

CUSTOMARY LAW ARBITRATION IN NIGERIA: AN APPRAISAL OF CONTENTIOUS LEGAL ISSUES

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Abstract

It is an established fact that disputes and dispute resolution mechanisms have been a recurrent decimal in human society. Customary law arbitration is one of the modes of settling disputes in Nigeria. This paper has examined the concept of customary law arbitration and the peculiar conditions precedent to its validity. The paper also dissected relevant issues relating to corroborative evidence, pleading and proof of customary law arbitration. It examined the issues as to whether a document containing customary arbitration proceedings is a public document that requires certification and whether affidavit evidence can be used to establish the existence of prior customary arbitration over a disputed fact. The authors adopted the analytical research approach wherein relevant statutory and scholarly materials were assembled, analysed and critiqued. The authors have proffered recommendations which, if adopted, would encourage Nigerians to embrace customary law arbitration in resolving disputes.

1. Introduction

Nigerians, and indeed, Africans had a way of settling disputes among themselves before and after colonisation.¹ This was by way of customary judicial system which included both civil and criminal

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adjudication. It is an established principle in African customary jurisprudence that whoever commits an offence must be punished.² Mbiti³ is of the view that each community has its own form of restitution and punishment for various offences and it is the elders that administer it. In other words, the elders and chiefs played and still play a major role in ensuring maintenance of law and order and settlement of dispute in their communities. Depending on the nature of the dispute, the adjudicatory body is headed by the family head, community head or village king and his chiefs - in – council.

The customary arbitral process is known for its conciliatory nature which tends to avoid unnecessary animosity among members of the society. Thus, despite the introduction of formal legal system by the colonial masters, Nigerians still have recourse to customary arbitration with a view to resolving disputes arising from their daily transactions, and the formal courts have recognised this process.

This paper examines the place of customary law arbitration in the settlement of disputes among indigenous Nigerians. The paper discusses the concept of customary law, its attributes and validity tests, customary law arbitration and the conditions precedent to its validity. Moreover, the paper raises and discusses questions as to proof of customary law arbitration, i.e, it highlights the importance of corroborative evidence and interrogates the contradictory judicial opinions as to whether a document containing customary arbitration proceedings is a public document that requires certification, whether ingredients of customary arbitration must be pleaded before evidence can be led to establish same and whether affidavit evidence can be used to establish the existence of prior customary arbitration over a disputed fact.

2. Understanding the Concepts of Customary Law and Arbitration

2.1. Customary Law

As a starting point, we make haste to submit that there is no codified body of customary law that is universally applicable in all the states in Nigeria. Rather, the over 250 tribes in Nigeria have different native laws and customs that regulate their customary affairs, including customary means of settling dispute, with some elements of similarities and disparities.⁴ These various native laws are generally referred to as customary law and it is in that sense the phrase is used in this paper.

Customary law, which would be used interchangeably with custom, has been variously defined by statutes, the Courts and scholars. Section 258 (1) of the *Evidence Act 2011* defines custom as “a rule

¹ Akhigbe, E.E., Adekanle, A., Oamen, P.E., *etal*, “100 Years of Customary Law and Disputes Settlement in Nigeria-A Comment” in the Conference Proceedings of the 47th Annual Conference of the Nigerian Association of Law Teachers, held at the Ebonyi State University, Abakaliki in June, 2014, 476.

² Adekanle, A., “Ostracism as a Means of Enforcing Judgment of Customary Arbitration and the Challenge of Fundamental Rights”, (2013), Vol. 3 No 1, *Ambrose Alli University Law Journal*, .21.

³ Mbiti, J.S., *African Religions and Philosophy*, (London: Heinemann, 1969), 211.

⁴ For further discussion on this, see Park, A.E.W., *The Sources of Nigerian Law*, (Lagos: African Universities Press Ltd, 1963), 65.

which, in a particular district, has from long usage, obtained the force of law.”On its part, Imo State Customary Court Edict⁵ defines customary law as:

A rule or body of customary rules regulating rights and imposing correlative duties, which obtains and is fortified by established usage and which is appropriate and applicable to any particular cause, matter, dispute, issue or question.

In the case of **Oyewumi v. Ogunesan**⁶ the Supreme Court defined customary law as:

The organic or living law of the indigenous people of Nigeria regulating their lives and transactions. It is organic in that it is not static. It is regulatory in that it controls the lives and transactions of the community subject to it. It is said that custom is a mirror of the culture of the people....⁷

Also in the case of **Olabode v. Lawal**⁸, the Court defined custom or customary law as a set of rules of conduct applying to persons and things in a particular locality.⁹ It is a mirror of accepted usage.¹⁰

In the circle of scholars, the term under consideration has also been defined. Hence, *Elias* says customary law of a community is the body of rules which are recognised as obligatory by its members.¹¹ On his part, *Salmond*¹² states that “*custom is the embodiment of those principles which have commended themselves to the national conscience as principles of truth, justice and public utility.*” *Obilade*¹³ defines the concept as one which “*consists of customs accepted by members of a community as binding among them.*” Customary law has also been defined as “The law of the indigenous people of Nigeria, which varies from one locality to the other. It is a body of rules and regulations that governs conducts and activities of the people as opposed to the laws promulgated by the House of Parliament [that is, the National Assembly or a State House of Assembly] in Nigeria.”¹⁴ In *Kanam*’s view, customary law is “*the law that is developed through the customary*

⁵ No. 7 of 1984, cited in Tilley – Gyado, M.U., “A Case for the Inclusion of African Customary Law in the Curriculum of Law Faculties in Nigerian Universities” in Ayua, I.A. (ed.), (1993 – 1995), Vols. 2 & 3, *Nigerian Current Legal Problems*, 255.

⁶ (1990) 3 NWLR (pt. 182) 20.

⁷ See also the cases of *Pam v. Gwon* (2000) 74 LRCN 22 and *Ogolo v. Ogolo* (2004) 115 LRCN 3099

⁸ (2008) 17 NWLR (pt. 1115) 8.

⁹ See also *Owoniye v. Omotosho* (1961) 1 All NLR 304.

¹⁰ See the case of *Owoniye v. Omotosho* (supra).

¹¹ *Elias, T.O., The Nature of African Customary Law*, (Manchester: The University of Manchester Press, 1956), 39.

¹² *Salmond, J. W., Jurisprudence* (1920) 143.

¹³ *Obilade, A.O., The Nigerian Legal System*, (London: Sweet and Maxwell, 1979) 4.

¹⁴ *Adekanle, A. & Agbator, A., “Towards the Enforcement of Women’s Right to Inheritance and Abolition of Cultural Discrimination against Women in Nigeria,”* (2010), Vol. 2, *EJOB*, 145.

practices of the people which it is meant to government [sic, govern] and regulate their activities.”¹⁵

We agree with *Adekanle*¹⁶ that “customary law is part of the laws of Nigeria and it is as valid as laws promulgated by the Parliament in Nigeria.” However, we wish to add that before a customary law can be said to be as valid as a law passed by the legislature, such a custom would have passed the tripartite tests of repugnancy, inconsistency and public policy. Once these tests, which would be highlighted soon, are passed, the regular courts are duty-bound to give recognition and enforcement to such customary law.¹⁷

2.2.

Arbitration

Arbitration, known as “arbitrament” in customary law, is the reference of a dispute or difference between not less than two parties for determination, after hearing both sides in a judicial manner, by a person or persons, other than a court of competent jurisdiction.¹⁸ In the case of *Agala v. Okusin*¹⁹, the Supreme Court defined arbitration thus: “An arbitration is a reference to the decision of one or more persons either with or without an umpire of a particular matter in difference between the parties.”

Arbitrament is the customary law kind of today’s English law arbitration. *Arbitrament* has been defined as “the award or decision of arbitrators upon a matter of dispute which has been submitted to them.²⁰ In other words, it is a system where a neutral person is requested to mediate in a dispute between one person and another, or between one community and another.²¹

3 Attributes of Customary Law

Though we had opined, earlier on, that tested customary law occupies the same pedestal with legislatively-flavoured laws as regards their validity, it is however apposite to state here that customary law parades certain features which make it peculiarly different from enacted laws. These characteristics include:

3.1 Flexibility:

Customary law is flexible and thus amenable to change, depending on the circumstances on ground. One major reason that accounts for this flexibility is the fact that customary law is largely unwritten and hence easily subject to change. As the society advances, the advancement comes with the need to

¹⁵ Kanam, S.M., “The Effect of the Incompatibility Test on the Application of Customary/ Islamic Law”,(2002), Vol. 23, *Journal of Islamic and Comparative Law*, 78.

¹⁶ Adekanle, A., op. cit., 21.

¹⁷ See *Laoye v. Oyetunde* (1944) AC 170.

¹⁸ Halbury’s Law of England, 4th Edition, Vol. 2, p.256.

¹⁹ (2010)10 NWLR (pt. 1202) 412 at 448 para G.

²⁰ Garner, B.A., *Black’s Law Dictionary*, eight edition, (USA: West Publishing Co., 2004), 1220.

²¹ Emiola, A., *Emiola’s African Customary Law*, 3rd Edition, (Ogbomosho: Emiola Publishers Limited, 2011),74.

adopt and adapt certain practices which may lead to discarding of certain rules of customary law. In the words of *Osborne*, C.J. in the case of **Lewis v. Bankole**²²:

One of the most striking features of West African custom... is its flexibility; it appears to have been always subject to motives of expediency, and it shows unquestionable adaptability to altered circumstances without entirely losing its character.

3.2 Diversity:

The point has already been made that there is no single body of law known as customary law which applies to the entire country. The secular and diverse nature of the Nigerian society is also reflective of the respective customary laws of the Nigerian people. As Nigerians are diverse in tongues, so are the customary laws applicable to them diverse²³. To *Lateef*²⁴, the diversity of human nature, society and idiosyncrasies account for this diversity of customary law. Thus, there is no uniformity of customary law in Nigeria.

3.3 It is Unwritten:

As noted above, customary law is largely unwritten.²⁵ As a matter of fact, it is this unwritten and unsystematic nature of the law that brought about the misconception among the colonial masters that Nigeria, nay Africa, had no laws before the advent of the British.²⁶ Being a law that evolves from customary practices of the respective communities in Nigeria, customary law is best known by heart rather than being traced to a written code.²⁷ Customary law is not declared or enacted but grows from or develops through time.²⁸ Hence, in *Allot's* perspective,

There is no written memory of edicts and decisions of past legislators or judges; they exist only in the minds of those who are subject to the customary law. There is no pondering over legal principles, no juristic analysis, no criticism or refurbishing of old precedents all of which depend on written texts which the jurists may scrutinize at leisure....That is, the rules of law trace back to the habits, customs and practices of the people, which

²² (1908) 1 NLR 81 at 100 – 101.

²³ Akhigbe, E.E., Adekanle, A., Oamen, P.E., *etal, op. cit.*, 475.

²⁴ Lateef, M.A., “Is Islamic Law Customary Law?”, (2012), Vol. 1, *The Silk (A Journal of Legal Issues for Contemporary Justice in Nigeria)* Vol. 1, 121.

²⁵ See *Nandi v. Njoku* (2008) 15 NWLR (pt. 1110) 287 – 288.

²⁶ Okogeri, O., “A Legal Reappraisal of Customary Adjudicatory System in Nigeria”, (2007) Vol. 10, No. 1, *UNIBEN Law Journal*, 85.

²⁷ Akhigbe, E.E., Adekanle, A., Oamen, P.E., *etal, op. cit.*, 474.

²⁸ Fuller, L.L., *Anatomy of the Law* (1968) 71.

engender and support the norms expressly formulated from time to time for the decisions of disputes.²⁹

3.4 .Acceptability or popularity:

Customary law owes its popularity to the people's willing and favourable disposition or acceptance to its rules in their day to day activities. Put differently, customary law binding effect is rooted in the fact that the people have voluntarily accepted it as the law that regulates their conduct, rather than one imposed by any coercive regime. This is why customary law has been defined as a "*mirror of accepted usage*."³⁰ According to *Emiola*³¹, it is the popularity of customary law among the people that gives the law the strength and validity it enjoys in the community.

4. Validity Tests for Customary Law

As a preliminary remark on this, it is pertinent to state that, prior to the year 1876, customary laws in Nigeria were applicable to the respective peoples of Nigeria in their respective localities without any form of restriction, limitation or validity test. However, in 1876, the British colonial masters enacted the Supreme Court Ordinance which Ordinance heralded a limitation clause to the applicability of customary law in Nigeria. The Ordinance states that before a customary law can be applicable or enforceable, it must pass the tripartite repugnancy test, incompatibility test and public policy test. In other words, the Ordinance provides that, post 1876, no custom or customary law will be enforced by the Courts unless the custom has first of all passed the above tests. It is equally important to state that, post 1876, regular customary Courts, established by statutes³², now sit over most customary law related issues. These courts have been vested with both civil and criminal jurisdiction in respect of some specific customary law matters. Though the elders still preside over disputes, they now exercise their powers side by side with the statutorily established customary courts which enforce customary law.³³ We will now examine the tripartite validity tests.

4.1. Repugnancy Test

In spite of the fact that the British administration introduced the common law principles, doctrines of equity and statutes of general application to Nigeria, Nigerian indigenous or customary law continues to apply to Nigerians in their daily affairs, though its applicability is subject to it not being repugnant to natural justice, equity and good conscience. As already laid out, this particular test originated from the Supreme Court Ordinance, the various High Courts Laws³⁴ and the Evidence Act. These laws did not however define the phrase "natural justice, equity and good conscience," thereby leaving it to the

²⁹ Allot, A.N., *Essays in African Law*, (London: Butterworth's African Law Series, 1960), 62.

³⁰ See *Owonyin v. Omotosho* (supra).

³¹ *Emiola, A., op. cit.*, 15 -16.

³² See, for example, the Customary Courts Law of Lagos State, 2004.

³³ Akhigbe, E.E., Adekanle, A, Oamen, P.E., *etal, op. cit.*, 482.

³⁴ See, for example, Section 34(1) of the Northern Nigeria High Court Law of 1963 and Section 13 (1) of the High Court Law of Bendel State, 1976 (now applicable in Edo and Delta States).

discretion of individual judges. Be that as it may, *Park*³⁵ says a custom will be declared repugnant to natural justice, equity and good conscience if it does not conform to the “most advanced notions of what is socially ideal in a particular situation.” Some writers have contended that this statement is only begging the question because, what is socially ideal is subjective to the perceptions of each individual. The writers query that, assuming the test is objective or subjective, which value will be used to measure the repugnancy? Is it based on what the English value says is repugnant to natural justice, equity and good conscience or that of customary value?³⁶

Park opines that customary law must be subjected to the fires of repugnancy test prescribed by an outside value or standard, instead of customary law value itself. To his mind:

It can therefore be stated with confidence that inconsistency with the principles of English law is not the standard applied in determining whether a particular rule is repugnant to natural justice, equity and good conscience. Equally, it is obvious that conformity with local custom is not the test, for, of course, it is precisely local custom whose validity is being determined. Consequently it must be the case that some less specific factor which is not derived from any individual legal or social system, but rather from general notions of what is just and proper.³⁷

It is our candid submission that the repugnancy test should be based on the customary value of the people, rather than on an external force or factor as proposed by Park. Since customary law flows from the age – long practices and deep –rooted convictions of the people, the question as to whether a particular custom is repugnant should be resolved by the customary law among the people concerned, and not by some external or extraneous factors or considerations. If a custom is acceptable to the people, then the issue of repugnancy should not arise, simply because it is not acceptable to English law.³⁸

4.2. Incompatibility Test

Every customary law must be compatible with existing enacted laws before the courts can enforce it. Being compatible means it must not be incompatible or incapable of existing together in harmony or incapable of combination, cooperation or functioning together with statutorily flavoured laws. This test was given recognition in **Oyebola v. Obanleowo**.³⁹ In this case, the Court held that a rule of customary law will be incompatible with a written law when both laws deal with the same subject matter and the enacting authority has intended in the written law that

³⁵ Park, A.E.W., *op.cit.*, 72.

³⁶ Akhigbe, E.E., Adekanle, A, Oamen, P.E., *etal, op. cit.*, 483.

³⁷ Park, A.E.W., *op. cit.*, 70

³⁸ Akhigbe, E.E., Adekanle, A, Oamen, P.E., *etal, op. cit.*, 483.

³⁹ (unreported), cited in Keay and Richardson, *The Native and Customary Courts of Nigeria* (London: Sweet and Maxwell, 1960),240.

customary law should not govern the subject matter. The test forbids the Courts from enforcing any customary law that is inconsistent, directly or by necessary implication, with any “written law⁴⁰” or “any law⁴¹” for the time being in force.

The question is, what does written law or any law mean? Does it include both local and English legislations? “Any law for the time being in force” has been interpreted to mean both locally made laws and received English laws. Hence, in **Re Adadevoh**,⁴² it was held that “any law” as used in the High Court Law means both statutes/legislations and the English common law rules. Put differently, the court held that a customary law would be said to have passed this test only where it is not inconsistent with both statute and common law principles as well as the doctrine of equity. However, in the subsequent case of **Malomo v. Olusola**⁴³, the Court took a position different from the judicial opinion in **Re Adadevoh**, by holding that “any law” does not include received English law.

We submit that the decision in **Olusola’s case** is more preferable in that, “any law” or “any written law” ought to be given a restrictive meaning, that is, it should refer to only Nigerian legislations. Including the received English statutes, common law and equity within the conclave of the definition would amount to total erosion of our customary law as the English law is largely incompatible with most of the rules of customary law.⁴⁴ Hence, *Obilade* observes, and we completely agree with him, that:

It should be noted that Customary Law is so inconsistent with English Law that prescribing an incompatibility test by reference to English Law would result in virtual abolition of Customary Law. It does not seem that such a destructive effect was intended by the legislature.⁴⁵

4.3. Public Policy Test

Further, a customary law, to be enforceable, must not be contrary to public policy. Hence section 18 (3) of the Evidence Act 2011 fortifies this position when it states that:

In any judicial proceeding where any custom is relied upon, it shall not be enforced as law if it is contrary to public policy, or is not in accordance with natural justice, equity and good conscience.

⁴⁰ As used in Section 13 (1) of the High Court Law of the defunct Bendel State, 1976.

⁴¹ As used in Section 26(1) of the High Court Law of Lagos State.

⁴² (1951) 13 WACA 304 at 310. A similar decision was reached in *Adesubokan v. Yunusa* (1971)NNLR 77.

⁴³ (1955) 15 WACA 12.

⁴⁴ Akhigbe, E.E., Adekanle, A, Oamen, P.E., etal, *op. cit.*, 485.

⁴⁵ *Obilade, A.O., loc. cit.*

Lastly on this, it is also germane to state that, apart from the above tests, customary law, unlike enacted laws, must be proved in court. This is owing to the fact that matters of customs or customary law are matters of fact which must be proved by cogent, convincing and credible evidence in court. Except for those customs that have been judicially noticed⁴⁶ by our Court by virtue of section 17 of the Evidence Act 2011, every custom is deemed to be a fact that must be specifically pleaded and proved. Thus, Section 18 (1) of the Evidence Act 2011 provides that “*where a custom cannot be established as one judicially noticed, it shall be proved as a fact.*” In **Agara v. Agunbiade**⁴⁷, it was held that:

....By virtue of the well set out provisions of section 14 [now Sections 17 and 18] of the Evidence Act, customary law pleaded by a party must be established in any of the following two ways, viz:

- a) By the court taking judicial notice of its existence; or
- b) By the party pleading same, by leading evidence in the particular case.

Also in the case of **Shuaibu v. Muazu**⁴⁸, the Court held that the law is settled, that where a party intends to set up and rely upon native law and custom, the asserted custom must be specifically pleaded and strictly proved. The court further stated that corroborative evidence is not a requirement for proof of customary law.

Although the judicial opinion in **Shuaibu’s case** tends to suggest that corroborative evidence is not necessary to prove a custom that has not been judicially noticed, we submit that a better view is that a party who seeks to rely on such a custom should call as many witnesses as possible to corroborate his opinion about the existence or condition of the asserted custom. Hence, in **Abolarin v. Ogundele**⁴⁹, the court held that:

He who asserts must prove under the Evidence Act, a customary law is a matter of fact to be pleaded and proved by evidence unless it has been judicially noticed. It is also good law that it is desirable that a person other than the person asserting should also testify in support as it is unsafe to accept the statement of the only person asserting.

In the instant case, only the respondent (as claimant) testified in support of his case. He did not deem it fit to call any witness to buttress his version of customary law on the appointment of Alapa of

⁴⁶ Such as the igiogbe custom among the Binis whereby the house where a Benin man lived, died and was buried is an exclusive inheritance of his eldest surviving son. See *Uwaifo v. Uwaifo* (2013) All FLWR (689) 1116 at 1128 paras D –E .

⁴⁷ (2013) All FLWR (pt.683) 1899 at 1816 -1817 paras G - A.

⁴⁸ (2014) 8 NWLR (1409) 207 at 284 paras D- F.

⁴⁹ (2012) 10 NWLR (pt. 1308) 253 at 288 paras B-G.

Omido, hence it is unsafe to hold that he has proved the custom of Omido Community on the selection of Alapa.

5. Requirements for a valid Customary Arbitration

As noted above, customary arbitration is one of the most potent ways of settling disputes among the indigenous people of Nigeria. Thus, in the case of **Nwankpa v. Nwogu**⁵⁰, Nsofor, JCA, while quoting Karibi-Whyte, JSC's dictum in **Agu v. Ikwibe**⁵¹, stated thus:

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 upon 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 up to that point. This is common method of settling disputes in all indigenous Nigerian societies.⁵²

However, before the court can recognise and enforce customary arbitration award, the proceedings leading to the award must meet certain requirements. In **Agala v. Okusin**⁵³, the Supreme Court held, *inter alia*, that “ where...there was an intervention by a non-judicial body, then the court ought to be satisfied that a number of conditions precedent were satisfied before it could hold that the decision constitutes estoppels.” The question, then, is, what are those conditions precedent to a valid customary arbitration? To them we now turn.

a. Voluntary submission of the dispute

It must be shown by clear evidence that the parties to the customary arbitration voluntarily submitted the dispute between them to the arbitrators for hearing and determination. If there is evidence that any of the parties was coerced to submit to arbitration or even refused to so submit, the entire proceedings would be voided at the instance of such an aggrieved party. In the recent case of **Raphael v. Ezi**⁵⁴, it was held that since evidence was led to show that the plaintiff/respondent had informed the Ogienu of Uzairue that he would not submit to an arbitration presided over by the traditional ruler, the entire arbitral proceedings carried out without such voluntary submission by one of the parties was void and its outcome cannot therefore debar the plaintiff/respondent from re-litigating the matter in the regular court.

b. Prior agreement to be bound by the arbitral award

⁵⁰ (2006)2 NWLR (pt. 964) 251 @ 279-280 paras G-B.

⁵¹ (1991) 3 NWLR (180) 385.

⁵² See also *Egesimba v. Onuzuruike* (2002)15 NWLR (pt. 791), 466 @513, para C.

⁵³ (2010)10 NWLR (pt.1202) 412 at 447-448 paras G-C.

⁵⁴ (2015) 12 NWLR (pt.1472) 39 at 60-61 paras H-B.

Further, both parties must have agreed from the outset that, they would accept and be bound by the outcome of the customary arbitration proceedings. This agreement could be given expressly or by necessary implication or conduct. Where the court finds out that a party had earlier agreed to accept the outcome of the arbitration, he may not be allowed to resile from it.

c. The customary arbitration must conform to the custom of the parties

It must also be shown that the customary arbitration over the dispute of the parties was conducted in line with the custom of the parties. The law frowns at the importation of a foreign or extraneous custom to adjudicate over such a dispute.

d. Decision making and publication of award

Moreover, it is further required that the customary arbitrators reach a definite decision on the dispute between the parties and thereafter publish their award.⁵⁵ Where no decision is made and award published after the hearing and determination of the dispute, it cannot be said that the customary arbitration dispute resolution mechanism has been concluded.

e. Acceptance of the award at the time it was made

It must also be shown that the parties accepted, either expressly or impliedly, the decision or award of the customary arbitrators as soon as they made the award.⁵⁶ *Adekanle*⁵⁷ is of the view, and we agree, that the requirement that parties must accept the award or decision of the arbitrators, before it becomes binding, should be expunged. He predicates his argument on the fact that it is only natural for a party against whom such an award is given to reject it and such rejection makes the customary arbitration process nugatory. We therefore submit that, in line with this reasoning, the court should strike down or remove this liberty given to parties to customary arbitration to either accept or reject the outcome of the arbitration. Such a removal would make the customary arbitration more effective and at par with the English legal system kind of arbitration where parties commit themselves, well in advance of the arbitral decision, to be bound by the decision and are unable to resile from same, except by appealing to a higher court.

It should be noted that, once the above conditions or requirements are satisfied, the decision reached or award made at a customary arbitration becomes binding on the parties thereto and same can be used as a defence of *res judicata* in a subsequent court action on the same or similar facts, subject matter and parties. In other words, once customary arbitration proceedings satisfies the above itemised requirements, its decision or award shall have binding effect and have the same authority as the

⁵⁵ See *Okoye v. Obiaso* (2010) 186 LRCN 181.

⁵⁶ See Akpata, JSC's view in *Ohiaeri v. Akabueze* (1992) 2 NWLR (pt.221) 1.

⁵⁷ *Adekanle, A., op. cit., 24.*

judgment of a judicial body and thus create estoppel.⁵⁸ In the case of **Achor v. Adejoh**⁵⁹, *Aboki*, JCA stated:

....Where parties agree to submit themselves to the arbitration of a traditional authority, they should be bound by whatever decision reached by the traditional authority. I am of the opinion that such decision will act as estoppels to future relitigation on the same matter by the same parties or their privies.⁶⁰

7. Contending Issues in pleading and proving Customary Arbitration as *Estoppel*

There are some contending issues as to what a party who seeks to rely on an earlier customary arbitration award needs to plead and prove before he can succeed in his defence of *res judicata*. *Res judicata* is a defence that a defendant raises to show that the case he is made to answer for has earlier been adjudicated upon and decision reached by a competent adjudicatory body as regards the same subject matter and parties. We would now examine some of these issues.

First, what does the law require to be pleaded as far as reliance on previous customary arbitration is concerned? In other words, would a pleading that merely states that there had been a concluded customary arbitration over the subject matter of the present litigation suffice, or does the pleading have to include the ingredients of the arbitration? There are discordant judicial opinions on this issue. While the Supreme Court held, in **Egesimba v. Onuzuruike**⁶¹, that a party need not plead the ingredient of the customary arbitration, the Court of Appeal, quite surprisingly, held otherwise. According to the Supreme Court in the Egesimba's case:

....Where it is clearly averred by a party that there was a previous customary arbitration which was in his favour and that he will rely on it, it will not be necessary for him to plead the ingredients establishing the estoppels. The party will have to adduce credible evidence of the relevant ingredients or incidents necessary to sustain the material plea of estoppels by customary arbitration.

The four ingredients usually accepted as constituting the essential characteristics of a binding customary arbitration are: (i) voluntary submission of the dispute to the arbitration of the individual or body; (ii) agreement by the parties either expressly or by implication that the decision of the arbitrators

⁵⁸ See *Egesimba v. Onuzuruike* (supra).

⁵⁹ (2010) 6 NWLR (pt. 1191) 537 at 569 paras D-E.

⁶⁰ See a similar decision by the Supreme Court in the earlier case of *Nka & Ors. v. Onwu & Ors* (1996) 40/41, LRCN 1303 at 1322.

⁶¹ (supra).

will be accepted and binding; (iii) that the arbitration was in accordance with the custom of the parties and (iv) that the arbitrators reached a decision and published their award.

It was not the case of the plaintiff at the trial or in the court below that these ingredients were not established, nor, indeed, that the pleading was in any way deficient to raise the issue of estoppels.

On the other hand, the Court of Appeal, per Nsofor, JCA, held in the case of **Nwankpa v. Nwogu**⁶² that:

...it is my respectful opinion that any party relying on arbitration under customary law should clearly plead and convincingly prove that those who sat over his dispute were, under the customary law alleged, competent to adjudicate over that class of cases-in other words that they constituted a judicial tribunal under the law. It should also be pleaded and proved that the decision of the arbitrator (or arbitrators) was final in the sense that it left nothing to be determined or ascertained thereafter in order to make it effective and capable of execution; that the decision was not under some other rule of the customary law of the parties, subject to subsequent review or modification by the panel of chiefs or elders who pronounced it. And as there is no general rule of customary law operating throughout the entire country or even throughout Abia State, it becomes necessary to plead and prove the peculiar incidents of the particular customary law (on which the parties rely) with regard to mediation or arbitration

On this issue, we pitch our tent with the Supreme Court. We humbly submit that a pleading that generally states that there has been a customary arbitration over the dispute now litigated upon and that the decision of the arbitrators would be relied upon at trial would suffice. In other words, there is no need to plead the specific requirements or ingredients of the customary arbitration. Such ingredients are better reserved for the trial proper where they would be proved by cogent and convincing evidence. Moreso, the decision of the Supreme Court should prevail in this instance as in all instances since it is the highest court in Nigeria. One therefore wonders why the lower court (Court of Appeal) did not follow the apex Court's decision which was already in place before the Court of Appeal determined **Nwankpa v. Nwogu**.

⁶² (supra), 276-277, paras H-C.

Another thorny issue is whether a document which contains the award or decision of customary arbitration is a public or private document. The answer to this question would help in determining an equally important question, i.e., whether such a document would need to be certified before same can be admissible in court. By the import of section 112 of the Evidence Act 2011, it is a Certified True Copy of a public document that is admissible in proving the contents of the public document.

Just like the issue of pleading we just examined, both the Court of Appeal and the Supreme Court appear to be travelling on different routes on this issue of classification of document. The Court of Appeal, per Aboki, JCA, held in **Achor v. Adejoh**⁶³ that:

The document herein referred to as exhibit “A” is an arbitration proceedings between the same parties....Exhibit “A” did not indicate the *res* or subject matter of the arbitration and has also not been certified. The document is a public document and as secondary evidence it must be certified before it can be admissible.

....Exhibit “A” having been admitted in evidence without certification should be discountenanced and expunged from the record of this court.

On the contrary, the Supreme Court stated in **Okoye v. Obiaso**⁶⁴ that such a customary arbitration judgment or award is not a public document that requires certification before it can be admitted in evidence. According to Onnoghen, JSC (as he then was):

....Exhibit J touches on the same land earlier dealt with by Oba elders under customary arbitration and therefore very relevant to the case; it was a copy given to the respondents by the secretary to the Oba elders who handled the arbitrationIt does not need the secretary of Oba elders to tender it before it can be admissible in evidence neither does it require prove [sic, proof] of the signature of the said secretary.... Exhibit J is also not a public document to require certification....

Corroboratively, Adekeye, JSC in the same **Okoye v. Obiaso**⁶⁵ asserted that:

....Exhibit J is not a public document and hence does not require any certification. It is the findings of the two lower

⁶³ (supra), 591-592, paras H-B.

⁶⁴ (2010) 8NWLR (pt. 1195) 145 @167 paras D-E.

⁶⁵ (Supra) ,171-172, paras H-A.

courts that exhibit J an arbitration decision of Oba elders act [sic, acts] as an estoppels against the plaintiff/appellants. In the circumstances, they cannot be heard to re-litigate the matter all over again.

While we submit that the views of the Justices of the apex Court appear to be more correct than that of the Court of Appeal, on the ground that there was no evidence to show what made the arbitration documents public documents, we however contend that the Supreme Court's pronouncement was rather too sweeping and leaves no room for any possibility of a customary arbitration award ever becoming a public document. It is, therefore, our humble submission that though a customary arbitration award is not, generally speaking, a public document, there is the likely circumstance where the document can come within the interpretative purview of a public document, that is, where the subject matter of the arbitration relates to the official acts of the executive, legislative or judicial arms of government. For example, a customary law arbitration proceedings based on a Government-registered mode of succession to a chieftaincy stool may arguably come within the definition of public document.

Further, there is this vexed issue as to whether affidavit evidence can be used to prove the existence of prior customary arbitration award in a subsequent litigation. The Court of Appeal seems to have ruled out the possibility of using affidavit evidence to establish the customary arbitration. Hence, in the fairly recent case of **Mkpa v. Mkpa**⁶⁶, Oriji-Abadua, JCA said:

Having sorted out the context in which the learned trial Judge used the word "arbitration" in his decision, it cannot, therefore, be overemphasised that a defendant who raises a plea of estoppels by customary arbitration must prove the same by credible evidence. Such a plea is not one that can be disposed of or determined by a trial court on the affidavit evidence of the parties.

His Lordship was not yet done. The learned Justice went further to state:

I must, with respect, to the learned trial Judge, hold that since it is an established law that the ingredients of a binding customary arbitration must be pleaded and proved by credible evidence before the court by a defendant who raised the plea of estoppels by customary arbitration, it is absolutely wrong in law for the learned trial Judge to have dismissed the appellant's case at a preliminary stage based on the affidavit evidence of the 2nd respondent without 2nd

⁶⁶ (2010) 14 NWLR (pt. 1214) 612 at 637 paras F-G.

respondent leading any credible evidence whatsoever in proof of those ingredients.⁶⁷

We submit, with due respect, that the Court of Appeal was wrong to have taken the above position in the **Mkpa case**. Our submission is predicated on two fronts, First, and as we have already dissected above, the said decision runs contrary to the Supreme Court position on whether or not ingredients of customary arbitration must be pleaded before same can be proved by credible evidence during trial. Second, the Court of Appeal seemed to have been labouring under the miscomprehension that it is only evidence given *viva voce* or orally that can be termed “credible”. It is our submission that what determines the credibility or otherwise of a piece of evidence is not solely tied to its being given orally or in the witness box. Hence, if affidavit evidence is found to be cogent, convincing and compelling, it can be held credible and thus used to establish the existence of an earlier customary arbitration award over a given subject matter, with a view to raising the defence or plea of estoppels by customary arbitration. Therefore, it is our humble view that, the above *dictum* of His Lordship lacks foundation in law as no law prohibits a party from using credible affidavit evidence in establishing or proving any fact whatsoever. After all, affidavit evidence, being sworn evidence, occupies the same legal pedestal and status with oral evidence given in open court.

8. Conclusion

In this paper, we have discussed customary arbitration with emphasis on its ingredients and emerging thorny legal issues. It is our finding that the indigenous Nigerian society has always had recourse to customary arbitration in settling interpersonal and communal disputes. We have also found out that the applicability of customary law, nay customary arbitration is still tied to the English law-imposed tripartite tests. It is further our finding that there are discordant tunes from the Nigerian courts as to issues of pleading customary arbitration, whether customary arbitration award is a public document as well as whether affidavit evidence can be used to prove the existence of customary arbitration. These burning issues have been addressed in the paper.

9. Recommendations

Further to the foregoing, we recommend the following:

- a. There should be home-grown or local tests on what customary law should be applicable or not applicable. The courts should discountenance the continued reliance on English law for guide in this regard as same weakens the potency of our indigenous or customary laws.
- b. Nigerians should continue to use customary arbitration to settle disputes as it tends to ensure a quicker dispensation of justice, when compared to the formal or regular court process. It also promotes reconciliation and reduces animosity between the parties. However, the court should revisit its position on the leeway given to a losing party to resile from arbitral proceedings. We canvass a customary arbitral process that does not give room to a party to

⁶⁷ At page 641 of the Law Report in the said **Mkpa’s case**.

back out of the proceedings mid-way, provided consent and submission to arbitration had earlier been given by the aggrieved party (ies).

- c. There should be consistency in making judicial opinions. There should be a synergy between the apex court and lower courts in judgment delivery with a view to eliminating the emergence of discordant judicial voices as to what exactly the position of the law is. This will bring about certainty in our laws which would consequently confer or boost the needed public confidence in the judiciary.