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AN OVERVIEW OF SIMILARITIES BETWEEN CUSTOMARY ARBITRATION AND NATIVE COURTS AS PLATFORMS OF ADMINISTRATION OF JUSTICE IN PRE- COLONIAL NIGERIA

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A B S T R A C T

At the pre-colonial times, a traditional mode of adjudication existed in plural forms; representing the various ethnic formations and rules in Nigeria. This ranges from Customary Arbitration to native courts; purpose of both platforms remains however the administration of justice. In African states, arbitration grew from customary law. In traditional African societies, parties to a dispute often resort to customary arbitration by submitting their dispute to family heads; chiefs and elders of the community for settlement and the parties will mutually agree to be bound by such decision. Arbitration was used for resolving conflicts then because of its emphasis on moral persuasion and its ability to maintain harmony in human relationship. In a similar vein in the 19th century, before the annexation of Lagos in 1861, the different societies that now form Nigeria and other African countries had their own political systems and their methods of administering justice. There existed ‘‘traditional courts” where traditional rules were applied against parties, irrespective of whether they were indigenes or foreigners. This paper seeks to look into these, establish similarities between customary arbitration and native courts; also establish that Africans have always had their own way rich way of settling disputes, which invariably have been sustained and modified into the modern ways of dispute resolution.

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INTRODUCTION

Before the advent of Europeans in Africa, Nigeria composed of pockets of tribal settlements and societies. Such settlements and societies started with a man and his family, which expanded by marriages, births, migration, conquest and annexation among other factors. These settlements and societies had its own legal system and methods of dispensing justice however differently or deficient e.g. customary law; had its innumerable customs; had its procedure for adjudication and enforcement and its correctional measurement methods and institutions. This paper seeks to look into all these.

EXPLANATION OF TERMS

Customary Laws

There is no universal definition of customary law. It has been referred to as "Native Law and Custom'', "Native Law", "Native Customary Law" and "Local Law" by many[1].

The Customary Court Laws of Anambra State defined it as:

> *A rule or body of rules regulating rights and imposing correlative duties, being a rule or body of rules which obtains and is fortified by established usage and which is appropriate and applicable to any particular cause, matter, dispute, issue or question*[2].

It is noted by the Supreme Court in *Zaiden V Mohosen*[3]. It is not a law enacted by any competent legislature in Nigeria; yet it is one that is enforceable and binding within Nigeria between the parties subject to its sway. Customary law is the oldest source of Nigeria law, having existed in the various communities and tribes long before the advent of the British into Nigeria. In reference to the character of customary law, Obaseki J.S.C in *Oyewunmi Ajagungbade III V Ogunsesan*[4] described customary law as:

> The organic or living law of an 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

[1] J.O. Asein, (2005) *Introduction to Nigeria Legal System*, 2nd Edition, (Lagos: Asaba press), p.114.
[2] Customary Courts Law Cap. 49 Revised Laws of Anambra State of Nigeria 1979, Section 2.
[3] (1973) 11. F. S.C.1
[4] (1990) 3. N.W.L.R. 182 at 207. This position has been followed in *Whyte V Jack* (1976) 2 N.W.L.R. 407 at 420, *Nwagbogu V. Abadon* (1994) 7 N.W.L.R. 357 and restated in *Ogolo V. Ogolo* (2004) and W.R.N. 1, Per Edozie, J.S.C.at 12

> and transactions of the community subject to it. It is said that custom is a mirror of the culture of the people. I would say that customary law goes further and imparts justice to the lives of all those subject to it.

Courts/ Judiciary

Judicial institutions remain a very important part of the government machinery, as they help to resolve conflicts and ensure the effective running of the other government bodies and institutions by keeping them in check e.g., when separation of powers exists[5]. The judiciary morally consists of judges who are the officers of the court and the courts are usually established by law to serve as the focus of judicial activity.

Arbitration

Arbitration is a process in which a neutral third party, after listening to parties in a relatively informal hearing, makes a binding decision resolving the dispute[6].

Arbitration has also been defined as a procedure for the settlement of disputes under which the parties agree to be bound by the decision of an arbitrator, whose decision is, in general final and legally binding on the parties[7]. Arbitration, in one form or the other could be said to be as old as mankind, it is said to have primordial origin.[8]

In the case of *Agu v Ikwebe*[9] the supreme court of Nigeria, 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 the community, and the agreement to be bound, by such decision or freedom to resile where unfavourable.[10]

In adopting this definition, the court seemed to have relied substantially on the earlier views of T.O. Elias[11] where he said:

> It is well accepted that one of the many African Customary modes of

[5] Asein Op.cit
[6] K. Aina, (1988) "Alternative Dispute Resolution", *Nigerian Law and Practice Journal*, Council of Legal Education, Nigerian Law School, Volume 2, No 1, March, p. 171.
[7] J.O. Orojo and M.A Ajomo., (1999), *Law and Practice of Arbitration and Conciliation in Nigeria* , (Lagos: Mbeyi and Associates) p. 3
[8] E.O.I Akpata Op.Cit. P. 1
[9] (1991) 3. NWLR (Pt. 180) 385 at 407
[10] Agu v Ikewibe (1991) 3 N.W.L.R. (pt 180) p. 407
[11] T.O. Elias, (1956), *The Nature of African Customary Law*, (Manchester) p. 212.

> 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.

However, the Supreme Court's definition of customary arbitration stated above, has given rise to an heated debate, particularly the decision of the court that either of the parties to customary law arbitration can reject the award if unfavourable. It is also 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 arbitration nor arbitral tribunals exist under the customary law of African village communities.

A distinctive feature of customary arbitration is that agreement to conduct the same is oral and its proceedings and decisions are not normally recorded in writing.[12] Because of these factors, customary arbitration is not regulated by the Arbitration and Conciliation Act, 2004 of Nigeria, which is concerned with written agreements to arbitrate.[13]

Customary Law Arbitration in however still Popular among people in the villages and it is recognized by courts. If there is a disagreement as to whether there is in fact a properly constituted arbitration between the parties, the court makes a specific finding of fact on that question.[14.]According to the West African Court of Appeal[15].

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

However, a decision or an award of a customary arbitration is not a judgement of a court of law. Consequently, it has no force of law and therefore cannot be enforced like such a judgement until it is

[12] Oline v Obodo (1958) 3 F.S.C 84 at p. 86; ofomata & ors v Anoka & ors (1974) 4. E.C.S.L.R 251 at p. 253.
[13] G. Ezejiofor, *The Law of Arbitration in Nigeria*_ (Lagos: Longman Nigeria Plc) (1997) p. 22.
[14] · *Ofomota & ors v Anoka & ors* Op. Cit., p. 253.
[15] *Assampong v Kweku Amuaku & Ors* (1932) W.A.C.A 192 at 201, Deans CJ.

pronounced upon by a competent court.[16] But the court will not make such an approving pronouncement unless the award is specifically pleaded and proved in proceedings before it, involving the parties to the arbitration, or their privies.[17] When this is done, the award may be accepted as creating an estoppel by way of res judicata, provided that the person or body that conducted the arbitration is a judicial tribunal which hands down judicial decisions.[18]

JUDICIAL ADMINISTRATION IN PRE-COLONIAL NIGERIA

In the 19th century, before the annexation of Lagos in 1861, the different societies that now form Nigeria and other African countries had their own political systems and their methods of administering justice[19]. There existed ‘‘traditional courts” where traditional rules[20] were applied against parties, irrespective of whether they were indigenes or foreigners. Let us see examples of these. The political structure of the traditional societies can be classified as monarchical and republican[21] chiefly and chiefless[22]; or centrally and non-centrally organized[23]. One remarkable characteristic of the various governments was the absence of clear demarcations between judicial, executive and legislative functions[24]

The monarchical states were organised in a hierarchical order of political authority. At the head of this, was the Emir in the north or the Oba in the Yoruba and Edo states. They were assisted by their councils of chiefs. Collectively, they exercised the functions of government[25]. Power was often delegated to subordinate authorities like the village heads or chiefs. These subordinate authorities were empowered to settle minor disputes arising within their areas of authority while appeals go to a higher chief, Oba or Emir. The Oba or Emir had his own court for this purpose and for the determination of the more serious disputes and offences against the state. His court was usually the court of last resort and was constituted by the Oba or Emir and his council of chiefs[26].

[16] G. Ezejiofor Op. Cit. p 22.
[17] *Ofomata & urs v Anoka & ors* Op. Cit
[18] *Assampong v Amuaku* Op. Cit 192 at 196.
[19] Edefe Ojomo,(2012) *Notes on the History of the Nigeria Judicial system*, p. 4. available at http://www.yararena.org/uploads/Topic%20Two%20%20History%20of%20the%20Nigerian%20Judicial%20System.pdf, accessed 15-10-2014
[20] This brings into mind, customary law discussed earlier.
[21] C.O.Okonkwo (1980), ed., *Introduction to Nigeria law,* (London, Sweet and Maxwell) p.60
[22] T.O Elias (1952), *The Nature of African Customary Law* (Manchester, Manchester University press,) p. 17.
[23] F.E.Umeh, (1989) *The Courts and Administration of Law in Nigeria* (Enugu , Fourth Dimension) pp 39-40
[24] See J.O. Asein Op.cit. p.151
[25] id
[26] id

In the republican states, prevalent in Igbo land and parts of the middle belt, there were no recognized heads as such. Each clan or village was governed by the council of elders often constituted by the adult male members of the community concerned. They jointly exercised judicial control in the society through the adult members and could settle minor disputes within the family. Amala Oha is an institution of government in pre colonial Igbo land as it is a form of general assembly. In this assembly, all adult male members meet to perform legislative functions. In ancient times, Amala Oha meetings were held in the village square. The decisions of the assembly in matters affecting the village or individual were final. The life of every individual in Igboland is highly respected, and recognition of an individual was not based on family background but on personal capabilities and age. The elders form the core of the village administration. The male population is divided into age grades corresponding with the youth, middle age or able bodied men and elders. Each age group has its own special rights, duties, obligation and responsibilities within the village[27] There are various levels of offences in the Igbo land ranging from "Mmehe" (negligence) through "Alu" (Crime) to "Nso ani" (abomination). In considering the court system/ judicial structure in the Traditional Efik society, both executive and judicial functions are exercised by the Obong-in-Council at the apex of the authority with a trickling down of the same authority to subjects under him to include – the Etuboms or Clan Heads, Village Heads and family Heads or subsidiary chiefs at the foot of the pyramid.[28]

Traditional religious institutions and beliefs helped in the sustenance of the adjudicatory system[29]. Communities had a very broad view of their societies as comprising their dead ancestors, the living and generations yet unborn[30]. The strong belief in deities and the ubiquitous spirits of their ancestors was a compelling force in ensuring due regard for the law[31]. The frightening displays of the *Omebe* in some parts of Igbo land; the *Ekpe* society in Efik-land; the *Sekeni* of the Kalabari's, the *Oro* in Ijebu-land or the *Adamu-Orisa* in the Lagos area are examples of this. The awe with which elders were held as representing wisdom and the work of the ancestors further strengthened the orthodox system.

The Administration of justice in traditional societies was based largely on unwritten customary rules interpreted by the institutions and

[27] James Agbogun, "The Nigeria Pre-Colonial Government in Igbo Land" available at http://www.the-nigeria.com/2011/10/pre-colonial-government-in-igboland.htm, accessed 26-10-2014
[28] Inameti, Etim Edet (2013), "Adminstration of Justice in Pre-Colonial Efik Land", *Filosofia Theoretica: Journal of African Philosophy, Culture and Religion*, Volume 2 No.1, January-June.
[29] id
[29] id
[30] See O. Adewoye,(1977) *The Judicial System in Southern Nigeria, 1854 – 1954* (London, Longman). p. 7.
[31] Id.

individuals that exercised judicial powers[32]. Social punishments such as ostracizing were very common, as well as corporal punishment in some instances. Influential individuals were allowed to mete out punishment to those who offended them, as was the case in Yoruba land[33].

The judicial system of many of these societies applied against native and non-natives, even when the latter did not understand their context or the rules. With the increasing growth in European trade in the region, British trades became involved in the politics of the region, and in judicial administration

BRITISH INTERFERENCE IN NATIVE ADJUDICATION

The traditional system of administration posed a problem for foreigners, particularly European foreigners who were unfamiliar with the traditional laws in many of the African societies[34]. As the economic interests of the early settlers expanded, their contact with the indigenous communities became were intense and intimate. Disputes naturally arose, many of which were considered inappropriate for the traditional tribunals[35]. Even where parties submitted to their jurisdiction, the rules of customary law were often not well suited for the determination of the kinds of disputes that arose. The law was not only ascertainable from oral pronouncements it also denied foreigners a fore-knowledge of what laws to expect.[36] Expressing his distrust for the system, Sir William Macgregor is reported to have remarked in 1903 thus:

> *The Bale's (Traditional ruler's) council is also the supreme court of justice for the town and province. There is not a single, enlightened man, not a man of the new school, in the council. If there is one in Ibadan ……. justice, it is to be feared, is too often sold to the the highest bidder in cases that came before native tribunals*[37].

The dissatisfaction for the system by the British led to the introduction of consul courts by the British government which appointed consuls to handle disputes between indigenes and foreign traders. While the traditional courts continued to administer cases involving only

[32] Edefe Ojomo Op. Cit. p.5
[33] See Peter Okoro Nwankwo (2010), *Colonial and Post Colonial Eras: An Application of the Colonial Model to Changes to the Severity of Punishment in Nigeria Law*, (Maryland: Maryland University Press of America) p. 175.
[34] Edefe Ojomo Op. Cit.p.5.
[35] J.O. Asein Op. Cit. p. 152.
[36] id
[37] Adewoye Op. Cit. pp. 20 – 21.

indigenes. An example is the Oil River Protectorate which later became the River Coast Protectorate, for which consuls were appointed by the British government to observe treaties and handle governance of British subjects in the area[38].

In the area that later became known as the protectorate of southern Nigeria, courts of equity had been introduced in the mid-nineteenth century, with the main function of administering the commercial relations between the subjects and non-British subjects. They were different from the consul courts in that they were less technical and related more to the administration of commercial relations, than governance and justiceable issues[39]. This was the beginning of the bifurcation of the legal systems of many of the British territories; including what eventually became Nigeria.

THE PRACTICE OF CUSTOMARY ARBITRATION AMONG SOME ETHNIC GROUPS IN NIGERIA.

In order to ensure peaceful co-existence of people in Yoruba indigenous society, there are in existence several courts of arbitration. There are informal courts and formal courts. The former includes public tribunals meeting under the trees, market places and other places for public settlement of disputes. The elders who head such tribunals, not only enjoyed the evening breeze under the shady trees, they also listen to, and help settle difficult matters affecting their community. Cases of fighting among the adolescents were in pass accorded an impromptu settlement by the passers-by, who, normally ensured restoration of peace and harmony hitherto upheld by the termagants[40]. It is the responsibility of the elders present to arbitrate for the parties. The judicial role and expectation of the elders is expressed in Yoruba proverb thus: ***Agba kii wa loja k'ori omo titun wo*** (meaning, that the presence of an Oba in the market place guarantees that the head of a new born baby shall not be mis-shaped)[41] . Where the issue involved could not be immediately resolved, such an elder must go ahead to report to more elderly person(s) especially elders in the families of the parties involved in the dispute. In Yoruba markets, there existed different commodity associations and guilds that are empowered to assist in maintaining peace and harmony in the market. Their powers extended to settling

[38] A.O., Obilade (2007), *The Nigeria Legal System,* ed. (Ibadan, Spectrum) p. 21.
[39] See. Osita Nnamani Ogbu (2007), *Modern Nigeria Legal System* (CIDJAP Press, Enugu) p. 153.
[40] O.B. Olaoba (2002), *Yoruba Legal Culture*, F. O. P. Pres, p. 43
[41] T.O Delano (1999) "*Owe Lesin Oro, Yoruba Proverbs – Their Meanings and Usage*" (Ibadan: University Press Limited), pp 38 – 39

minor assault cases, theft, fraud, cases of debt etc. There are also formal courts in Yoruba land.

There are also formal courts in Yoruba land. These include Baale's court (in family houses), tribunal of the ward chief and the central tribunal. The central tribunal considered to be an important courtyard in Yoruba palaces is the last 'Court of Appeal'[42] In this court, the king (Oba) and his Council which constitute the 'Supreme Court' handle serious cases like rape, murder, manslaughter, arson, kidnapping, putting dangerous medicine in a public place, assaulting a Chief or Oba's wife adultery with an olori (Oba's wife), land cases etc.

Sometimes the King and his councils may delegate their role of arbitration to lesser chiefs within the kingdom or heads of families to exercise. The decisions of the delegates are however subject to the King's court, if the situation arises. Akpata[43], reported, while examining the settlement of disputes in Benin City in the southern part of Nigeria that:

> In the environs of Benin City, the Village head (Odionwere) or the family head (Oka egbe) principally function as the arbitrator or mediator to resolve conflict or dispute among the people. The parties were also at liberty to request any member of the community in whom they repose confidence to mediate or arbitrate with the undertaking to abide by his decision … in certain types of disputes, there would be a review in the palace at the instance of one of the parties.

Minor disputes like adultery, abduction, squabbles between friends, destruction to farm trees etc, are handled at *Baale's* courts or before the Ward Chiefs.

INGREDIENTS OF A VALID CUSTOMARY LAW ARBITRATION

The Supreme Court has held in the recent case of *Agu v Ikewibe*[44] and *Ohiaeri v Akabeze*[45] that a valid customary arbitration is manifested where:-

- The parties voluntarily submitted to arbitration.
- The parties before hand agreed expressly or by implication to be bound by the arbitral decision or award.
- None of the parties withdrew from the arbitration midstream.

[42] Olaoba OP.Cit.P.43.
[43] Akpata Op.Cit.P.1
[44] (1991 3 N.W.L.R. (Pt 180)385
[45] (1992) 2 N.W.L.R. (Pt.221); also *Okere V Nwoke*(1991) 8 N.W.L.R. (Pt.209)317.

- None of the parties rejected the award immediately it was made.

- The arbitration was conducted in accordance with the custom of the people.

- The arbitration handed down a decision or an award, which is final.[46]

These ingredients will now be discussed one after the other.

1. Voluntary submission of the dispute to arbitration by the parties: - It must be shown that the parties voluntarily agreed to submit their dispute to arbitration. If parties to a dispute have not voluntarily submitted it to a person or persons for settlement, an arbitration has not taken place and any decision reached by such a person or persons will not be enforced by the court. In the case of *Ekweume v Zakari*.[47], in 1970, the defendant started an hotel business at Abakaliki, and employed the plaintiff as one of his workers. There was, however, an understanding between them that the business could be converted into a partnership of the two, if after about 3 months they were both satisfied that they could work together in that relationship. Unfortunately they fall apart almost immediately because differences developed between them regarding the management of the business. Later, five mutual friends of the parties on their own initiative undertook to look into the dispute with a view to settling it. The panel took evidence from the parties, and on the basis that the parties were equal partners in the business awarded the sum of 631:6:3(Pounds) to the plaintiff as his share of the profits of the partnership. The plaintiff commenced this action to enforce the decision. It was held that there was no arbitration because the parties did not voluntarily submit the dispute to the panel, nor did they agree to be bound by its decision. That being the case, the so-called award could not be enforced.

   However, if parties voluntarily agree, to submit their differences to arbitration and to abide by the decision of the arbitrator, they cannot repudiate such a decision when it is made.

2. The parties before hand agreed expressly or by implication to be bound by the arbitral decision or award: -

   When parties to arbitration have expressly or impliedly agreed to accept the decision of the arbitrator or to be bound by such decision, they cannot repudiate such a decision when it is made.

[46] Karibi – White, J.S.C. in *Agu V Ikwebe* and Akpata, J.S.C in *Ohiaeri v Akabeze* Op.Cit
[47] (1972) 2. E.C.S.L.R. 631

In *Oline v Obodo*[48], the plaintiffs and defendants jointly executed a lease in favour of a government corporation. Later, a dispute arose between them over the sharing of the rents accruing from the grant. The District officer in charge of the area wrote to the parties suggesting that his assistant, one Mr Lawrence, should arbitrate in the matter. Mr Lawrence met the parties on the land, where upon they orally agreed to be bound by his award.

After taking evidence from the parties and viewing the locus in quo, he delivered his award on the spot orally. Thereafter, he reduced the award into writing and it was tendered in evidence. In the award, he set out how much each of the parties would get out of the rents. But the defendants were not willing to share the rents, where upon the plaintiffs commenced this action against them, claiming title to the demised land and an order of the court to allow the plaintiffs to withdraw their own share of the rents according to award. It was held by the Federal Supreme Court that since there was evidence, which was accepted by the trial court, that the parties orally agreed to submit their dispute to arbitration by Mr Lawrence and that his award would bind them, they could not, after all these contend that they were not bound.

3. None of the parties withdrew from the arbitration mid stream: The question here is whether parties to a customary arbitration can in some circumstances; resile from the arrangement before an award is made. The point was considered by the privy council in the then Gold Coast Case of *Kwasi v Larbi*[49], in that case, the plaintiff commenced an action in a native court against the defendants, claiming a declaration of title and an injunction over a certain piece of land. The elders of the community intervened and offered to withdraw the case for arbitration, whereupon it was mutually argued by the parties to submit to such an arbitration. The case was therefore adjourned, in order to enable the arbitration to take place. The elders heard the parties and their witnesses and sent court messengers to review the land in dispute in company of the parties. The plaintiff cooperated with the messengers and pointed out their boundaries them. The defendants, on the other hand, refused to show their boundaries. At the end of the exercise, the messengers instructed the parties to meet the arbitrators on a specified date. On that date the defendants did not attend the meeting; but sent a message to the arbitrators that they had withdrawn from the arbitration. This information was ignored and the arbitrators went ahead and made

[48] (1958) 3. F.S.C 84; also *Foli v Akese* (1930) 1 WACA. *Yardon v Minta*, Goldcoast LR. 1926 – 29 76, *Njoku v Ekeocha* (1972). E.C.S.L.R. 199 *Aguocha v Ubiji* (1975). E.C.S.L.R. 221, *Anyabunsi v Ugwunze* (1995) 6 N.W.L.R 255.
[49] (1952) 13 W.A.C.A 76

an award in favour of the plaintiff. The case was then remitted back to the native court and against the defendant's opposition, the plaintiff urged the court to enforce the award. The opposition was rejected by the court and the award was accepted and made a judgement of the court. On appeal to the privy council, the Board held that:

(i) the proceedings before the elders were of the nature of an arbitration and not merely a negotiation for a settlement, because it was undertaken with the consent of the parties; and

(ii) the defendant, had no right to resile from the arbitration before the award since they had no such right after the award.[50]

The defendants had been unable to satisfy the Board that such a right which is so contrary to the basic conception of arbitration is recognized by native customary law. It would seem from the statement of the privy council that a party can specifically reserve the right to resile from arbitration before an award is made.

According to the Board, the appellants in the instant case must fail, since it is established that the parties gave their consent to the submission of the dispute to the elders without any express reservation of a right to resile.[51]The implication would seem to be that if a party specifically reserved such a right ab initio and in fact resiled mainstream, but the arbitrator nevertheless continued the proceedings, an award made by him would not bind the party.

4. None of the parties rejected the award immediately it was made: the cases of *Agu v Ikewibe* and *ohiaeri v Akabeze* supra made it clear that a customary arbitration will be valid if non of the parties rejected the award when it was made. If none of the parties reject the award immediately it was made however, the award becomes binding. A party to a customary arbitration has the right to reject the award of the arbitral tribunal immediately the award is made if such a party was not given a fair hearing in the course of the arbitration. It is therefore necessary that the proceedings leading up to a customary award must be conducted in accordance with the rules of natural justice. For example, the parties and their witnesses must have adequate opportunity to present their case to the arbitrator.[52]

[50] Oyete & Etim V Edumawu Aduo (1956) I.W.A.A.L 278.
[51] *kwasi v Larbi* (1952) 13 WACA, 76 at p. 80
[52] *Mbaegbu v. Agochukwu* (1973) 3 E.C. S.L.R. 90 at pp 95 & 96.

A party to a customary arbitration can also reject the award immediately after it was made if an arbitrator or arbitrators behave in a way that tends to compromise their impartiality, such as where he was called as a witness by one of the parties to the dispute.A party to a customary law arbitration can also reject its award if the award is arrived at arbitrarily such as where it amounts to the sharing of a partnership assets between disputing partners when no proper account has been taken.[53]

5. The arbitration should be conducted in accordance with the custom of the people: - A customary arbitration conducted in accordance to any acceptable customary law of any community will be binding on the parties to the customarily arbitration. Also once the selection of the arbitration tribunal was done in accordance to customary law, the decision of the tribunal will bind the parties and can be enforced. Therefore when customary law is mutually submitted to by the parties and once they have agreed that it will bind hem. Such customary law must however not be repugnant to natural justice.

   For instance in the environs of Benin City, the village head (Odion were) or the family head (Okaegbe) principally functioned as the arbitrator or the mediator to resolve conflicts of disputes among their people. The parties were also at liberty to request any member of the community in whom they repose confidence to arbitrate with the undertaking to abide by his decision. Eminent chiefs in city would be called upon by the Oba (the king) to reconcile differences between the neighboring villages at the request of the villagers. Also in certain types of disputes (not all disputes) there would be a review in the palace at the instance of one of the parties, either by way of rehearing, as there was no written record of the earlier proceedings, or with the Odionwere, in the presence of the disputants, narrating what had transpired between him and indicating the area of disagreement[54] All these disputes were settled in accordance to the Binin native law and custom.

6. The arbitrations must hand down a decision or an award which is final: - The court will ratify and enforce an award, provided that its enquiry reveals that it is certain, final, reasonable, legal, possible of execution and disposes of all the differences submitted to arbitration[55]. If the award is conditional, or contingent upon something, which may or may not happen, it is not final. In *Ofomata & ors v Anoka ors*[56], there was a dispute between the plaintiffs and defendants over a piece of land. The parties agreed that the elders of the village should settle the dispute by arbitration.

[53] *Ekwume v Zakari* (1972) 2 E.C S.L.R 631.
[54] E.O.I Akpata Op. cit p. 2
[55] *Ofomata $ Ors V Anoka $ Ors*. (1974)4 E.C.S.L.R. 251 at 253.
[56] Id.

The arbitrators took evidence from both parties, found that the land belonged to the plaintiffs and decided that if the defendant were not satisfied with the function they should produce an oath to be sworn by some members of the plaintiffs' family. No oath was sworn because the parties did not meet for the purpose as was previously agreed. It was held that the award was not final because it was conditional on the swearing of an oath, which might or might not take place. According to the court, the proper line of action would have been for the arbitrators to adjourn the award until the oath was sworn. In its opinion, the arbitrators should have supervised to oath swearing ceremony.

The above case can be contrasted with *Njoku v Ekeocha & ors*.[57] The plaintiff sued the defendants claiming title to two pieces of land, damages for trespass and injunction against further trespass. Evidence before the court revealed that the plaintiff's father had, some years earlier, claimed to be the owner of the lands, which he alleged were pledged to the defendants father, who was then dead. The parties then mutually agreed to submit the dispute to arbitration by the elders, the amalas, and to be bound by their decision. The elders examined the case and came to the conclusion that the lands belonged to the defendants, but directed that if the plaintiff's father was not satisfied he would produce an oath to be sworn by the defendants. If they did not die within one year after the swearing, the lands would belong to the defendants, but if they both died within the year, the lands would be lost to them in favour of the plaintiff's father. This decision was accepted by the parties. The oath was produced and sworn as agreed and the defendants did not die within the year. The plaintiff's father accepted the decision and no longer disputed the defendants' ownership of the lands. On his death, the plaintiff commenced this action, claiming the lands all over again. It was held that the plaintiff, just like his father was bound by the decision of the arbitrators and was therefore estopped from reopening the case. This is particularly so as the defendants were led by the plaintiff's father to take a step prejudicial to their interests by being put in peril of losing their lives by swearing the oath.

All the ingredients discussed above must however co-exist before a customary arbitration can be valid.

OBSERVATIONS AND CONCLUSION

The traditional styles of adjudication discussed in this paper which are judicial administration/court system and customary arbitration were commendable for their simplicity and affordability. They were straightforward and easy to understand by people. Their proceedings were also transparent in every respect, judicial proceedings were held in the open courts of the palace for judicial system and in open places for

[57] (1972) 2 E.C.S.L.R 1999

customary arbitration. Their nature does not involve the technicalities of the modern judicial system; judicial proceedings were devoid of rigid rules of procedure and evidence, the same goes for customary arbitration. There were however enough rules of evidence designed to ensure fair hearing and transparency in the administration of justice. The idea of fair hearing or natural justice was practiced, generally an offender is punished only after hearing has taken place and the nature of every gathering is determined by the case at hand. The Traditional adjudicatory process also observed the process of adjournments and made provision and application for such in order to enable relevant witnesses appear in the case as well as give testimony and; to enable the sitting judge(s) to verify the facts of claims in the case in question, for example, land disputes. An individual who seeks justice will not also have to pay through his nose to get it.

The native court system and customary arbitration were also very accessible for people. The Oba's and Elders headed these systems and were very close to the people. These qualities paved way for law and order consistently in the native society. The judicial machinery and customary arbitration system installed by each community was dictated by historic past, political structure and social – cultural values. Nevertheless, they all aimed not at doing justice in the modern sense of that word, but, at the maintenance of peace and order; the promotion of social welfare and the sustenance of the social equilibrium in the society concerned. The prime motive was the reconciliation of disputes. The idea of justice, as the European later discovered, was in some cases opposed to the notion of what is fair and just[58]. This divergence did not make one inferior or superior to the other because a society's conception of fairness and justice cannot be entirely divorced from its beliefs and social environment.

The native Court system and customary arbitration system were very affordable. In the case of *Okpuruwu v Okpokam*[59], Honourable Justice Oguntade JSC (as he then was) observed thus: In the pre-colonial times and before the advent of regular courts (Nigerians) 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. The practice has over the years become strongly embedded in the system that they survive today as custom.

The native judicial system and customary arbitration system were generated by customary laws which were largely unwritten. The unwritten nature of the law would have made the administration of justice difficult. This is because unwritten laws are usually uncertain. Transactions in writing were unknown to customary law. This was based on the fact that the community at that time was largely illiterate and any person who took initiative to put his transactions in writing was given the benefit of English laws. But in line with the exposure of native communities to different

[58] See *Lewis v. Bankole* (1908), N.L.R 81, *Dawodu v. Danmole* (1962) All NLR. 701, (1962) 1 WLR 1053, *Man'yana v. Sadiku Ejo*. (1961) NR NLR and *Re Effiong Okon Ata* (1930) 10 NLR 65.

[59] (1998) 4NWLR Part 90.554 at 586

kinds of written documents, especially as evidence of transactions, the court, in *Rotibi V. Savage*[60], refused to abandon the application of customary law only on that scene. The unwritten nature of customary law may look like a disadvantage but the good news there is that despite its uncertainty, the native community adjudicated well without problem and even still observed precedents in previous decisions which would naturally have only been possible where laws and judicial decisions were written .Though, this may not be possible again today because of complications and non-simplicity of human beings any more.

Judicial systems and arbitration are therefore not imported mechanisms in Nigeria. Traditionally, native courts and customary arbitration systems were used to settle disputes in Nigeria. Native courts and customary arbitration systems remain part of the Nigerian legal system. Therefore Africans have always had their own ways of resolving conflicts which is different from that of the English men. Africans have their own independent and cherished custom and traditions which are of a necessity different from that of the British. This fact was justified by Niki Tobi, JCA(As he then was) in *Caribbean trading & Fidelity Corporation V. NNPC*.[61] That:

> English is English; Nigerian is Nigerian. The English are English; so also the Nigerians are Nigerians. Theirs is Theirs. Ours are ours. Theirs are not ours; ours are not theirs.

[60] (1944)17 NLR 117 See also *Alfa v. Arepo* (1963) WNLR 95.
[61] (1992) 7 NWLR (Pt.252) 161 at 179

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