USA 7th edn. (West Publishing Co. 2009), 132.
[43] (1819) 1 Brod and Bing 350/129 ER 758
[44] See generally S. A. Fagbemi, 2006. Recognition and Enforcement of Arbitral Awards: The Law and Practice *University of Ibadan Journal of Private Law* vol. 5, 111-140; K. Aina. 1998. Alternative Dispute Resolution. *Nigerian Law and Practice Journal*, vol. 2, No. 1, 169.
[45] M. M. Akanbi *et al*, (n 24) 214
[46] A. O. Ladapo (n 25)119

arbitration is binding on the parties therein and the status of the award in Nigeria is as valid as the decision of the court of law.[47]

On the issue of legality of customary arbitral award, the law is already settled that customary law is an existing law under the constitution which by implication and logic means that customary arbitration is legal and known to our law. In other words, since the process of arbitration is legal under the law, its outcome would or should be legal.[48] Conversely, the issue of the status of the customary arbitral award appears not yet settled due to some conditions inherent in statutory arbitration, which are alien to customary law. On this, several views have been made. One of the views is that the award has the same effect as the judgment of a court of law and as such operates as *stare decicis*.[49] On the other hand, the antagonists of the view submitted that such view is unconstitutional and to admit same amounts to the usurpation of courts' power as the only bodies recognised in law to give decisions that could be called "Court Judgment". They further argued that this would also amounts to raising the status of non-judicial bodies to the status of the regular courts and at the same time making the decisions of the arbitral panels capable of operating under the doctrine of *stare decicis* which in law in Nigeria is not so.[50]

Premised on the foregoing, it is submitted that the legality of customary arbitration and the award therein is not in issue in Nigeria but the status of the award. For instance, publication and writing of an award are prominent issues for the determination of statutory arbitration. For instance, Akanbi *et al*,[51] posit that when discussing publication of an award as one of the parameters for the validity of a customary arbitration award, two things that come to mind are: first, the award must be declared publicly.[52] They therefore submitted that this is antithetical to the spirit of customary arbitration as one of the main reasons parties resort to arbitration for the settlement of their disputes is to ensure privacy and confidentiality. Indeed, confidentiality has been identified as one of the major potentials of an ADR process.[53] The second thing that comes to mind is that the award must be in a written form. This condition seems impracticable especially because of the largely unwritten and unsophisticated nature of customary law. Again, acceptance of the award at the time it was made indicates that none of the parties must have withdrawn from the arbitration after the award was made. Consequently, a party is free to reject an award he finds unfavourable by this parameter.

Although these criteria appear to have generated controversies among text writers as well as judicial decision, it is submitted that the above features of statutory law can be adapted to suit and modify customary arbitration in view of nature of modern commercial transaction and advancement in education among people. After all, one of major features of customary law is its flexibility.[54] In the case of *Lewis v Bankole*,[55] it was held *inter alia* that customary law must be responsive to the present conditions and lifestyle of the people and would not qualify if it is a relic of bye-gone days.[56] In the case of *Kwasi v. Larbi*[57], it was held

[47] *Ras Pal Gazi Construction Company Ltd vs. FCDA* (2001) 5 SCNJ, 234

[48] S. 315(3) & (4) (b) 1999 Constitution as amended).

[49] B. Oyaleke. 2013. A Critical Analysis of Customary Arbitration in Nigeria. Being a Long Essay Submitted to the Faculty of Law, University of Ilorin, Ilorin, in partial fulfilment of the requirements for the award of the Degree of Bachelor of Law LL.B (Hons.) in Common Law, 90

[50] In this connection, see the conditions for raising estoppel in the case of *Sunday Ufomea & Anor v. Nwosu Ahuchaogu & Ors* (2003) 4 SC (Pt. II) 65 at 90; T. O. Elias. *The Nature of African Customary Law,* (Manchester University Press, 1956), 228-238.

[51] M. M. Akanbi *et al*,(n 24), 215

[52] A. O. Ladapo (n 25), 123

[53] M. M. Akanbi, Kwara Multidoor House: An Idea Whose Time Has Come. A paper delivered on the occasion of the formal inauguration of the Committee on the proposed Kwara State Multidoor Courthouse at the High Court of Kwara State on Tuesday, 29 July 2008.

[54] In *Kimdey v. Military Governor of Gongola State* (1988) 2 NWLR (Pt. 77) 445 at 461, Karibi-whyte JSC explained that; *One of the characteristics of native Law and which provides for its resilience is its flexibility and capacity for adaptation. It modifies itself to accord with changing conditions.*

[55] (1908) 1 NLR 81 at 83

[56] *Esugbayi Eleko v Government of Nigeria* (1931) AC 622 at 677

[57] (1952) 13 WACA 76. Although, the case was decided by Ghana courts, the decision should be followed in Nigeria to encourage people to trust customary arbitration. See also the case of *Foli v. Akese* (1930) 1 WACA 1;

that the general principles of customary arbitration are based on reason and good sense and that it would be repugnant to good sense to allow the losing party to reject the decision of the arbitrators to whom he had previously agreed. Doing this, it is submitted, will promote confidence in customary arbitration and encourage people to make use of it in this 21st century. For instance, the decision of the Nigerian Supreme Court in *Agu's* case is that a successful plea of customary arbitration before the courts create estoppel and bars the losing party from re-litigating the case.

5. Recognition and Enforcement of Customary Arbitral Award

When a customary arbitral award has been recognised, the next issue is its enforcement. It is important to note that a customary arbitral award is not self-enforcing, but would require the assistance of the courts for enforcement. Where the unsuccessful party in the arbitral proceedings performs the terms of the award, the matter comes to an end. It is often expected that the terms of an award should be performed but this does not happen occasionally and in that case the successful party has a duty to move the court if he must enjoy the fruit of his victory. The history of enforcement of customary arbitral awards in a court under the common law system can be traced to the case of *Mensal v. Takyiampong*[58] where the then West African Court of Appeal held that customary law awards cannot be enforced but that they can be used as terms for it is anomalous to hold a customary arbitration as being valid and at the same time stating that the award can only be used as a defence.[59] In *Kwasi v. Larbi*,[60] the court stated that customary arbitration award is binding and that it can be used as a shield such as estoppel in the form of a defence and that it can also be used as a sword, that is, as a cause of action where it is final, valid and certain.[61] Furthermore, in the case of *Odonigi v. Oyeleke*[62] the Nigerian Supreme Court held that where the application on recognition of customary arbitration are satisfied, the arbitration would literally be treated as a judicial proceedings and thus creating an estoppel on all matters settled by the customary arbitration proceedings. The three basic methods for the enforcement of a customary award are:

i. Enforcement by the community (social or business),
ii. Raising of defence of estoppel when the losing party seek to set aside the award or try to re-litigate the issue decided by customary arbitrators; and
iii. Enforcement by action- This method can only be used to enforce customary awards

Arising out of domestic arbitration and not subject to the provisions of the Arbitration and Conciliation Act. In such case, the award creditor would have to institute an action by way of writ of summons in which he/she pleads the entirety of his/her case simultaneously with the fact of arbitration and award.[63] In the case of *Eke v. Okwaranya*[64] the Supreme Court listed the conditions to be fulfilled by party seeking enforcement of a customary arbitral award as follows:

a. That there has been a voluntary submission of the matter in dispute to an arbitration of one or more persons,
b. That it was agreed by the parties, either expressly or by implication and that the decision of the arbitrators would be accepted as final and binding;
c. That the said arbitration was in accordance with the action of the parties or their trade or business;
d. That the arbitrators reached a decision and published their award; and
e. That the decision or award was accepted at the time it was made.[65]

In addition to the foregoing, it is trite that before the courts enforce customary arbitration, the court will investigate the procedure from which the award was arrived at and ensure that such custom passes the validity repugnancy test; compatibility with the constitution and public policy test to ensure that such award

G, Elombi. 1993. 'Customary Arbitration: A Ghanian Trend Reversed in Nigeria'. *African Journal of International and Comparative Law,* vol. 5, 803

[58] (1940) 6 WACA 116

[59] C. G. Nwakoby, (n 2), 143

[60] *(supra)*

[61] Conversely the doctrine of estoppel under municipal law can only be used as shield and not as sword. See the case *Achiakpa & Anor v. Nduka & Ors* (2001) 11 SCM 16 at 25-26.

[62] *(supra).*

[63] G. Etomi. *An Introduction to Commercial Law in Nigeria: Text and Material.* (Lagos: MIJ Professional Publishers Limited, 2014), 368

[64] (2001) 4 SCNJ 300 at 323-324

[65] *Egbesimba v Onuzuike* (2002) 15 NWLR (PT 791), 466.

is not contrary to public policy, and is in accordance with natural justice and good conscience. When the court is satisfied that all these conditions have been complied with, it will then ratify and enforce the award, provided that its enquiry revealed that the award is final, certain, reasonable, legal, possible of execution and disposes of all the differences submitted to arbitration. In *Awonusi v Awonusi*,[66] it was held that: 'where arbitration under customary law is pronounced valid and binding, it would be repugnant to good sense and equity to allow the losing party to reject or resile from the decision of the arbitrators to which he has previously agreed.

6. Conclusion

Customary arbitration is a unique form of domestic arbitration in Africa and in deed in Nigeria prior to the advent of colonial rule. It was evolved as a method of dispute resolution not just for communal harmony but also for the advancement of trade. We are aware that there are few challenges to the conduct of customary arbitration *vis-a-vis* the western type arbitration. For instance, the modern arbitration is private in nature while customary arbitration is not. Again, customary law is largely unwritten, thus making its application subject to judicial review to test its enforceability. However, in spite of these challenges, the objective of customary arbitration is to socialise the whole society, therefore, the community is present. Also, parties could arise from the whole process and still maintain their relationship and where one party got an award the whole society that witnessed it will see to it that it is enforced. Furthermore, customary law arbitration is an important institution among the various ethnic groups in Nigeria. Hence, people often resort to it for the resolution of their differences because it is cheaper, less formal, speedy and less rancorous than litigation and modern mechanism for dispute resolution and, above all, more in tandem with their own individual local circumstance. It is more responsive to their yearnings and aspirations. The Nigerian courts, as seeing in this paper, have over times laid down the necessary conditions that must be met for the validity of customary arbitration as well as recognition and enforcement of arbitral award therefrom. The major requirement for the validity of customary arbitration is that it must not be repugnant to natural justice, equity and good conscience; it must not be contrary to public policy and it must be compatible with a law being in force. Consequently, once a customary arbitration and its award passes repugnant test, it will be upheld by the court. Similarly, if customary arbitration award passes public policy test, it will be upheld and enforced by the court. Premised on the foregoing, it is recommended that customary arbitration should be adopted for the resolution of commercial as well as other forms of civil disputes. Doing this, it is submitted, will guarantee harmony and eschew all forms of technicality, anarchy and misunderstanding characteristics of litigation and modern arbitration. It is further recommended that in view of global acceptance of arbitration, customary arbitration should be incorporated into the arbitration door available at the Multi-Door Courts established in the various States High Courts in Nigeria. As a corollary to this, the experts or legal practitioners who are well knowledgeable in the customs of a particular tribes or communities constituting Nigeria should be enlisted as arbitrators in the Multi-Doors Courts in Nigeria to handle customary arbitration.

[66] *(Supra)*