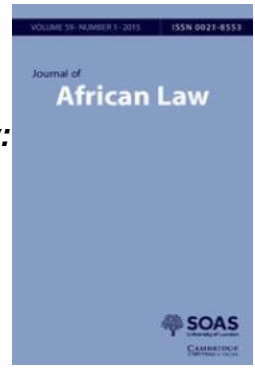

Customary "arbitrations" in Nigeria: a comment on Agu v. Ikewibe

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Journal of African Law / Volume 42 / Issue 02 / September 1998, pp 231 - 234
DOI: 10.1017/S0021855300011852, Published online: 28 July 2009

Journal of African Law, **42**: 231–234

COMMENT

CUSTOMARY "ARBITRATIONS" IN NIGERIA: A COMMENT ON *AGU* V. *IKEWIBE*[1]

Introduction

In a most interesting article in this journal,[2] Virtus Chitoo Igbokwe reviews and re-opens many notable controversies on this topic as they have arisen both in West African courts and in scholarly comment. In particular, he discusses the questionable issue of whether a party to a customary arbitration is entitled to withdraw from an arbitration after an award has been made. His argument in summary is as follows:

1. there is a distinction between customary arbitration and other forms of voluntary dispute resolution such as negotiation and conciliation;
2. the customary laws on this matter vary from society to society;
3. the decision of the Supreme Court of Nigeria in the case of *Agu* v. *Ikewibe* was a correct restatement of the law and practice of customary arbitration in Nigeria; and
4. many traditional societies in Nigeria did, and—despite the impact of colonial rule and the introduction of Western law—still do, recognize various forms of arbitral proceeding.

A number of subsidiary issues arise. These include the definition of "arbitration"; the authority of previous decided cases dealing with customary arbitration; and whether the existence and conduct of customary arbitrations and other forms of extra-judicial procedures in Nigeria fall foul of the provisions of the Nigerian Constitution which reserve the judicial power to the courts expressly named therein.

On the definition of customary arbitration

Mr Igbokwe cites the definition proffered by the Supreme Court in *Agu* v. *Ikewibe*:

> "... Customary Law arbitration is an arbitration of a dispute 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."[3]

He traces the origins of this definition largely to the late Dr T. O. Elias's dictum in his *The Nature of African Customary Law*:

> "It is well accepted that one of the many African customary modes of settling disputes is to refer the dispute to the family head or an elder or elders of the community for a compromise solution based on the subsequent acceptance by both parties of the suggested award, which becomes binding only after such

[1] (1991) 3 Nigerian Weekly Law Reports 385, SC.
[2] "The law and practice of customary arbitration in Nigeria: *Agu* v. *Ikewibe* and applicable law issues revisited", [1997] *J.A.L.* 201.
[3] Ibid. at 407.

> signification of its acceptance and from which either party is free to resile at any stage of the proceedings."[4]

Mr Igbokwe observes that the *Agu* definition apparently reverses the previous Nigerian case-law defining customary arbitrations, which had generally insisted that, by submitting to customary arbitration, the parties had expressly or impliedly bound themselves by the award of the arbitrators, which they could no *ex post facto* reject. *Agu* also, he comments, contradicts case-law in the superior courts of Ghana, which had denied the right of a party to a customary arbitration to revoke his consent to arbitration or reject an award once made.

We must recognize two factors which are critical. The first is that there are, in customary societies, various procedures and mechanisms which may be resorted to in the settlement of disputes. Some of these may be termed "judicial", in that typically the proceedings are open and public; proceedings may be instituted either by the relevant political authority (especially the case with criminal accusations) or by complaint from an aggrieved individual or group; attendance at and submission to the authority of the "court" is obligatory on the part of the defendant; the conduct of the enquiry and the final decision of the body are in the hands of a public official or "judge" or bench; there is no question of such judgment being submitted to the losing party for his or their acceptance; and the orders or sanctions imposed as a result of the finding of the court are usually either executed or monitored by the court.

Other dispute settlement procedures may fail to fall within one or other of these parameters. Even so, within this latter category different types of proceedings are found. These may include (not all of them in every society): arbitral proceedings, available in parallel with regular judicial proceedings, conducted in private by persons or bodies which may also possess judicial functions; domestic proceedings, falling within the competence of those having authority in a domestic (e.g. lineage or extended family) or local residential (e.g. village) group; resort to religious or spiritual authorities for determination by ordeals or divination; and negotiations for a settlement of a dispute, with or without the intervention of an arbiter, mediator or conciliator.

The second factor, especially important in understanding the Ghanaian case-law, is the choice of an English noun to identify some or all of the non-judicial proceedings just mentioned. We must blame interpreters and others who attempted to translate the institutions of customary law into English for selecting the English word "arbitration"—with all its precise English legal connotations—to represent some or all of the varieties of customary voluntary dispute-resolution procedures. The inevitable consequence followed in Ghana/Gold Coast. The expatriate judges familiar with English law easily slipped into the error of equating the customary proceedings with the English legal institution of arbitration. (This tendency to use an English legal term—inappropriately extended to a customary institution—as determinative of the content of the customary institution, was a trap into which the colonial judges readily fell, with, for example, the use of the word "trust" in describing the land tenure powers of a chief, "fee simple" as an applicable term for a customary interest in land, and many others.) The issues which now perplex us might never have arisen if the word "arbitration" had not been used, and alternative customary non-judicial procedures for the resolution of

[4] Manchester, 1956, 212.

disputes had been called just that (as with contemporary Anglo-American law and ADR).

West African judicial precedents on the effect of customary "arbitrations"

The trouble started in colonial Gold Coast, and was perpetuated in independent Ghana, with the judgments of the colonial courts ruling on Akan laws and customs. Mr Igbokwe cites a number of Ghanaian cases which in his opinion establish the principle 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. Under Akan Customary Law of Ghana, the initial consent to an arbitration under customary law, if valid, remains binding throughout the proceedings and a party could neither withdraw before the award nor, in the absence of agreement to the contrary, retain the right to reject the award of the arbitrators."

Mr Igbokwe cites myself, in my *Essays in African Law*,[5] and J. N. Matson[6] as challenging this view. He says:

> "some learned commentators on African law have criticized the compartmentalisation of the customary law dispute settlement into arbitration and attempt at settlement. Professor Allott, an eminent scholar of African law, argues that the distinction does not exist and that arbitration as known to English law is foreign to customary law. In his view, all cases of the so-called arbitration under customary law are mere negotiations for a settlement and the parties thereto are always free to withdraw from the arrangement at any time before the award. Matson was of a similar view when he earlier contended that the distinction between customary 'arbitrators' and those who attempted reconciliation is false and misleading and mistakes a distinction of a degree for one of a kind."

He goes on to restate what he sees as the general and universal features of an arbitration, be it under English or customary law. That, with respect, is to beg the central question. The question is, what are the essential features of such proceedings as found in Akan customary law?

Here we come up against a problem which has bedevilled the ascertainment and application of customary laws in anglophone West Africa. I refer to the split and divergence between customary law as observed by the members of the community whose law it is, and customary law as found by the judges of superior courts operating in the English common law tradition and creating law by laying down precedents.

Put bluntly, whose law it is, and who is competent to declare it? Is it what I term "judicial customary law", the law which the judges have found or made; or is is the "popular or practised customary law", the rules which the people follow and may change from time to time? In essence customary law is what the people make through their practice and the respect that they accord to its precepts and institutions. But common law jurisdictions are tempted to turn to the findings of judges as the premier source of law, despite the fundamental principle, enshrined in legislation as well as reiterated in such leading cases as *Angu* v. *Attah*,[7] that the people make the law.

J. N. Matson, who was Judicial Adviser in the colonial Gold Coast administration, with responsibility for overseeing customary law and native courts

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[5] London, 1960, 126.

[6] "The Supreme Court and the customary judicial process in the Gold Coast", (1953) 21 *I.C.L.Q.* 47 at 58.

[7] (1916) Privy Council Judgments 1874–1928, 43.

in Ashanti, had conducted extensive research into this among other aspects of the customary law and legal process. I myself, through intensive fieldwork in Ghana, had become familiar with the Akan customary laws on the subject as administered by the indigenous institutions. I had not only surveyed the reported, and especially the unreported, cases—in the native courts as well as in the superior courts—in southern Ghana, I had personally witnessed, and had on occasion even been invited to participate in, customary arbitral proceedings.

A whole chapter of *Essays in African Law* was devoted to the topic of "Arbitral proceedings in customary law" and included much of the material thus obtained, as well as an analysis of some of the decided cases in the superior courts which had either recognized or denied the essentially voluntary character of Akan customary arbitral proceedings. My researches entirely corroborated Matson's earlier findings on the topic.

The use of the word "judicial", whether by judges in Ghana or by Mr Igbokwe in his article, should not mislead us. It is true that a customary arbiter should act "judicially"; but this adverb does not prejudge the issue of whether he is a judge in the sense of a person whose judgment is binding. It merely means that he should strive to act fairly and impartially.

It is a matter of regret that the superior courts in Ghana have apparently not seized the opportunity to reconsider their approach to this question. After all, when there is a contest between two accounts of the customary law, the court can and indeed must use whatever means are available to decide what is the correct position, which includes testimony from those who are subject to or administer the customary law as well as from experts, books and other materials.

As for Nigeria, customary law is still largely a matter of evidence; and proof of the rules of a particular system of customary law is still permissible. We must accept that the rules in different customary laws may vary. What is clear is that Nigerian courts are in no way bound by decisions given on a customary law in another West African country, viz, Ghana—especially as that law (Akan) is not in force in Nigeria. And the point is even more strengthened when it appears that the foreign decisions may be based on a misconceived view of that law.

There is no need to examine in detail the issues which arise regarding the constitutionality of customary arbitral procedures in Nigeria. If those who operate such procedures do not assert a judicial power in the strict sense, there can be no conflict with the constitution.

As for estoppel, estoppel *per rem adjudicatam* is inapplicable if the prior proceedings are not judicial, and their outcome not binding on the parties. If, however, the parties had, prior to the proceedings commencing, formally agreed to be bound by the outcome of the proceedings (in other words, agreeing to an English-style arbitration properly so-called), or had, after entering the proceedings voluntarily, accepted the final "award" of the arbiters, then they will be estopped from later challenging the proposition that they are bound by its terms, as a matter of contract or estoppel by conduct.

The Supreme Court of Nigeria, through the leading judgment of KARIBI-WHYTE, J.S.C. in the *Agu* case, are to be respectfully congratulated on restoring—through their formulation of the governing principles—the status of customary arbitral proceedings in Nigerian law. It would be good if their brethren in Ghana could be persuaded to do likewise.

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