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THE LAW AND PRACTICE OF CUSTOMARY ARBITRATION IN NIGERIA: *AGU* V. *IKEWIBE* AND APPLICABLE LAW ISSUES REVISITED

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> "Reservations about any concept do not automatically discredit it but allow for healthy and open debate to take place... the discussions that can arise from any such criticism, constructive or otherwise, can often lead to a greater awareness of the values of the system and ways in which it can be strengthened and made more effective in the interests of the general public."
>
> (Brown and Marriot, *ADR Principles and Practice*, 1993, 394)

INTRODUCTION

This article critically examines the controversies surrounding the law and practice of customary arbitration in Nigeria against the background of the decision of the Nigerian Supreme Court in *Agu* v. *Ikewibe*. The case law on customary arbitration is briefly reviewed with a view to demonstrating that prior to the *Agu* case, there existed a divergence of opinion among judges on some fundamental principles of the law and practice of customary arbitration in Nigeria, particularly with respect to the right of the parties to withdraw at any stage of the arbitration proceedings or even after the award is rendered. The article disagrees with the views of some judges and learned scholars that there is no distinction between customary arbitration and other consensus-oriented dispute resolution methods such as negotiation and conciliation. In disagreeing with these views, it is argued that in distinguishing customary arbitration from negotiation or conciliaion, the nature of the decision-making process should be of paramount consideration. It will further be argued that the binding nature or enforcement of the decisions of a judicial or quasi-judicial body differs from society to society. These enforcement mechanisms should not be divorced from the social relationships existing in a particular society. In conclusion, the article endorces the decision of the Supreme Court in *Agu* v. *Ikewibe* as the correct restatement of the law and practice of customary arbitration in Nigeria.

Arbitration as a means of settlement of disputes is part of the customary norms of Nigeria. It is older than the courts in Nigeria and even before written history, communities and individuals were known to have chosen or appointed "arbitrator(s)" to settle disputes between them. It has thus been noted that:

> "Arbitration as a method of settling disputes 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. Indeed, in many of the isolated communities, such a method of dispute resolution was the only reasonable one, for the wise men or the chiefs were the only accessible judicial authorities. This tradition still persists in certain village communities, despite the centralized

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> legal system and the attendant efforts at modernization and reform of the legal system."[1]

The British colonization of Nigeria witnessed the interaction of English law with customary law. But the British colonization did not result in a complete obliteration of the customary laws of Nigeria and the local level dispute resolution mechanisms such as customary arbitration. As Ajayi has rightly posited:

> "It is not surprising that after many years of British connection with and administration in Nigeria ranging in various parts from sixty to about one hundred years, English law and English legal concepts have not been received in total replacement of the Customary laws of the country. History has shown that even conquerors of comparatively less advanced peoples than themselves have rarely even succeeded in replacing the old laws of the conquered *in their entirety* with those of the conquerors."[2]

Generally, in the southern states of Nigeria, disputes occurring within the family or kindred are often settled by the family or kindred head with the assistance of the elders. Minor disputes between parties belonging to different families might be settled by the heads or elders of the respective families. Also, of considerable importance were *arbitral tribunals* constituted ad hoc by the agreement of the parties.[3] Customary arbitration is still one of the modes of resolving disputes in contemporary indigenous communities of Nigeria.

Until comparatively recently, not much effort has been made towards putting the law and practice of customary arbitration in Nigeria in a proper perspective. Prior to the *Agu* case, some of the controversies which had peppered the law and practice of customary arbitration in Nigeria included the meaning of customary arbitration and its validity under the 1979 Constitution of Nigeria. Moreover, whether there can be an arbitral tribunal properly so called under customary law has been a subject of intense debate. However, the recent decision in the *Agu* case[4] seems to have heightened the confusion of thought hitherto existing about the law and practice of customary arbitration in Nigeria.

Agu v. Ikewibe: A Brief Summary

In the *Agu* case, the claim was for a declaration of title to land. The respondent, Ikewibe, who brought the action contended that the matter had been decided under customary arbitration by the chiefs and elders of their locality and an award rendered in his favour. The appellant denied that any arbitration had taken place between the parties and that even if there had been any arbitration, the arbitration referred to by the respondent was different from that in which an award was rendered in favour of the respondent. The High Court dismissed

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[1] See Ezediaro, "Guarantee and incentive for foreign investment in Nigeria", (1971) 5 *International Law* 770 at 775

[2] See Ajayi, "The interaction of English with customary law in Western Nigeria", (1960) 11 *J.A.L.* 98 at 103; Ayua "The blend of customary law with English law", (1986–90) 4–8 *Ahmadu Bello University Law Journal* 1, 5–6. See also Gordon R. Woodman, "Some realism about customary law: the West African experience", (1969) *Wisconsin Law Review* 128.

[3] See B.O. Nwabueze, *The Machinery of Justice in Nigeria*, 1963, 45. See also Amazu A. Asouzu, "The legal framework for commercial arbitration and conciliation in Nigeria", (1994) 9 *F.I.L.J. (I.C.S.I.D. Review)* 214 and Asiedu-Akrofi, "Judicial recognition and adoption of customary law in Nigeria", (1989) 37 *American Journal of Comparative Law* 571 at 572–73.

[4] (1991) 3 Nigerian Weekly Law Reports. (part 180, hereinafter N.W.L.R) 385. The Supreme Court is the highest court in Nigeria and as a result, the judgment of the court takes precedence over any other case laws, be it foreign or local. See also *Ohiaeri* v. *Akabeze* (1992) 2 N.W.L.R 1. The Supreme Court followed the decision in *Agu's* case.

the claim of the respondent. On appeal, the Court of Appeal overturned the decision of the High Court and held that there had been a binding arbitration between the parties and consequently the appellant could not deny the respondent's title to the land. Dissatisfied with the decision of the Court of Appeal, a further appeal was made to the Supreme Court of Nigeria by Agu. At the Supreme Court, two major issues arose to be decided: whether the alleged arbitration had been properly pleaded and established on the evidence; and, if so, could it constitute *res judicata*?

While the Supreme Court of Nigeria dealt exhaustively with these and other controversial issues in the *Agu* case, the pronouncements of the court with regard to some of them did little to resolve the seemingly endless controversy about certain aspects of the law and practice of customary arbitration in Nigeria. Among judges and legal scholars, opinion has become polarized with respect to several issues, such that much juristic ink has been spent in ascertaining the exact contours of the law and practice of customary arbitration in Nigeria. Since legal scholarship learns in order to improve, it is necessary that these issues be critically examined, in order to infuse some certainty and a greater degree of effectiveness into the concept of customary arbitration. But first, what is customary arbitration?

Customary Arbitration Defined

As stated earlier, in traditional African societies, parties to a dispute can and do often resort to customary arbitration by submitting the dispute to the family head or chiefs and elders of the community for settlement and mutually agree to be bound by such decision. The Supreme Court of Nigeria in *Agu* v. *Ikewibe* defined customary arbitration as follows:

> "... 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.*"[5]

In adopting this definition, the court seemed to have relied substantially on the earlier views of T.O. Elias:

> "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 signification of its acceptance, and from which either party is free to resile at any stage of the proceedings.*"[6]

The Supreme Court's definition of customary arbitration has given rise to a heated debate, particularly the decision of the Court that either of the parties can reject the award if unfavourable. As demonstrated below, it is being contended by some eminent commentators on African law that the above definition extinguishes the fundamental distinction between arbitration and conciliatory measures. It is also argued that neither customary arbitration nor arbitral tribunals exist under the customary law of African village communities. Before

[5] Ibid. at 407. Italics supplied. The controversial issue is whether a party in those proceedings can withdraw from the process at any stage before or after the award. This is discussed below.

[6] See T.O. Elias, *The Nature of African Customary Law*, Manchester, 1956, at 212 (emphasis supplied).

these issues are examined in detail, the next section determines the constitutional validity of customary arbitration in Nigeria.

The Constitutional Validity of Customary Arbitration in Nigeria

Previous decisions of various High Courts in Nigeria had upheld the law and practice of customary arbitration in Nigeria. But in 1988, in the case of *Okpuruwu* v. *Okpokam*,[7] the majority of the Court of Appeal (Enugu Division) surprisingly denied the existence and constitutional validity of customary arbitration in Nigeria. One of the issues submitted to the court for determination was whether what was referred to as "customary arbitration" had ever been, in a true sense, an aspect of Nigeria's legal jurisprudence having a place in the administration of justice in Nigerian courts. Counsel for the appellants in this case had argued that it is a misnomer to talk of customary arbitration as having the binding force of a judgment on the grounds, *inter alia*, that the Nigerian Constitution does not recognize customary arbitration and that under native law and custom, there can be no arbitral tribunal properly so called.[8] The majority of the Court of Appeal (Uwaifo, J.C.A., delivered the leading judgment) held *inter alia*:

> "To talk of customary arbitration having a binding force as a judgment in this country is therefore somewhat a misnomer and certainly a misconception. Of course, to say that a decision by such a body creates res judicata is erroneous ... 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. It may be that in practical life, when there is a dispute in any community, the parties involved may sometimes decide to refer it to a disinterested third party for settlement. That seems more of a common device for peace and good neighbourliness rather than a feature of native law and custom, unless there is any unknown to me which carries with it 'judicial function' or authority as in Akan laws and customs. I do not also know how such a custom, if any, or more correctly, such a practice, to get a third party to intervene and decide a dispute can elevate such a decision to the status of a judgment with a binding force and yet fit it into our judicial system ... I say by way of emphasis that we have no equivalent of Akan laws and customs in this country under which elders of the same description in Ghana's circumstances perform recognized judicial functions consistent with our judicial system. ..."[9]

It was also the view of the court that even if the concept of customary arbitration had existed in Nigerian jurisprudence, it would have no place under the 1979 Constitution of Nigeria which vested judicial powers in the "courts".

The opinion of the Court of Appeal in this case was astonishing and thus heightened the already existing confusion of thought bedevilling customary arbitration. Further, the passage quoted above was given *per incuriam* because the court made no reference to the earlier case of *Idika & Ors.* v *Erisi & Ors*,[10] nor was its attention drawn to the said case in which another division of the Court of Appeal accepted the existence and constitutional validity of customary arbitration.

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[7] (1988) 4 N.W.L.R. (part 90) 554.
[8] Ibid. at 566
[9] Ibid. at 571–73
[10] (1985) 2 N.W.L.R. (part 78). The Nigerian Court of Appeal is one but is divided into various judicial divisions for administrative convenience and accessibility. A decision of Lagos division for instance has to be applied and followed by Kaduna division. Appeals from the Court of Appeal go to the Supreme Court of Nigeria.

It is my submission that the dissenting opinion of OGUNTADE, J.C.A., on this issue accepting the notion of customary arbitration and its binding effect is not only convincing and persuasive but also a correct articulation of the law and practice of customary arbitration in Nigeria. His lordship rightly observed as follows:

> "In pre-colonial time and before the advent of regular courts, our people certainly had a simple and inexpensive way of adjudicating over disputes between them. They referred 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.*"[11]

The victory achieved by the opponents of customary arbitration in *Okpuruwu's* case was however short-lived because shortly thereafter, the opportunity for determining the constitutionality of customary arbitration with finality presented itself before the Supreme Court of Nigeria in *Agu* v *Ikewibe*.[12] The Supreme Court, in a considered judgment that was a clear vindication of OGUNTADE, J.C.A.'s dissenting view in *Okpuruwu's* case, dealt exhaustively with the meaning, constitutional validity and the binding effect of customary arbitration.

Relying on the judgment of the majority of the Court of Appeal in *Okpuruwu's* case, counsel for the appellants in the *Agu* case argued that customary arbitration is unknown to Nigerian law. He further submitted that Nigerian law did not recognize the practice of elders or natives constituting themselves as customary arbitrators to make binding decisions between parties in respect of land or other disputes and that customary arbitration is contrary to section 6(1) and (5) of the 1979 Constitution of the Federal Republic of Nigeria.

KARIBI-WHYTE, J.S.C., in his leading judgment held that although it is clearly unarguable that the judicial powers of the Constitution in section 6(1) is by section 6(5) vested in the courts named in that section, it does not prevent disputing parties from setting their differences in a manner acceptable to them. According to his lordship, a customary arbitration is not an exercise of the judicial power of the Constitution, since it is not a function undertaken by the courts. Secondly, customary law is by virtue of section 274(3) and (4)(b) of the Constitution "an existing law" by virtue of the fact that it was a body of rules of law in force immediately before the coming into force of the Constitution in 1979. Thus, customary law which includes customary arbitration was saved by section 274(3) and (4)(b) of the Constitution, 1979. The Supreme Court (per KARIBI-WHYTE, J.S.C.) stated:

> "I think it is well settled and judicial authority is not lacking for the view that persons exercising judicial functions in accordance with native law and custom and who are duly authorized to adjudicate among their community have always been recognized as having such powers. ... The provisions of the Constitution of 1979, sections 6(1) and (5) have not altered the judicial position. ..."[13]

The Arbitration and Conciliation Act, Cap. 19 of the Laws of the Federation of Nigeria, 1990, also recognizes customary arbitration. Section 35 of the Act provides as follows:

> "This Act shall not affect any other law by virtue of which certain disputes:

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[11] Ibid. at 586–87. Italics supplied.
[12] Above, n. 4.
[13] Ibid at 412.

(a) may not be submitted to arbitration; or
(b) may be submitted to arbitration only in accordance with the provisions of that or another law."

It is submitted that the reference to "the provisions of that or another law" includes customary law and customary arbitration.

If customary arbitration is recognized by the Constitution of Nigeria and the Arbitration and Conciliation Act, it follows that there can be an arbitral tribunal under customary law. Support for this assertion can be drawn from the fact that in determining the status of the tribunal that pronounced the decision which is being relied upon as constituting estoppel, the criterion is not whether it is a court of record or not. It suffices if the "alleged judicial tribunal" can be properly described as a person, or body of persons exercising judicial functions by common law, statute, patent, charter or custom. In customary arbitration, the customary arbitrators who constitute the arbitral tribunal are the chiefs and elders of the community exercising judicial functions by custom. A judicial tribunal for the purposes of estoppel has been defined to include tribunals whether it is known by the name of a court or not:

> "It is now stated to be well established that it is quite immaterial whether the tribunal which pronounced the decision relied upon as a ground of estoppel is a court of record or not, or whether it is what has been denominated custom, or statute, a superior court or not or even whether it is known by the name of a court at all . . . . It is enough if the alleged 'judicial tribunal' can properly be described as a person, or body of persons exercising judicial functions by common law, statute, patent, charter, custom or otherwise in accordance with the law of England, or in the case of a foreign tribunal, the law of the particular foreign state, whether he or they be invested with permanent jurisdiction to determine all cases of a certain class as and when submitted, or be clothed by the State or the disputants with merely temporary authority to adjudicate on a particular dispute, or group of disputes."[14]

The above definition is broad enough to include decisions of customary arbitral tribunals under customary law. With the Supreme Court's decision in *Agu's* case, the existence and constitutional validity of customary arbitration in Nigeria are now settled.

Proof of Customary Arbitration and the Res Judicata Effect

Although the Supreme Court settled the controversy surrounding the existence and constitutionality of customary arbitration, it seemingly deepened the debate as to whether a successful plea of customary arbitration constitutes estoppel so that the matter cannot be re-opened by either of the parties. Related to this issue is whether the consent to customary arbitration, once given, cannot be revoked by the unilateral act of either of the parties. Simply put, can either of the parties withdraw at any stage of the proceedings, even after the award has been rendered?

In *Agu's* case, the Supreme Court laid down the following four requirements of customary arbitration in Nigeria: the voluntary submission of the dispute to a judicial body for determination; the willingness of the parties to be bound by the decision and the freedom to reject it if not satisfied; that neither of the parties resiles from the decision or, *a fortiori*, withdraws from the proceedings before the

[14] See Spencer-Bower and Turner, *Estoppel* (2nd ed.) at 21–22.

award is made; and that the said award is in conformity with the custom of the parties or their trade or business.

The first requirement seeks to draw a distinction between a dispute submitted to a judicial body for determination and not simply to make peace between the parties or otherwise reach some loose arrangement. This is what distinguishes the case of *Equere Inyang* v. *Simeon Essien*[15] from the other cases. In *Inyang*, an action for a "declaration of title" had been withdrawn and the case referred to an Imam council for settlement. The mandate of the council was to make peace between the parties. The appellants rejected the decision of the Imam Council and initiated an action in court. It was held by the then Federal Supreme Court of Nigeria that the decision of the Imam council was not binding. On the evidence both of the plaintiff and the defendant, the mandate of the council was limited to making peace between the parties and the settlement having failed, the parties could not be bound by the outcome of an unsuccessful attempt at effecting a settlement between them. The case is therefore an authority for the view that a decision by a group of persons acting as a non- judicial body could not be binding.

However, the fundamental issue revolves around the second requirement and the question is whether the prior agreement of the parties to customary arbitration can be determined before and after the award. Can any of the parties resile from the arbitration at any point in the proceedings or reject the award if unfavourable? In the *Agu* case, there was a difference in opinion between the majority (KARIBI-WHYTE, J.S.C., delivered the leading judgment, OBASEKI, KAWU and WALI, JJ.S.C., concurring) and NNAEMEKA AGU, J.S.C., on this requirement. The latter was of the opinion that the agreement to customary arbitration and the willingness to be bound runs throughout the arbitral proceedings. He said:

> "Before a party to a case in the High Court, which has an unlimited jurisdiction under the Constitution, can defeat the right of his adversary to have his case adjudicated upon by the courts on the ground that there has been a previous binding arbitration which raises an estoppel between them, five ingredients must be pleaded and established by the party relying on the decision. These are:
>
> (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 that the decision of the arbitrators will be final and binding. . . ."[16]

Prior to the *Agu* case, the case law on customary arbitration did not reveal any uniformity of approach to this issue. The courts had been divided on whether the consent to customary arbitration was irrevocable or not. As will be seen from the cases reviewed herein, the attitude of the courts both at first instance and on appeal has not helped in resolving the controversy. One line of Nigerian cases held that the consent to customary arbitration can be withdrawn at any stage of the proceedings or shortly after the award is rendered.

In *Philip Njoku* v. *Felix Ekeocha*,[17] the defendant claimed that there had been customary arbitration by the chief and council of elders and that the outcome had been accepted by the parties. It was held that the settlement created an

[15] [1957] 2 F.S.C 39.
[16] At 418–19.
[17] [1972] ECNLR 199.

estoppel against the plaintiff on the ground that the parties had accepted the settlement. The difference between the decision in this case and the judgment of the majority in *Agu's* case is that IKPEAZU, J., surprisingly regarded the chief and his councillors as being in the same position as the Imam council in *Inyang* v. *Essien*, that is, as a body, not being clothed with judicial authority, whose decision could not become binding until accepted by the parties at the time it was given. His lordship stated as follows:

> "The legal position seems to me to be that where the decision of a body [although in this particular case plainly exercising judicial functions, since its jurisdiction was not, as in *Inyang*, expressly or impliedly limited] has been accepted by the parties, it will not be open to any of them to turn around at a later stage and reject it. In such a case, the decision will be binding on him, the operative factor being the initial acceptance of the decision at the time it was made."[18]

IKPEAZU, J., concluded that although the panel of elders, including the chief, were a non-judicial body, they could still sit as arbitrators and their decision, while sitting in that capacity, will be binding subject to the following three requirements: that the parties submitted to the arbitration; that they accepted its terms; and that they agreed to be bound by the award. The crux of the controversy is the third requirement as to whether the mandate of the arbitrators is revocable or not, but the point did not fall directly to be decided because the parties accepted the award at the time it was rendered. As earlier mentioned, the case law on customary arbitration does not reveal uniformity of approach on this requirement. In *Agu*, the Supreme Court considered the facts and concluded that all the three requirements were present and satisfied in *Njoku's* case. But it is unclear as to why *Njoku's* case was considered by the Supreme Court and approved when the decision in that case was not in some respects along the same line as the Supreme Court's decision in *Agu's* case.

Nicholas Mbagbu v. *Agbarakwe*[19] was a case in which the court had to choose between two conflicting decisions of two separate arbitrators. The defendant, not being satisfied with the decision of the elders in the first proceedings initiated by the plaintiff, took the case to another body chaired by a chief and a group of elders. The plaintiff rejected the outcome of the second arbitration on the ground that the second arbitrator was a local tyrant who could not be trusted to do justice and had completely failed to give him a fair hearing by refusing to consider his evidence. He therefore commenced proceedings in court against the defendant. The court rejected the outcome of both arbitrations. In reference to the second arbitration, the court was of the view that the plaintiff did not accept the decision of the chief who he claimed violated the rules of natural justice by refusing to consider his case and those of his witnesses. The court concluded that none of the bodies was vested with judicial powers and that their decisions, unless accepted by the parties concerned, cannot be binding on either of them. The judgment of the court (per NWOKEDI, J.) in this case is similar to that in *Njoku's* case. The court maintained that a decision of elders not vested with judicial authority cannot be binding unless agreed to by the disputing parties and that since both the plaintiff and the defendant did not accept the decision of the arbitrators, they cannot be held to it. NWOKEDI, J. treated both arbitrators in the same manner as the Imam council and the council of elders

[18] Ibid. at 208.
[19] [1973] 3 ECSLR Pt. 1, 90.

and chiefs as non-judicial bodies, thus making the award binding upon acceptance only after rendering the award or shortly thereafter. In effect, the outcome of a customary arbitration was regarded in the same way as that of a non-judicial body, as both would not become binding unless accepted by the parties at the time it was made.

The court in *Ofomata* v. *Anoka*[20] maintained that a party to the proceedings still retained the right to withdraw at any stage of the proceedings. The judge observed that there was a properly constituted customary arbitration possessing the requisites and essentials of a tribunal and that the decision of such a tribunal could be binding on the parties thereto.

Another line of Nigerian cases is to the effect that the submission to customary arbitration is irrevocable. As long ago as 1962 in the case of *George Onwusike* v. *Patrick Onwusike*,[21] BETUEL, P.J., stated that:

> "The decisions given by the elders, authorized by custom to settle such disputes, and exercising their customary functions, as a result of the submission of the parties to their jurisdiction, unless clearly wrong in principle, is binding on them . . . .I apprehend that it would be contrary to common sense to allow persons who have voluntarily submitted their dispute to an independent body of their own choosing to render nugatory the decision arrived at, merely because it does not favour the interest they assert or in some other way is regarded by them as unsatisfactory."[22]

The former Federal Supreme Court of Nigeria in *Oline* v. *Obodo*[23] also rejected the contention that the arbitration was merely a settlement which was not binding on the parties. The court followed the Privy Council and held that:

> ". . . where parties submitted their dispute for settlement by arbitration in accordance with Native Customary Law and one party withdrew from the arbitration before it was completed, the award of the arbitration was nevertheless binding on all the parties. In the present case, there is a finding of fact against the appellants that they attended the arbitration and that they agreed to be bound by the award of the arbitrator.[24]"

The same line of reasoning was followed in *Joseph Aguocha* v. *Edward Ubiji*.[25] Although the judge had already found as a matter of evidence that the defendant had accepted the outcome of the arbitration thus making it binding, he nevertheless posited that parties who have voluntarily submitted to an arbitration of their dispute by a third person cannot be allowed to withdraw from the outcome on the basis that it was unfavourable to him.

In summary, the effect of the Supreme Court decision in *Agu* v. *Ikewibe* is that either of the parties can resile from the customary arbitral proceedings and that the award is binding only if accepted by both parties at the time it was given. If therefore any of the parties rejects the award at the time it was pronounced, it is not binding on him. As a result of the decision of the Nigerian Supreme Court in *Agu's* case, the previous cases which had upheld the irrevocability of the consent to customary arbitration are no longer good law in Nigeria.

Having regards to the decision of the Supreme Court in *Agu's* case, it is posited that a successful plea of customary arbitration before a High Court creates

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[20] [1974] 4 ECSLR 251.
[21] (1926) 6 Eastern Nigerian Law Report 10.
[22] Ibid. at 14.
[23] [1958] 3 FSC 84.
[24] Ibid. at 86.
[25] [1975] 5 ECSLR 221.

estoppel and bars the losing party from re-litigating the case provided that neither of the parties withdraws from the proceedings or rejects the resultant award at the time it was rendered. However, the party relying on customary arbitration as creating estoppel must plead the requirements projecting it as creating estoppel because not every decision of a customary arbitration, unlike that of a regular court, can create estoppel. In the definitive words of AKPATA, J.S.C.:

> "While it may be sufficient to simply plead the fact of a previous judgment by a regular court as the basis of an estoppel, merely pleading such a decision in respect of a customary arbitration without pleading the ingredients that project it as creating an estoppel, will not be proper pleading because not every decision of a customary arbitration, unlike that of a regular court, can create an estoppel. On the other hand, where it is clearly averred by a party that there was a previous customary arbitration which was in his favour and that he will be relying on it as creating estoppel, it will not be necessary for him to plead the ingredients establishing the estoppel. The party will have to adduce credible evidence of the relevant ingredients or incidents necessary to sustain the material plea of estoppel by customary arbitration."[26]

The decision of the Nigerian Supreme Court in *Agu's* case seems to have revolutionized the concept of "arbitration" in general and the law and practice of customary arbitration in Nigeria in particular. Is the decision of the Supreme Court in *Agu's* case a correct restatement of the law and practice of customary arbitration in Nigeria? Has the Supreme Court strayed in its effort to resolve the controversial aspects of the law and practice of customary arbitration in Nigeria? In answering these questions, it is apposite that the concept of customary arbitration be re-assessed against the background of the decision of the Nigerian Supreme Court in *Agu's* case.

AGU V. IKEWIBE AND THE LAW AND PRACTICE OF CUSTOMARY ARBITRATION IN NIGERIA: A CRITICAL ASSESSMENT

The decisions of the Supreme Court of Nigeria in *Agu* v. *Ikewibe* and *Ohiaeri* v. *Akabeze* apparently imply a redefinition of the concept of "arbitration" vis-à-vis customary arbitration in Nigeria. The position of the law is that the line of West African Court of Appeal cases including *Oline* v. *Obodo* which express the view that the prior agreement to customary arbitration is irrevocable, are no longer good law in Nigeria to the extent to which they decided that a prior agreement to be bound by the outcome of an arbitration is an element of customary arbitration. The two cases have resolved that it is not and that the proceedings will be binding in the same manner as an arbitration under statute only if the parties accept the decision after it has been pronounced. Prior to such an acceptance, which could be express or implied, each of the parties retain the right to resile whether or not the award favoured him.[27] This is a reversal of the attitude of the courts of Ghana with regards to customary arbitration.[28]

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[26] *Ohiaeri* v. *Akabeze* above, n. 4 at 24–25. See also *Idika* v. *Erisi* [1988] 2 N.W.L.R. [pt. 78] 983 at 986. "Whether the decision will operate as estoppel per rem judicatam or issue estoppel can only be decided when the terms of the decision is known and ascertained. If it qualifies to operate as res judicata, both parties are entitled to that plea. Similarly, if it qualifies as issue estoppel, each party will be entitled to that plea" (per OBASEKI, J.S.C.).

[27] See generally George Elombi, "Customary arbitration: a Ghanaian trend reversed in Nigeria", [1993] 5 *African Journal of International and Comparative Law* 803.

[28] Ibid.

The Ghanaian case of *Foli* v. *Akese*[29] and other cases decided by the courts of Ghana had laid down the rule that the general principles of native customary law 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. 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 an agreement to the contrary, retain the right to reject the award. The basic requirement is the prior agreement of the parties to accept the award of the arbitrators.[30] Thus, the courts of Ghana treat customary law arbitration in exactly the same manner as statutory arbitration and arbitration under the received English law, both of which proceed on the proposition that the parties took their arbitrators for better and for worse and that the requirements of arbitration are satisfied not at the time of the award when an adverse decision may cause one of the parties to reconsider his participation in the proceedings.

Some learned commentators on African law have criticized the compartmentalization 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 in 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.[31] Matson was of a similar view when he earlier contended that the distinction between customary "arbitrators" and those who attempt reconciliation is false and misleading and mistakes a distinction of a degree for one of a kind.[32]

I respectfully disagree with their views. In distinguishing arbitration from conciliation and other consensus-oriented dispute resolution mechanisms, the focus should be on the nature of the decision-making process and not necessarily on its binding nature or enforcement. The means of securing compliance with the decision of a judicial or quasi-judicial body differs from society to society.

It is submitted that the arbitrator's mission, be it under customary or English law, involves the exercise of judicial functions, which among other things requires him to give both parties a fair hearing and to reach a decision on the merits of the parties' cases based on the evidence. The arbitrators' duty in that respect is the same both in customary or English law but different from that of a conciliator given that the conciliator's duty is limited to guiding the parties to reach a compromise solution to their differences.[33] Moreover, the social relationships existing in a particular society determine to a large extent the method of achieving order within it and the suitability of an external policing force to enforce decisions that are taken. These village communities that practise customary arbitration exhibit certain common features which include racial homogeneity, common cultural identity predicated on kinship bonds and a collectivist rather than individualistic social orientation. The use of an external enforcement mechanism

[29] [1930] 1 WACA 1. See also *Kweku Assampong* v. *Kweku Amuaku* (1930) 1 W.A.C.A. 192 and *Kwasi* v. *Larbi* (1956) 13 W.A.C.A. 76, Privy Council.

[30] Elombi op. cit., n. 27.

[31] Antony Allott, *Essays in African Law*, London, 1960, 126.

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

[33] Elombi, op. cit., n. 27, 820.

is rarely resorted to; rather internal measures are used such as social ostracism, shaming and supernatural beliefs. Thus, because of the social structure of these communities, the methods of social control and the social organization of the community are coterminous. Empirically, there is a plethora of sociological and anthropological evidence to the effect that in these local communities, the high degree of social cohesion accounts for the reliance on social pressures rather than an external policing force, to enforce any decisions that are taken.[34] The social nexus of traditional African society is the family which plays a central role in the group consciousness such that the society is sometimes referred to as a familial society.[35] Social relationships are modelled on family relationships and the rules governing the family are regarded as the ideal rules by which other social relationships should be governed. Additionally, traditional African societies are settled in localized farming communities and a consequently stable society of families living in one place generation after generation. Social relations are face-to-face, highly particularized and long in duration. Because of the existing social relationships which encourage communal living, every effort is made to avoid "washing dirty linen" in public and there is a general reluctance to involve authorities outside the community. There is a fundamental mistrust of formal state-run legal institutions, which are perceived as exogenous, intrusive, uncontrollable and ill-suited for representing indigenous concepts of justice. For this reason, there is often a distinct almost exclusive preference for resolving conflicts within the community and according to indigenously defined concepts and procedures.[36]

Against this background, it is submitted that the introduction of external instruments of coercion for the enforcement of customary arbitral awards is an invitation to anarchy and a disruption of the peace and good neighbourliness prevalent in these village communities. It cannot be said that the decisions of customary arbitrators are not binding *stricto sensu* since there are customary

[34] See Michael Barkun, *Law Without Sanctions: Order in Primitive Societies and the World Community*, Yale, 1968, 17 "The way in which a society is organised has a marked effect on the way order is achieved within it"; P.H. Gulliver, "Dispute settlement without courts: the Ndendeuli of Southern Tanzania", in Laura Nader (ed.), *Law in Culture and Society*, Chicago, 11; Max Gluckman, "The judicial process among the Barotse of Northern Rhodesia", in Csaba Varga (ed.), *Comparative Legal Cultures* (Vol.1), Aldershot, 1992, 225; William L.F. Felstinen, "Influences of social organisation on dispute processing", (1974) 9 *Law and Society Review* 62–63 "The dispute processing practices prevailing in any particular society are a product of its values, its psychological imperatives, its history and its economic, political and social organisation."

[35] Generally in Africa, the meaning attached to the word "family" is not restricted to nuclear family but refers to a corporate body created upon the death of the founding father. It includes all his descendants in the male line (in the case of agnatic lineage) or in both male and female lines (in the case of agnatic descent group). New members of the group acquire their membership by virtue of their birth and they accede to their rights at the time of their birth. Thus, the family is made up of multiple generations: parents and children, grandparents, aunts, uncles, cousins, etc. There is always a nexus between one family and another. See generally Gordon Woodman, "The family as a corporation in Ghanaian and Nigerian law", (1974) 11 *African Law Studies* 1.

[36] See generally Peter Just, "Conflict resolution and moral community among the Dou Donggo", in Kevin Avruch et al. (eds.), *Conflict Resolution: Cross-Cultural Perspectives*, New York, 1991, 107–108; O. Adigun, "The equity in Nigerian customary law", in Osibanjo and Kalu (eds.), *Towards a Restatement of Nigerian Customary Laws*, 1991, 8; Chanock, *Law, Custom and Social Order: The Colonial Experience in Malawi and Zambia*, Cambridge, 1985; Sally Engle Merry, "Disputing without culture: review essay on dispute resolution", (1987) 100 *Harvard Law Review* 2057 at 2063. The learned writer rightly noted that "Disputing is cultural behaviour, informed by participants' moral views about how to 'fight', the meaning participants attach to going to court, social practices that indicate when and how to escalate disputes to a public forum and participants' notion of rights and entitlements. Parties to a dispute operate within systems of meaning... The normative framework shapes the way people conceptualise problems, the way they pursue them, and the kinds of solutions they look for."

means of securing compliance with these decisions. What the Supreme Court did was to allow sleeping dogs to lie by refraining from imposing external standards of enforcement inconsistent with arbitration under customary law. Customary arbitration is a localized method of resolving disputes and as such, its enforcement or binding nature should have relevance to the practices acceptable to the village communities that practise it. Thus, customary arbitration should be treated with regard to its own characteristics as known to those to whom it applies. It should not be subject to a validity test by reference to orthodox arbitration or arbitration under the received English law.

Moreover, different societies have different ideas of how to organize human relations and of how to use law and law enforcement institutions to this end. Law in some places is regarded as a model code of behaviour whereas in others, it may be an instrument of compulsion. It consists principally of substantive rules in some places, whereas in other places there are different ideas as to its connection with religion, customs or politics. It is in effect not out of place to talk of the Western conception of law[37] or the Far Eastern conception of law[38] or the African conception of law.[39] These varying conceptions to a very large extent dictate the role assigned to law and legal institutions in a particular society and this is also reflected in the organization and social relations of that society. The Western conception of law necessarily entails the use of force or the practice of formal adjudication.[40] According to Gulliver, the view that "law", a Western term and concept, should be defined by Western criteria has led to difficulties: first, that there are many non-Western societies in which "law" thus defined is absent; and secondly, that alternative institutions and processes in non-Western societies have their comparable counterparts in Western societies, both within and outside the legal system.[41]

In virtually all cases, the decisions of the customary arbitrators are carried out, not by means of an external policing force or coercive measures, but rather the compliance with the decision of the customary arbitrators is secured by means of social pressures engendered by the existing social relationships within the village communities.

Concluding Remarks

It is submitted that the decision of the Supreme Court of Nigeria in *Agu's* case on the binding nature of customary arbitration and other issues is a correct restatement of the law and practice of customary arbitration in Nigeria as known to the village communities that utilize the process as a dispute resolution mechanism. The decision of the court is also a tacit approval of the existing social relationships in these communities, as well as showing that social pressures, not an external policing force, is what is needed for the enforcement of the

[37] See Geoffrey Sawer, "The Western conception of law", in René David et al. (eds.), *International Encyclopaedia of Comparative Law*, 1978, at 17.

[38] Yosiyuki Noda, "The Far Eastern conception of law", in David et al., ibid., at 120.

[39] Keba M'Baye, "The African conception of law", in David et al., ibid., at 138.

[40] See Chin Kim and Craig M. Lawson, "The law of the subtle mind: the traditional Japanese conception of law", (1979) 28 *I.C.L.Q.* 491: "Westerners are accustomed to the idea of justice under a system of rational and impersonal laws. Western society is litigation-oriented; social problems become legal problems, thrashed out in open court."

[41] P.H. Gulliver; "Case study of law in non-Western societies: an introduction", in Nader, *Law in Culture and Society*, 11.

decisions of the customary arbitrators. Furthermore, the decision strikes a balance between the need to prevent arbitrator bias or violation of the parties' right to a fair hearing and the need to recognize the right of the members of the local communities to settle their disputes in a manner acceptable to them. The right of the parties to withdraw from the proceedings is an antidote against arbitrator bias or violation of the parties' right to a fair hearing. It is necessary to remember that it is a feature of customary arbitration in a closely-knit community that some, if not all, of the customary arbitrators have prior knowledge of the facts of the dispute and they may therefore have their prejudices and interests in the matter. Moreover, some of the customary arbitrators have usually been involved in previous efforts to resolve disputes by means of mediation or conciliation. In such situations, they may be biased against the party whom they consider to be responsible for the frustration of a possible settlement at the mediation or negotiation stage. The right of the parties to withdraw from the proceedings or to reject the resultant award serves as a protection against the possibility of such bias. Before a party to a customary arbitration refuses to bow to social pressures to comply with the decision of the customary arbitrators, such a customary arbitral award must be manifestly contrary to the facts or tainted by arbitrator bias or by the violation of the parties' right to a fair hearing.

For the Supreme Court to hold otherwise would not only have amounted to an unwarranted interference in the internal methods of achieving order within these village communities but also have resulted in a marriage of inconvenience between customary arbitration and orthodox arbitration or arbitration under the received English law. However, the Supreme Court ought to have elaborated its decision on the binding nature of customary arbitration by stating in unambiguous terms that there are customary means of enforcing customary arbitration.

Finally, the courts should apply the customs of the present day, and in doing so, the totality of the elements which characterize a given society should be taken into consideration. Customs undergo changes and modifications in accordance with the needs of society. Customary law has been described as a mirror of accepted usage.[42] It still maintains its flexibility and in the words of OSBORNE, C.J.: "... It appears to have always been subject to motives of expediency, and it shows unquestionable adaptability to alter circumstances without entirely losing its character".[43] Arbitration under customary law is no exception.

[42] See *Lewis* v. *Bankole* (1929) 1 NLR 82 at 84.
[43] See *Owonyin* v. *Omotosho* (1961) 1 ANLR 304.