THE SCOPE ANDRELEVANCE CUSTOMARY ARBITRATION IN CONTEMPORARY NIGERIAN SOCIETY

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Abstract

Access to court remains a major challenge due to un-affordability of legal representation delay in resolving cases, high cost of litigation, inadequate manpower and the cumbersome process of criminal justice administration in Nigeria with attendant effect of denial of justice. Customary arbitration is a native arrangement by selected elders of the community, who are vast in the customary law of the people and take decisions which are mainly aimed at bringing some amicable settlement and social equilibrium to the people and the immediate society. Customary arbitration is the oldest and earliest form of dispute resolution that has achieved tremendous success in our indigenous society. Arbitration has been a key player in the alternative resolution of dispute rather than court of law. The convenience, simplicity and informality associated with settlement of disputes in the customary way fortifies the recognition of customary arbitration. Alternative Dispute Resolution (ADR) is only an adaptation of the customary mode of dispute resolution to suit the challenges in the court room due to the demands of contemporary society. This paper focused on third parties intervention in dispute resolution, categories and mode of intervention as well as the problems and consequences associated with litigation. The paper then examined the origin of Customary Arbitration in Nigeria, its operations, advantages and disadvantages as an alternative dispute resolution mechanism and finally reiterates the need for its adoption in view of the increase in global acceptance of alternative dispute resolution as a result of its simplicity, predictability, accommodation and affordability.

Keywords: Arbitration, Customary arbitration, litigation, modern arbitration, and intermediary

1. Introduction

The practice of disputes settlement through the process of arbitration is not a n phenomenon in Nigeria. Arbitration had been with various indigenous communities Nigeria before the introduction of the British legal system of court litigation into country.[1] It is imperative to assert that the belief that arbitration is of recent developmen

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Nigeria is misleading. Customary law operated freely in areas of influence as a complete and independent legal system before the advent of colonialism. There was also the existence of a separate, independent and organized dispute resolution system based on the individual customary law of each community. This system of dispute resolution is generally referred to as customary arbitration or customary arbitration tribunal constituted by elders of the community who administer the process. Customary law arbitration derives its authority from the custom and tradition of the community, which are accepted by members as binding on them.[2] According to Igbokwe, the British colonization of Nigeria witnessed the interaction of English law with customary law. But the British colonization did not result in complete obliteration of the customary laws of Nigeria and the local level dispute resolution mechanism such as customary arbitration.[3]

There exists a litany of decided cases validating the existence of arbitration prior to colonialism. The operation of customary law in Nigeria as administered in some parts of the Southern and Northern Nigeria includes Native law and custom and Islamic law. The essence of this paper is to reiterate the advantages of Customary Arbitration over other forms of dispute resolution mechanisms especially litigation, and the need to have recourse to customary arbitration, which is economical, friendly, quick and simple. This is essential considering the increasing number of problems bedeviling court litigation and their consequences, amongst which are denying citizens of access to justice hence resulting in breakdown of law and order in the society. Some of the identified problems of litigation to mention but a few are: delay in administration of justice the technicality involved in litigation, expensive nature of litigation, delay caused by Legal Practitioners and win – lose litigation dispute settlement, that is parties may not remain friends usually at the end of court litigation.

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[1] Gadzama J.K. Inception of ADR and Arbitration in Nigeria, a paper presented at NBA Annual General Conference in Abuja, (2004) cited in Eunice R. O. Alternative Dispute Resolution and Dele P. (2005). What is Alternative Dispute Resolution?
Lagos Dee Sege Nigeria Limited. p 11.

[2] Akanbi M.M, "A Critical Assessment of the History and Law of Domestic Arbitration in Nigeria: Trends in Nigeria Law" in Oluduro *et al* (eds.), *Essays in Honour of Oba DVF Olateru-Olagbegi III, Olowo of Owo Kingdom*, Lagos, Constellation Nig. Publishers, 2014, P. 462.

[3] Igbokwe V.C. "Socio Cultural Dimensions of Dispute Resolution: Informal Justice Processes among the Igbo speaking people of Eastern Nigeria and their implications for community/Neighbouring Justice System in North America" *Africa Journal of International and Comparative Law*, Vol. 10, No. 3, 1998, P. 1.

2. Conceptual Clarification

For a clear appreciation of the issues canvassed in this paper, it is essential to define some concepts that are germane to the subject matter. These concepts include arbitration, customary arbitration, modern arbitration and intermediary, among others.

2.1 Arbitration

Arbitration is a third party intervention or mechanism in the settlement of dispute. The terms "third party" and "intermediary" are both used to refer to a person or team of people who become involved in a conflict to help the disputing parties manage or resolve it. Third parties might act as Consultants helping one or both sides analyze the conflict and plan an effective response on how to resolve the dispute amicably. The most powerful third party role is that of an arbitrator. An arbitrator listens to presentations made by both sides, examines written materials and other evidence relating to a case, and then makes a determination of who is right and who is wrong, or how a conflict should be settled. Usually, the arbitrator's decision is binding and cannot be appealed. Arbitration is a procedure for 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 both parties. The process derives its force principally from the agreement of the parties and in addition from the state as supervisor and enforcer of the legal process. So where two or more persons agrees that a dispute or potential dispute between them shall be decided in a legally binding way by one or more impartial persons of their choice, in a judicial manner, the agreement is called an arbitration agreement.[4] Arbitration, which maybe institutional or ad-hoc is usually the referral of a dispute between at least two parties to a person or group of persons, chosen by them to consider the dispute between them in an adjudicatory manner.[5] Arbitration can be said to be a dispute resolution

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[4] Chukwuemerie, I. A., *An Overview of Arbitration and the Alternative Dispute Resolution Methods (ADRs)* A Journal of the Civil Litigation Committee of the Nigerian Bar Association, Lagos, Pearls Publishers, 2010, page 102 "See also Daibu, A. A., *The Lagos State Arbitration Law and the Doctrine of Covering the Field: A Review* Vol. 6, No. 1, The Gravitas Review of Business and Property Law, March, 2015, pages 44 – 52 at 44, Alumn M. M., *Domestic Commercial Arbitration in Nigeria: Problems and Challenges*, Germany, Lambert Academ Publishing, 2012, p. 32, Ajogwu, F., *Commercial Arbitration in Nigeria: Law and Practice*, Lagos, Mbeyi Associates Nig. Limited, 2009, page 5, Daibu, A. A., and Abdulrauf, L. A., *Challenges of Section 20 of the Admiralty Jurisdiction Act to International Arbitration Agreements*, Vol. 6, No. 4, The Gravitas Review Business and Property Law, December, 2015, page 14.

[5] Onigbinde, A. and Adesiyan, F., *The Practice of Arbitration and Allied Alternative Dispute Resolution Mechanisms in Nigeria* being a paper presented at the Christian Lawyers Fellowship of Nigeria, (CLAFON) (Directorate of Trial and Advocacy) on the 23rd day of May, 2015 at Reiz Continental Hotel, Abuja. Abiri O., *Resolving Domestic Violence through Alternative Dispute Resolution in Nigeria*, Vol. 6, University of Ilor Law Journal, 2010, pages 154 – 168 at 163-164.

process in which the disputing parties present their case to a third party intermediary (*or a panel of intermediaries, called arbitrators*) who examine all the evidence and then imposes a decision (*which is called an Award*) that is enforceable and legally binding on the parties. Like court-based adjudication, arbitration is somewhat adversarial.

In the case of *NNPC v Lutin Investment Limited,* the court defined arbitration as:

> ... the reference of a disputes 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. The arbitrator who is not an umpire has the dispute submitted to him by the parties for determination. If he decides something else he will be acting outside his authority and consequently the whole of the arbitration proceedings will be null and void and of no effect. This will include any award he may subsequently make.[6] Halsbury Laws of England defines arbitration as; the process of resolving disputes between people or groups by referring them to a third party either agreed on by them or provided by law, who makes a judgment.[7]

Arbitration as a mechanism of settlement of dispute has been with Nigerians for a long time as it has been with mankind from the beginning of its creation.[8] The existence of the mechanism as a means of dispute resolution is based on the fact that conflicts and controversies are inevitably a daily occurrence in society from time immemorial, this may be in the form of personal disagreements, religious crises, political, ethnic, marital disputes, chieftaincy matters, land and community boundary dispute and even economic conflict and which from time are settled one way or the other through an organized traditional dispute resolution mechanism like arbitration.

2.2 Customary Arbitration

Elias describing Customary Arbitration stated that 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.[9]

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[6][2006] 25 NSCQR 77 at 111-112.

[7] Halsbury 's Law of England 4th Ed, Vol. 2

[8] Ibrahim, J. The Legal Regime of Customary Arbitration in Nigeria Revisited. Being a Public Lecture delivered at the Department of Public law, Faculty of Law, University of Ilorin.

[9]Elias O.T *The Nature of African Customary Law*, Manchester, Manchester University Press, 1956, P. 212.

2.3 Modern Arbitration

Modern arbitration is set in motion once the disputing parties through a written agreement submitted their dispute to arbitration, that agreement is binding on those parties and any decision made by arbitrators appointed by parties shall be final and binding. The award will create an estoppel and operate as '*res judicata*' with regard to matters with which the award dealt with, hence preventing either party from abandoning the award or pursuing such matters dealt with in the award in litigation.[10]

2.4 Intermediary

The terms "intermediary" and "third party" refer to a person or team of people who become involved in a conflict to help the disputing parties manage or resolve it. Third parties might act as consultants, helping one side or both sides analyze the conflict and plan an effective response. Alternatively, they might act as facilitators, arranging meetings, setting agendas, and guiding productive discussions. Facilitators will also usually record what was said, and may write up a short report summarizing the discussions and any agreements that were reached.

A more active and powerful third party role is that of mediator. Mediators, not only facilitate discussions, but they usually impose a structure and process on the discussions that is designed to move the parties towards mutual understanding and win-win agreements. Pruit and Rubin[11] describe three effective forms of third-party intervention:

> Third parties may intervene to modify the physical or social structure of the conflict. They can facilitate communication, offer a neutral or private venue for talks, impose timeline and deadlines, contribute resources, and call up public pressure, third parties can change the structure of the issue in a conflict. They can help the parties identify issues and interests, and break psychological linkages, they can help the parties group and order the issues to be addressed and they can introduce new issues, alternative solutions and super-ordinate goals while such intervention can further motivate the conflicting parties to reach an agreement, and third parties may help participants save face by accepting responsibility for concessions, they manage parties' emotions and absorb hostility and they can also help sustain the parties' momentum toward resolution.[12]

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[10] See Fidelitas Shipping Co. Ltd v V/O Exportchleb (1965) 1 Lloyd's Rep. 223, C.A.

[11] Pruitt, D. G. and Rubin, J. Z. *Social Conflict: Escalation, Stalemate and Settlement* (1986) New York: Random House.

[12] Pruitt, D. G. and Rubin, J. Z. Social Conflict: Escalation, Stalemate and Settlement (1986) New York: Random House.

2.5 Litigation (Adversarial process)

An adversarial process is a means of resolving disputes by allowing the parties to present their evidence and argument, and challenge opposing evidence and argument, before a passive judge or jury for decision. The easiest way of identifying its characteristics are to contrast it with its chief western rival, the inquisitorial process. The former is a procedural feature of the common law derived from medieval England; the latter a procedural feature of civil law systems derived more immediately from 19th century France. The essential features of the adversarial process have been helpfully summarized by the Australian Law Reform Commission (ALRC) as follows:

In the litigation system the trial is the distinct and separate climax to the litigation process. Courtroom practice may be subject to rigid and technical rules. Proceedings are essentially controlled by the parties to the dispute and there is emphasis on the presentation of oral argument by counsel. The role of the judiciary is more reactive than proactive. Given the parties' opportunity and responsibility for mounting their own case the system is more participatory.

The judiciary possesses an inherent and separate power to adjudicate. The expense and effort of determination of disputes through litigation falls largely on the parties. They can be contrasted with the essential features of the inquisitorial process which have been summarised by the ALRC as follows:

> In litigation no rigid separation exists between the stages of the trial and pretrial in court cases. Legal proceedings are viewed as a continuous series of meetings, hearings and written communications during which evidence is introduced, witnesses heard and motions made. Rules relating to court-room practice are intended to be minimal and uncomplicated.

3. JUDICIAL RECOGNITION OF CUSTOMARY ARBITRATION

Historically, arbitration and other mechanisms of dispute settlement is one of the processes used in dispute resolution in most ethnic groups in Nigeria like many other communities in African countries[13].Amongst the various mechanisms for resolving disputes, arbitration is the most preferable in the traditional and modern African communities because it is friendly, economical, quick, flexible, easy and simple. Disputes arising out of dissolution of marriages, trades, land matters, political and other types of disputes were presided over and settled

[13] Alfred, A: *The Nigerian Magistrate*, (Revised edition), Lagos, Amftop Books, 2005, page 1.

amicably by elders, chiefs and traditional leaders in a particular community through [illegible] and reconciliation rituals.

The simplicity, convenience and informality associated with settling disputes in the customary way fortifies the recognition of the Customary Arbitration, so much that our case law is now clothed with decisions on customary arbitration as a viable alternative dispute resolution mechanism. This is captured in the words of Ezedinro where he said:

> Arbitration as a method of settling dispute is a tradition of long standing in Nigeria. Referral of a dispute to a layman for decision has deep roots in the customary law of many Nigerian communities. Such a method of dispute resolution was only for the wisemen or the chiefs who were the only accessible judicial authorities. This tradition still persists in certain villages and communities, despite the centralized legal system and the attendant efforts at modernizing and reform of legal system.[14]

The above citation points to the fact that arbitration is not new or strange to Nigeria and African communities in general. It is a culture that had been practiced by our ancestors in settling disputes. The Supreme Court has in the case of *Ohiaeri v Akabueze*,[15] judicially affirmed the historical existence of customary arbitration as a process of dispute settlement in Nigeria where it defined customary arbitration thus "arbitration in dispute resolution is founded upon voluntary submission to the decision of the arbitrators who are either chiefs or elders of their community and the agreement to be bound by such decision and a freedom to resile where unfavourable".

Significantly the use of customary arbitration in settlement of dispute is democratic in nature because of its characteristics features particularly respect for tradition, fear of sanction and spiritual or legal effect of disobedience to decision. This position is evidenced by the observation of Webster and Boahen who posited that,[16]

> Quarrels between individual of different families in the ward were settled before the people of the ward, elders acting as arbiter. Quarrels between wards comes before the full assembly ...A man might attempt to settle with the individual who had aggrieved him, if this failed he could ask a respectable elders to intervene or call members of the family together, he could also ask the ward or village head to solve the case.

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[13] Ezedinro, (ed) Guarantee and Incentives for Foreign Investment in Nigeria (1971) International Law 770 at 770

[14] *Ohiaeri v Akabueze* [1992] 2 NWLR (pt 222) 1 at 7 see also *Agu v Ikewibe* 3 NWLR] (pt 1)[1991 at 407

[15] Webster J. B. and Boahen A. A. *The Revolutionary Years of West Africa since 1800*, (1967). Longman (Nig) page 102-103

The affirmation of the legality and validity of customary arbitration complemented the fact of its historical existence as a dispute resolution mechanism in Nigeria even before the introduction of English litigation system through courts, inherited from the imperialist. This is equally captured by the Supreme Court pronouncement per Karibi Whyte JSC (as he then was) where he said:

> Where a body of men be they chiefs or otherwise, acts as arbitrators over a dispute between two parties their decision shall have a binding effect, if it is shown firstly, that both parties submitted to the arbitration, secondly that the parties accepted the terms of the decision, such decision has the same authority as the judgment of judicial body and will be binding on the parties and thus create an estoppel.[17]

The existence and practice of customary arbitration was also observed by Niki Tobi JSC (of blessed memory) in the case of *Ufomba v Ahucahoagu*,[18] where he said:

> A customary arbitration is essentially a native arrangement by selected elders of the community who are vast in the customary law of the people and takes decision, which are mainly designed or aimed at bringing some amicable settlement, stability and social equilibrium to the people and their immediate society or environment.

3.1 Essential Ingredients for a Valid Customary Arbitration

Proof of the compliance of the following ingredients will validate a customary arbitration and make its decision to be binding on the disputing parties. They are:

> Where the parties in the dispute had voluntarily submitted the matter in dispute for arbitration (that is either by their elders or chiefs as the case may be for determination and indicated the willingness to be bound by the decision of the arbitrations but that the parties reserved the freedom to reject the decision if unsatisfied.

It is also necessary for the parties to have agreed either expressly or impliedly that the decision of the arbitration will be accepted as final and binding on them.

While of importance is the fact that the said arbitration process was conducted in accordance with the custom of the parties or their trade or business of the disputants.[19] Another essential ingredient is that the arbitrator(s) must reach a decision and published their award to the knowledge of the parties. Lastly, it is very important that neither of the parties has resiled from the decision/award by the arbitrator(s).

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[17] *Egesimba v Onuzurike* [2002] 9-10 SC 1 at 19 and *Agu v Ikewibe* [1991] 3 NWLR (Pt. 180) 385.
[18] *Ufoma v Ahucahoagu* [2003] 4 SC 65 at 90.
[19] "Socio Cultural Dimensions of Dispute Resolution: Informal Justice Processes among the Igbo speaking people of Eastern Nigeria and their implications for community/Neighbouring Justice System in North America" *Africa Journal of International and Comparative Law*, Vol. 10, No. 1998, P. 1.

the Islamic law that has been in existence before the introduction of the English Common Law and promulgation of statutes. "*Tahkim*" is an agreement by parties to a contract on the basis that in the event of any dispute, such disputes should be brought before a "*Hakam*" for settlement.[29] There is however few reference of disputes to "*Tahkim*" or Islamic arbitration in Nigerian courts for judicial review.[30] To buttress this view Akanbi,[31] also affirmed that there is no evidence of judicial pronouncement confirming the application of Islamic arbitration mechanism as a method of disputes resolution in Nigeria, neither was there any on its validity or even the legality or otherwise. The fact however remains that Islamic legal system is one of the three recognized and enforceable legal system in Nigeria and evidence abound in Sharia of arbitration as one of the practical method of dispute settlement. The Quran upholds arbitration which by analogy suggests that the ancient northern Nigerian practiced customary arbitration. It states that:

> If two parties among the believers fall into quarrel make you peace between them…make peace with justice and be fair for God loves those who are fair and just[32]. If you fear a breach between them twain appoint one from his family and one from hers[33]if they wish for peace God would cause their reconciliation for God had full knowledge and is well acquainted with all things.[34]

In Northern Nigeria, the principal customary law prevailing in the predominantly Muslim communities is Islamic Customary law,[35] which is in line with Sharia Law.[36] The system of

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mechanisms to facilitate trade in a community where there was no organized system of governance and judicial structure – H. M, Fathy, "Arbitration According to Islamic Law (Sharia)," (2000) ***Arab Arbitration Journal***, p. 1.

[29]An arbitrator.

[30]Imam, I., "The Legal Regime of Customary Arbitration in Nigeria (Revisited)"http://www.unilorin.edu.ng/publications/imami/UNIKOGI%20CUSTOMARY%20ARBITRATION %202.pdf accessed on 24th August, 2016; see also Akanbi, supra, p.68.

[31]Akanbi, M.M. (2007): A Critical Assessment of the History and Law of Domestic Arbitration in Nigeria. Publish in "The Learned" a publication of LASA Kwara CAILS Ilorin page 39.

[32] Quran 4 v. 35.

[33] This suggest the appointment of arbitrators.

[34]Ibid, Quran 49 v. 9.

[35] Even though there have been a lot of controversies among scholars as to whether Islamic law is customary law, Oba opines that Islamic law is a divine law and cannot be considered as customary law, which is largely a man-made law. See Oba A.A 'Islamic Law as Customary Law: The Changing Perspective in Nigeria' The International and Comparative Law quarterly 51 (4), 817-850; Aboki Y. "Does Customary Law Include Islamic Law?" in Okoh, Aluboet al (eds.), *Contemporary Frontiers in Nigerian Law: Essays in Honour of the HonourableJusticeSalihuModibbo Alfa Belgore*(Oracle Business Ltd, Makurdi Nigeria 2006). Ladipo disagrees with the opinion of the above scholars and submits that Islamic Law is part of customary law because some of the sources of Islamic law are the Pre-seventh century Arabian customs, which are mainly man-made and also the
Continuing dynamism of the Sharia. See Ladipo, O.A. "Where does Islamic Arbitration fit into the Judicially Recognized Ingredients of Customary Arbitration in the Nigerian Jurisprudence?" (2008) Vol. 8, No 2 African Journal on Conflict Resolution 108.

[36]The Sharia is the Muslim legal code. The Primary sources of the Shariah are the Quran, the Sunnah (Practice of the Holy Prophet), the Qiyas (analogical deductions) and Ijma (Consensus of Islamic Jurists). See Yusuf,

dispute resolution is also structured according to Islamic law. Emirs head Emirates. Each emir had a court even though they do not wield judicial power in most circumstances. Judicial power is usually wielded by the Alkali who administers Sharia law.[37] The practice of arbitration under the Maliki School of Islamic jurisprudence applicable in Northern Nigeria is known as *Tahkim*, which is based on the injunction of the Holy Quran[38] and also finds support under the Sunnah of the Holy Prophet.[39]

The above does not mean that Islamic law system of arbitration is exclusively adopted in all areas of the North. For example, in Ilorin,[40] the *Daudus* (district heads) Magaji,[41] *Alangua,*[42] and family heads still perform the function of arbitrators within their respective domain.[43] In the Southern part of Nigeria, however, the practice of arbitration is more pronounced. This fact is highlighted by the number of litigated cases on customary arbitration from that part of the region. The method of dispute resolution still varies considerably in communities within the Southern region, however, dispute resolution through arbitration are generally done by elders, family heads, and chiefs.[44]

There are principally two types of traditional societies in southern Nigeria: the cephalous society that has a central authority like the kings and emperor and the acephalous society, which has a decentralized system of government but controlled through collective leadership. The latter are predominantly found in the eastern part of Nigeria.[45] In the cephalous society, the king or emperor,[46] plays the role of final arbiter in any dispute arising within their

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Nigerian LegalSystem(National Publishing House, New Delhi 1982) 27, 33. In non-Muslim areas of the north, the practice of arbitration is similar to what is obtainable in the southern part of Nigeria. See Keay and Richardson, *The Native and Customary Courts of Nigeria. (1966)*(Sweet & Maxwell, London. P.21.

[37]Yusuf A. supra p. 36.

[38]See Quran Chapter 49 verses 9-10 and Quran 4 verse 35 and 58.

[39]There were at least 3 instances where the Holy Prophet was involved in arbitration. He was said to have appointed an arbitrator, submitted to the decision of an arbitrator and was bound by an arbitral award. And He has also recommended the use of arbitration to other procedures. See Abdulhamid El-Ahdab, *Arbitration with the Arab Countries* (2nd ed., Kluwer Law International, Hague 1999).

[40]Ilorin is an ancient city and now capital of Kwara State of Nigeria. See Daibu A. A. "An Examination of the Rules of Natural Justice and Equal Treatment of Parties in Arbitration" (LL.M Thesis, Faculty of Law, University of Ilorin, 2012) 103.

[41]Community head.

[42] Village Head.

[43]Igbokwe V.C. "Socio Cultural Dimensions of Dispute Resolution: Informal Justice Processes among the Igbo speaking people of Eastern Nigeria and their implications for community/Neighbouring Justice System in North America" (1998) Vol. 10 (3) Africa Journal of International and Comparative Law 1.

[44] Ibid.

[45]Akanbi M.M. "A Critical Assessment of the History and law of Domestic Arbitration in Nigeria" (3rd ed The Learned, Law Students' Association Kwara State College of Arabic and Islamic Legal Studies Ilorin) 40-41.

[46]Traditional kings are called "Emir" in the Northern part of Nigeria save for the Sultan of Sokoto whose traditional title is "Sultan"; virtually all traditional kings in the north are Emir. In the South-Western part of Nigeria traditional kings are generally referred to as Oba although with different tittles e.g. The Alafin of Oyo,

domain.[47] The role of the arbitrator in most cases is delegated to lesser chiefs within the kingdom or heads of families.[48] The decisions of these lesser chiefs are however subject to the king's court if the need arises.[49] On the other hand, in the acephalous society, the administrative machinery is diffused and disputes are normally resolved through a political arrangement whereby authority is wielded either by reason of headship of a very important and powerful family or clan or by being the oldest in the community.[50] Feuding members in the communities bring their disputes voluntarily to their family heads, elders, and prominent leaders in the communities, chiefs or kings who are independent persons for settlement.[51]These persons are often selected ad hoc with the primary aim of restoring harmony through elimination of grievances.[52] The parties usually accept the decisions of these respected elders and chiefs who sit as native tribunals,[53] because they derive their authority from the custom and tradition of the community which are accepted by members of the communities as binding upon them.[54]

The essence of the exercise of this function by elders in various communities lie in the philosophy that these respected members are vast in the customary law of their communities.

The role played by these members of the community in resolving disputes among their subjects is not only a practice but a significant element of customary law: peaceful and harmonious resolution of dispute to ensure a continued peaceful co-existence among the people as well as the maintenance of social equilibrium of the society as a corporate whole.

Oni of Ife, Oba of Benin, Oba of Lagos, Olubadan of Ibadan, Alake of Egba and Timi of Ede to mention a few. See Daibu A. A (n 19) 104.

[47]Akanbi M.M. (n 25) 41.

[48]Oluduro, O., Trends in Nigeria Law" in Oluduro et al (eds.), Essays in Honour of Oba Olateru-Olagbegi III, Olowo of Owo Kingdom (Constellation Nig. Publishers) 462

[49]The king's Court serves as Appellate Court, which can review the decision of the family heads, elders and chiefs at the instance of one of the parties. See Akpata E, *The Nigerian Arbitration Law in Focus* (n 2)1, for an example in Benin Kingdom in the southern part of Nigeria.

[50]Emiola, A, *The principle of African customary law,* (Emiola Pub Nig. 1997) p .1; Igbokwe V.C. Dispute settlement among Ibo and community Justice in North America P. 451; Akanbi M.M. (n 25) 41.

[51] Okekeifere, A. I, "The Recent Odyssey of Customary Law Arbitration and Conciliation in Nigeria's Apex Court" (2005) 5 (No.1) *Modern Practice Journal of Finance Investment Law,* p.130.

[52]"The term 'arbitration'… in the mouth of the African, refers to all customary settlements of disputes other than by the regular courts. The aim of such a transaction is not the rigid decision of the dispute and the imposition of penalties, so much as reconciliation of the two parties and removal of the disturbance of the public peace." –A. N. Allott, Essays in African Laws. London: Butterworth (1960) p. 126; O. K. Edu, "Effect of Customary Arbitral Awards on Substantive Litigation: Setting Matters Straight," Available online at <http://www.nigerianlawguru.com/articles/customary%20law%20and%20procedure/EFFECT%20CUSTOMARY%20ARBITRAL%20AWARDS%20ON%20SUBSTANTIVE%20LITIGATION,%20SETTING%20MATTERS%20STRAIGHT.pdp> Accessed on 6th December, 2016.

[53]The elders, chiefs and families head are generally referred to as members of the native tribunals

[54] Akanbi, supra P.33

3.6 Advantages of Customary Arbitration

It has being observed and established by writers of repute that courts litigation system in resolution of disputes has the disadvantages of being time consuming, expensive, less friendly, unpredictable, discriminatory, cumbersome, technical to mention but few.[55] These accounted for the global acceptance of the option of arbitration mechanism as an alternative dispute resolution of disputes.

In the realm of customary arbitration for instance, because it is part of the community and being the customary method of administration of justice, customary arbitration has the advantages of being quicker, not technical, cheap and predictable. Furthermore, all the cumbersome procedures in litigation system are not applicable to customary arbitration, the disputing parties have the choice of choosing their arbiter, the parties determine the venue of arbitration and the procedure to be followed, it is more friendly in nature and preserve personal relationship in community and less expensive, there is no requirement to employ legal representation to stand for parties; and parties or witnesses attend without hesitation due to respect and fear for the elders.

Additionally, customary arbitration is more susceptible to be respected and submitted to than modern arbitration because of the tendency or an obligation to respect customs and traditions and fear of sanction and or as in Islamic law respect and acceptance of arbitration is considered as religious obligations and or fear of sanction like banishment. It is equally submitted that dispute resolution under the customary arbitration brings about an amicable settlement of dispute without creating further acrimonies between the disputing parties which is the case in litigation.

3.7 Disadvantages of Customary Arbitration

Recourse to customary arbitration is very low if not totally forgotten. Customary arbitration like all customary law is not codified except Islamic arbitration which has its laws contained in the Quran, the traditions of the Prophet Mohammed and other subsidiary Islamic

[55] Alfred A. op cit, Gadzama J. K. Inception of ADR and Arbitration in Nigeria, NBA Conference Abuja (2004), Dele P. Supra (2005) What is Alternative Dispute Resolution? Dee-Sege Nigerian Ltd Lagos, Aina K. (1997) Alternative Dispute Resolution (ADR): Solution to Court Congestion, The Guardian Newspaper page 24, Giaus E. (1997) The Law of Arbitration in Nigeria, Longman Nigeria Plc, Akanbi M. M. op cit and Abdul A. Y. (2002) Arbitration in Nigeria: Problems, Challenges and Prospects, Ilorin Bar Journal vol. 1.

legislations. This of course is disadvantageous to its application in Nigeria as same is considered personal law only limited to adherence of Islamic faith.

Most people handling customary arbitration are not trained arbitrators, therefore, the procedure and the award may be faulted if appealed against in court. Similarly, a customary arbitration award cannot be enforced except upon the application of a party to court for it; this negates the advantage of customary arbitration as being quicker and less expensive.

It is painful to note that one of the striking disadvantages of the binding effect of customary arbitration is the freedom parties enjoy not to accept the decision or the award at the time it was made. Any of the party who is dissatisfied with the decision of the arbitrators has the freedom to abandon it. This freedom was confirmed in *Awosibe v. Sotunbo,*[56] where the Supreme Court per Nnmaeka-Agu JSC (as he then was) observed, "…his (dissatisfied party) filling of a writ of summons was a positive demonstration that he never believed there was a binding arbitration and his abandonment of the gentlemen's agreement reached between them".

Likewise, the Supreme Court per Edozie JSC accepted the above position in *Okereke v Nwanko* where it was held that the legal implication of the evidence of Appellant and respondent initiation of action against the arbitral award in Exhibit B is that Exhibit B (decision of a customary arbitrator) is not binding on the parties.[57]

3.8 Challenges to the Practice of Customary Arbitration in Nigeria

The legality of the practice of customary arbitration in Nigeria has been a subject of intense debate by jurists and legal scholars[58]. Although, issues like its nature and scope, features, conditions for its validity, effect and award have been pronounced upon and appears settled by plethora of decided cases. The practice of customary arbitration is still facing a lot of difficulties in its operation and continuous use in Nigeria as a means of dispute settlement.

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[56] *Awosibe v. Sotunbo* [1992] 5 NWLR (Pt 243) 514.

[57] *Okereka v Nwanko* [2003] 4 SC (pti) 16 at 29 and *Okere v Nwoke* [1991] 8 NWLR (Pt. 209) 311.

[58] See generally G. Ezejiofor, "The Prerequisites of Customary Arbitration," *The Journal of Private and Property Law*, (1992-1993) Vol. 16, p. 32; Ezejiofor, abovenote 3, pp. 22-26; Oba, above note 1, p 139; Akanbi, above note 2, pp. 113- 178;Ayinla, above note 2, p. 254; I. Imam, "The Legal Regime Of CustomaryArbitration In Nigeria Revisited" (2010) Vol. 3, No. 2, *Confluence Journal of Jurisprudence and International Law*, Kogi State University, Ayingba available online http://www.unilorin.edu.ng/publications/imami/UNIKOGI%20CUSTOMARY%20ARBITRATION%202.pdf, D. A. Ariyoosu, "Customary Arbitration as a Dispute Mechanism and Its Operational Framework as *Estoppel Per Rem Judicatam*," *University of Ilorin Law Journal*, Vol. 5, No. 1, 2009, P. 102.

This is evident from the various judicial pronouncements on the issue of its validity as well as conflicting and at times confusing decisions of the courts on the basic elements or characteristics of customary arbitration. It is in this light that the basic challenges facing the practice of customary arbitration will be discussed.

1. Voluntary Submission

Voluntary submission has been said to be the basis of arbitration and it is universal to the concept of arbitration under all legal systems.[59]While this might be true of conventional arbitration, it is doubtful if the same can be said for customary arbitration as customary arbitration is not founded on the basis of a formal, contract but social device for the maintenance of a stable and harmonious society[60].Voluntary submission under customary arbitration must be to body of persons recognize as having judicial authority under the custom of the parties. The courts in some other cases have continued to pronounce that submission to elders or Chief is an ingredient for the validity of customary arbitration. It is humbly submitted that the same problem of generalization of the yardsticks still apply here.

2. Prior Agreement to be bound by the Arbitrator's Award

There are divided opinions on whether an agreement to be bound constitutes part of the conditions for the validity of an arbitral award. Agreement to be bound, though controversial, is fundamental to the validity of an arbitral award under English arbitration. However, it is submitted that this condition which was borrowed from the English common law system has now been made a requirement for customary arbitration. Unlike Customary arbitration, English style arbitration is strictly contractual, based on agreement of both parties.

3. Option to Resile

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[59] Ladipo, above note 6, p. 115.

[60] *Agu v. Ikewibe,* supra, where Nnaemeka-Agu JSC in his dissenting opinion picked on the portion of the plaintiff's pleadings where it was averred that the plaintiff 'summoned' the defendant before the chiefs and elders of the parties' community and he reasoned that the word 'summoned' employed in thepleadings, drafted by a lawyer, must have been deliberate, and should be interpreted technically because it originated from the old common law writ of summons. His Lordship went further to opine that since the word summons connotes a command to appear, a subsequent submission to such summons could not be voluntary. He however concluded that the arbitral panel in question, even if it had purported to summon the defendant, had no power to do so. Also in *Yaw v. Amobie* [1958] 3 West African Law Report p. 406 at 408; where it was held that it is very rare for two people who are quarrelling to meet and agree together that they would submit their dispute to arbitration. The usual thing is that one party makes a complaint to somebody, the other party is sent for, and if he agrees, the party to whom the complaint is made arbitrates uponthe dispute.

It should be noted that the cardinal distinguishing factor of arbitration from other alternative dispute resolution (ADR) mechanisms is the binding effect of the decision of a private adjudicator voluntarily consented to by parties to a dispute. The option to resile is the most heavily contested and it is one of the ingredients of customary arbitration that must be present before a court can enforce it. The greatest danger this ingredient poses if it remains is that customary arbitral processes will be sentenced to a purgatory of some sort where their decisions are in an uncertain state or at worst in an unending flux.[61] This is because any of the parties who is dissatisfied with the decision of the arbitrators would be free to abandon the proceedings. The greatest danger this ingredient poses if it remains is that customary arbitral processes will be sentenced to a purgatory of some sort where their decisions are in an uncertain state. This is because any of the parties who is dissatisfied with the decision of the arbitrators would be free to abandon it.

4. Arbitrability

Not every dispute can be subject to the jurisdiction of the arbitration tribunal. This is more so for a customary arbitral tribunal. Thus, the underdeveloped nature of customary arbitration in Nigeria appears to have limited its scope to land related matters and domestic relations.[62] Also, customary arbitration cannot be used to settle disputes arising from transactions that are considered contrary to the norms of the society[63]. Therefore, quite a number of customary disputes are therefore not arbitrable on account of issues of non-arbitrability or limited scope.

On the other hand, *Tahkimis* applicable to all types of disputes except those that are expressly forbidden by Islamic law[64] or on account of public policy.[65]

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[61] Ladapo, Customary Arbitration in the Nigeria Jurisprudence, p. 22.

[62] A. Asouzu, *International Commercial Arbitration and African States Practice, Participation and Institution Development* (United Kingdom CambridgeUniversity Press), 2001, p. 146.

[63] The Yoruba customary law dealing with sale of family land which has been judicial recognized, is to the effect that sale of family land can only be done by the head of family with the consent of the accredited representatives or principal member of the family. Therefore any alienation purporting to transfer family land without the requisite consents is void *ab initio*. *Adenle v. Olude* [2002]18 NWLR (Pt.799) 413; *Adejumo v. Ayantegbe* [1989]3 NWLR (Pt. 110) 417.

[64] There is a classification of *halal* transactions, which are acceptable as lawful under the Shariah and haram transactions which are prohibited under the Shariah..

[65] Public policy consideration under the Shariah is determined by the Islamic code e.g. transactions concerning alcohol, gambling and interest based banking are forbidden under the Shariah. This makes it difficult to enforce an arbitration agreement dealing with disputes arising from such prohibited transactions; and where the arbitrated upon, the successful party may find it difficult to enforce the award due to the inarbitrability of the dispute in the first instance. Lew et al, Commercial International Commercial Arbitration (The Hague, Kluwer Law International 2003) p. 221.

5. Publication of Customary Arbitral Award

Confidentiality has been identified as one of the major potentials of an ADR process.[46] The requirement of publication of customary arbitral award it is submitted means the act of conveying of arbitration award to the parties.[47] This condition seems impracticable especially because of the largely unwritten and unsophisticated nature of customary law which customary arbitration belongs.

6. Customary Arbitration under the Nigerian Legal System

Customary law is largely unwritten, making its application subject to judicial review to test its enforceability. The customs and traditions of various Nigeria communities are diverse and this makes its codification almost impossible. Also knowledge of the customary law is not universal but only peculiar to its people and is not accepted by all Nigerians unlike the received English law and is therefore subjected to some applicability test for it to be en forced.[48]

7. Acceptance of Arbitral Award

This element was alien to customary arbitration but super imposed by the courts in Nigeria.[49] Acceptance of the award at the time it was made on the other hand indicates that none of the parties must have withdrawn from the arbitration after the award was made.[50] Consequently, a party is free to reject an award he finds unfavourable by this element. This element of customary arbitration appears to be the most controversial and unsettled among all the characteristics.

2.3 Modern Arbitration

Shortcomings of customary arbitration, led to the emergence of reforming customary arbitration and developing arbitration in itself. In Nigeria the first statute to be enacted on

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[46] W. W. [illegible], "Kwara/Multi-door Courts: An Idea Whose Time Has Come" being a paper delivered on the occasion of the formal inauguration of the Committee on the proposed Kwara State Multi-door Courthouse at the High Court of Kwara State on Tuesday, 29th July 2008.
[47] W. W. [illegible], "Kwara Multi-door Courts" (supra).
[48] Okpuruwu v. Okpokam (supra); Agu v. Ikewibe (supra); Eke v. Okwaranyia (supra).
[49] For a detail discussion on this, see Idornigie, Arbitration, and Orojo, ibid.
[50] See N. [illegible] T. [illegible] "The Binding Effect of a Customary Arbitration Award: Examining the Ghost of Agu v. Ikewibe" (2014) 58 Journal of African Law p. 228-249.

arbitration law was the Arbitration Ordinance 1914 modeled based on the English Arbitration Act 1889. It was later re-enacted as the Arbitration Ordinance 1958.[71] This ordinance was in force until in 1988 when Nigeria adopted the United Nations Commission on International Trade Law (UNCITRAL) Model law on International Commercial Arbitration[72] and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, thereby enacting the Arbitration and Conciliation Decree 1988. [73] This decree was largely significant as it provided for rules governing international and domestic arbitration and made provisions for conciliation, which was not present in the Arbitration Ordinance of 1958.

On the transition from a military regime to a democratic setting, the Arbitration and Conciliation Decree became an Act codified under the Laws of the Federal Republic of Nigeria. This Act has refined customary arbitration in Nigeria. Under section 1 of the Act it provides that:

> 'Every arbitration agreement shall be in writing contained:(1) (a) in a document signed by the parties; or (b) in an exchange of letters, telex, telegrams or other means of communication which provide a record of the arbitration agreement; or (c) in an exchange of points of claim and of defence in which the existence of an arbitration agreement is alleged by one party and denied by another (2) Any reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if such contract is in writing and the reference is such as to make that clause part of the contract.'[74]

Major emphasis is placed on a written agreement evidencing the *consensus ad idem* of the parties to submit their dispute to arbitration. Customary arbitration which is based on oral submission to arbitration brings with it the problem of certainty and enforcement. Where there is no initial written agreement, the decision of the arbitrator has no binding effect on the parties, as either of disputing parties is at liberty to accept or reject the award at the time it was made as in the *Awosibe v. Sotunbo*[75]

Modern arbitration takes a different dimension on the matter abovementioned. Once the disputing parties through a written agreement submitted their dispute to arbitration, the agreement is binding on those parties and any decision made by arbitrators appointed by parties shall be final and binding. The award will create an estoppel and operate as 'res *judicata*' with regard to matters with which the award dealt with, hence preventing either

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[71] CAP 13 Laws of the Federation of Nigeria and Lagos 1958.
[72] 1958
[73] No 11 of 1988.
[74] Arbitration and Conciliation Act Laws of the Federation of Nigeria 2010.
[75] Supra.

party from abandoning the award or pursuing such matters dealt with in the award in litigation.[76]It becomes better as Section 31 (1) of the Arbitration and Conciliation Act (ACA)[77] provides that: "An arbitral award shall be recognized as binding and subject to this section 32 of this Act, shall, upon application in writing to the court, be enforced by the court"[78].Hence the award would be enforced in the same manner as a judgment or order of a court. This significantly recycles the mode of procedure in customary arbitration. Also, judicial assistance is rendered here as the court helps in enforcing an award. In *Ras Pal Gazi Construction Company Ltd. v Federal Capital Development Authority*[79]it was held that "an award made pursuant to Arbitration proceedings constitutes a final judgment on all matters referred to the arbitrator. It has a binding effect and it shall upon application in writing to the court, be enforced by the court…" [80].

More so, New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards marks a significant recycle of customary arbitration. The Arbitration and conciliation Act (ACA) adopted Article 1 of the Convention enshrined in its Article 54.[81] Article 1 of the New York Convention stipulates thus:

> This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.[82]

Section 54 states provides that:

> Without prejudice to section 51 and 52 of this Act, where the recognition and enforcement of any award arising out of an international commercial arbitration are sought, the Convention on the Recognition and Enforcement of Foreign Awards (hereafter referred to as "the Convention") set out in the Second Schedule to this Act shall apply to any award made in Nigeria or in any contracting state: a. Provided that such contracting state has reciprocal legislation recognising the enforcement of arbitral awards made in Nigeria in accordance with the provisions of the Convention; Section54 (b) provides that the Convention shall apply only to differences arising out of legal relationship which is contractual.

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[76] See Fidelitas Shipping Co. Ltd v V/O Exportchleb [1965] 1 Lloyd's Rep. 223, C.A.
[77] Arbitration and Conciliation Act Laws of the Federation of Nigeria 2010.
[78] *Ibid.*
[79] [2001] 10 NWLR (pt. 722) p. 559 at 562 para. 3.
[80] Ras Pal Gazi Construction Company (supra)
[81] Laws of the Federation of Nigeria , 2010
[82] New York Convention 1958. Available online at http://www.euro arbitration.org/resources/en/nyc_convention_en.pdf. Accessed August 18, 2014

Customary arbitration does not involve international commercial arbitration or recognising decisions that were under different norms, customs and traditions of a particular community to be enforced under another community's custom and tradition.

Furthermore, with the emergence of arbitration centres in Nigeria, customary arbitration is recycled. There was nothing like an arbitration centre in ancient times that would be charged specifically with facilitating arbitration. These arbitration centres assist in the facilitation of arbitral proceedings coupled with resolving disputes through their own rules. Some of these Centres include:

1. Lagos Multi-Door Courthouse
2. Abuja Multi-Door Courthouse
3. Chartered Institute of Arbitrators UK (Nigerian Branch)
4. Lagos Regional Centre for International Commercial Arbitration
5. The International Chamber of Commerce (Nigerian National Committee)
6. Lagos Court of Arbitration

Legal commentator Maureen Cain points to the 'claustrophobic structure' of the legal profession as one of the reasons why the ideology upon which the profession operates remains largely unexamined. He stated that the maintenance of the unity of legal thought is contingent upon [judges and lawyers] being impervious to the various day to day rationalities of other sections of the population."[83]

That is, says Cain, there is power in the mystery and esoterism of the litigious process, in its language, the dress of counsel and the formal courtroom practices.[84] Judges generally are not averse to perpetuating that power and esoterism. They are unlikely to renounce the deference the public accords to their judgments.[85] Lawyers may act likewise.

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[83]Cain, M. (1976) 'Necessarily out Of Touch: Thoughts on the Social Organisation of the English bar' I Carlen (ed), *The Sociology of Law,* Keele, UK: University of Keele.p.24.

[84] Sarre, R. *Uncertainties and Possibilities: A discussion of selected criminal justice issues in contemporary Australia*, (1994) Adelaide: University of South Australia P16-20.

[85]Elson, J(1989) 'The Case against Legal Scholarship; or, if the Professor must Publish, must the Profession perish?' *Journal of Legal Education*, p.39 (3), 343-381.

6.0. Factors Aiding Litigation over Customary Arbitration

Law is a discipline that is highly resistant to change. Yet despite all of the evidence of the spiraling costs and enduring bitterness launched and fomented by the litigious process, there is little evidence that its appeal, generally, is shrinking. Yet there is an unyielding view that alternatives to litigation are still very much the 'alternative'. The instituting of legal proceedings, and, indeed, the making of threats of litigation, are fundamental to the processes associated with civil justice. There are a number of possible reasons why litigation endures as the cornerstone of the civil legal system notwithstanding the great strides made by law reform commissioners, community legal services and governments alike in seeking alternatives. The instituting of legal proceedings, and, indeed, the making of threats of litigation, are fundamental to the processes associated with civil justice. These reasons are explored briefly in the discussion that follows.

6.1. The adversarial system is entrenched in the current style of legal education

There is little doubt that the way in which law is taught and the curricula that are assembled entrench the view that legal judgments (as opposed to customized outcomes arrived out through parties' discussions) are a preferred method for reaching 'correct' results.

6.2 Law reformers accept the centrality of the adversarial/litigious approach

It is the often case that reformers review alternatives to litigation by referring to them as 'exceptional' and thus the perceived immutability of the prevailing assumption remains intact.

6.3 The adversarial system may assist those who challenge authority and power

There is, furthermore, an argument that the adversarial approach can return power to the hands of the otherwise powerless[86]. It is possible that an open court judgment, with fixed procedural rules, may act against the threat of arbitrary action by the more powerful elements of society.

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[86] Handler, (1978) p.232-3Handler, J. F.*Social Movements and the Legal System: A Theory of Law Reform and*

6.4 The adversarial system is culturally determining and determined

There is, finally, an argument, albeit from one particular paper, that the rate at which peop choose adversarial, litigious approaches can serve as an indicator of legal culture.[87] Based o research conclude that 'legal culture' is as much the product of the system as it is it generator and does not exist outside of legal institutions.

7. Conclusion

The attitudes of courts in the determination of the binding nature of an award given unde customary arbitration, using the parameters of modern arbitration, has caused considerabl damage to the essence and potency of customary arbitration practice in Nigeria. In order to b authentic, it is contended that judicial development of customary arbitration, must respond the traditions and goals of the people whose society is under consideration. It should not b subject to a validity test by reference to arbitration under the received English la Arbitration has become a globalized occurrence in the world today and most important fondly resorted to for settlement of international and domestic commercial agreements. As result, there is need to revisit arbitration under the Nigerian Customary law taking int consideration that access to justice is becoming a mirage for indigent persons in the socie due to very high cost of litigation hence there is the to enlighten the citizens of the laudable advantages of customary arbitration else majority denied of legal justice may resort to self help and this will wreck-havoc to the peace and of the society and the country as a whole.

The adoption of the customary arbitration will assist in the reduction of cases before the cou especially trivial issues or dispute which can ordinarily be resolved at community lev amicably settled through customary arbitration but were taken to court and this will as we lead to prison decongestion across the country due to its quick and less technical proce adopted in customary arbitration. Lastly, the incidence of incessant strikes will become thing of the past if the organized labour unions and employers can also embrace and adop customary arbitration in the settlement of their disputes. Considering, the increasing problem confronting litigation, the government should brace up plans to enlightening the people on th need to revert to our traditional mode of dispute resolution that is customary arbitration whi has been judicially affirmed by the Supreme Court in plethora of cases.

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[87] Blankenburg, E.'Civil Litigation Rates as Indicators for Legal Cultures' (1997)in D. Nelken (ed)*Comparin Legal Cultures*, Hants, UK: Dartmouth Publications, 41-68.