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UNEARTHING THE RELEVANCE OF ARTIFICIAL INTELLIGENCE IN CUSTOMARY ARBITRATION UNDER AFRICAN JURISPRUDENCE

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Abstract
Over the years, customary arbitration has played very important role in maintenance of peace and coexistence among the people indigenous to Africa. Generically, arbitration is a form private settlement of dispute. It is a form of dispute resolution mechanism outside the normal court proceeding. In Africa, until the introduction of western methodology in the administration of justice and subsequent classification of disputes into civil and criminal, arbitration had remained the tool for social equilibrium and management of cohesion among the indigenes. Due to advance in technology, artificial intelligence becomes germane in every field of human endeavour including settlement of disputes. The objective of this paper is to unearth the relevance of artificial intelligence in customary arbitration under African jurisprudence. The paper was commenced by reviewing the modus operandi of the customary arbitration in Africa. For this purpose, the paper adopted a doctrinal research method. It was discovered among others that the dichotomy of disputes into civil and criminal by the western adjudication system had downplayed the scope of customary arbitration in Africa among other challenges. Codification of African dispute settlement system methodology is also a challenge, hence the need to employ artificial intelligence. It was based on the foregoing that recommendations were made among which is the use of artificial intelligence in customary arbitration in Africa.

Keywords: Unearthing, Relevance, Customary arbitration, Artifice Intelligence, Africa Jurisprudence.

1. Introduction

Dispute and settlement are as old as mankind. Resolution of dispute has always been organized in different forms in accordance with the peculiarities of each society. As in many other places, the practice of dispute settlement using the process of arbitration is as old as the existence of the African society.[1] Arbitration had existed in the various indigenous communities in Africa long before the advent of the British legal system of court litigation in most African countries.[2] In pre-colonial Nigeria, there was in existence a separate, independent and organised dispute resolution system based on the individual customary law in each community. This in its relevance appeared to have promoted harmony, respect for elders, respect for custom and served as instrument of social control. However, the challenge of documentation of various approaches to customary arbitration in Africa has caused generation gaps that it now appears that the system is gradually fading away.

With the globalization of every aspect of human engagements, it becomes germane, that documentation of customary arbitration methodology in Africa follows the change of trend if its relevance will be sustained for the future generation. This cannot be perfectly done without a breath into the theory and development in the computer system popularly called Artificial Intelligence (AI). This paper shall unearth the relevance of Artificial Intelligence in Customary Arbitration under African Jurisprudence. For the purpose of juxtaposition of the topic under the discourse, this

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[1] Per Niki Toby JCA (as he then was) in *Caribbean Trading and Fidelity Corporation v NNPC* (1992)7 NWLR (Pt. 252) 161, 179.
[2] JK. Gadzama, 'Inception of ADR and Arbitration in Nigeria', being a paper presented at the NBA Conference Abuja, 2004; *Agu v. Ikewibe* (1991)3 NWLR (Pt. 180) 385.

paper will examine the concept of customary arbitration, legal basis of arbitration under customary law, validity of customary arbitration, enforcement of customary arbitral award, challenges to customary arbitration, relevance of Artificial Intelligence in Customary Arbitration under African Jurisprudence. The paper shall draw conclusion and make recommendations.

2. Customary Arbitration

Customary arbitration is the arbitration proceedings conducted under native law and customs. In *Agu v Ikewibe*,[3] the Supreme Court of Nigeria opines that customary arbitration is 'An arbitration in dispute founded on the voluntary submission of the parties to the decision of the arbitrators who are either the chiefs or elders of their community, and the agreement to be bound by such decisions or freedom to resile where unfavourable.' In *Njoku v Ekeocha,*[4] Ikpeazu J. noted that:

> *Where a body of men be they chiefs or otherwise, act as arbitrators over a dispute between the 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 arbitration and, thirdly, that they agreed to be bound by the decision; such decision has the same authority as the judgment of a judicial body and will be binding on the parties and thus create an estoppel.*

It therefore follows according to the learned jurist that the parties to a dispute must submit or agree to arbitration, must accept the terms of the arbitration and must agree to be bound by the decision of the arbitration. On whether a dispute taken to a local non-judicial body of elders for settlement was binding on the parties, the court held in *Mbagbu v Agochukwu*[5] 'that the decision was binding if accepted at the time it was made.' This decision seems to suggest that an important principle of customary arbitration is that parties have the prerogative to either accept the decision of the arbitrators or refuse it.

The above position of scholars and jurists agreed that customary arbitration must have the components of the voluntary submission of the parties to a group of arbitrators who may be either the elders of the family or community who are competent to adjudicate over the case in accordance with the custom and tradition of the parties, that the decision of the arbitrators shall be binding on the parties if they accept, or that any of the parties can resile the decision.

It is submitted that making the bindingness of the decision reached in arbitration subject to the acceptance of the parties defeats the purpose of arbitration. Submission to arbitration is with the understanding that a dispute will be fully resolved and to our mind should have been enough. This is because, if parties do not have confidence in the arbitrators, they would not submit their dispute to them for their arbitration *ab nitio*. Once parties have submitted their dispute to arbitrators, they are implied to have consented to be bound by the outcome of the arbitration otherwise the exercise will amount to waste of time, resources and energy. An aggrieved party at the end of arbitral exercise has the right of appeal to a higher authority including the court. We found more sound reasoning in *Ndah v Chianuokwu*[6] where the court held that:

> *Where two parties to a dispute voluntarily submit the issue in controversy according to customary law and agree expressly or by implication that the decision of such arbitration would be accepted as final and binding, then once the arbitrators reach a decision, it would no longer be open to either party to subsequently back out of or resile from the decision so pronounced.*

[3] [1991] 3 NWLR (Pt. 180) 385.
[4] [1972]2 ECSLR 199.
[5] [1973]3 ECSLR 9pt.1) 90.
[6] [2006]17 NWLR (Pt. 1007).

It is our further submission that since main objective of arbitration is to maintain peace and induce cohesion within a community, the decision reached in arbitration as a dispute resolution mechanism must be accepted as final so long as the customs and tradition of the community have been complied with; without a proviso for a losing party to resile such decision.

3 Legal Basis of Arbitration under Customary Law

Customary arbitration is not regulated by the Arbitration and Mediation Act 2023. However, Section 70 of the Evidence Act 2011 (as amended) provides that:

> *In deciding questions of customary law and custom the opinion of traditional rulers or chiefs or other persons having special knowledge of the customary law and custom and any book or manuscript recognized as legal authority by people indigenous to the locality in which such law or custom applies, are admissible.*

Opinion of traditional rulers or chiefs or other persons having special knowledge of the customary law and custom is recognised under the Nigerian law as a valid dispute resolution mechanism by the courts.[7]

In discussing the legal basis and validity of customary arbitration in African jurisprudence especially in Nigeria, it is imperative to understand that there are two broad divisions of customary arbitration in Nigeria and which are applicable depending on whether in the predominantly Moslem Northern Nigeria or in the Southern Nigeria with its multiple customs. Therefore, customary arbitration is dependent on the customary law of the community. Under the Islamic law, Imam opines that the Islamic legal system is one of the three recognised and enforceable legal system in Nigeria and evidence abound in Sharia, which is the Muslim legal code.[8] He further noted that the 'practice of customary Islamic arbitration in the Northern Nigeria has its legal basis from the primary source of law, which is the holy Quran, the *Sunnah* of the holy Prophet Mohammed, the *Ijma'a, Qiyas*, *Ifhitihad* and *Istihisan*.[9] In accordance with the *Maliki* School of Islamic jurisprudence, arbitration is regarded as *Tahkim* or *Sulhu*, which is a form of contract whereby parties agree to bring any dispute or conflict arising from the terms of a contractual agreement before a *hakeem*, or arbitration, for settlement.[10]

In the Southern part of Nigeria, the practice of arbitration is more pronounced.[11] The method of dispute resolution still varies considerably in communities. But generally, dispute resolutions through arbitration are generally done by elders, family heads, and chiefs.[12] The arbitrator in each community depends on whether the community is, by tradition, cephalous, that is, where there exists a king or acephalous; meaning that there is collective or decentralized leadership. In the cephalous society, the king, by whatever name he may be called locally, is the final arbiter in any dispute arising within his domain; while in an acephalous society, the administrative machinery is decentralized and disputes are usually resolved through an arrangement whereby authority is wielded either by reason of headship of family, clan or by being the oldest in the community.[13] According to *Emiola*, the essence of the exercise of this function by elders in the various communities lies in the philosophy that these respected members are versed in the custom of their communities.[14]

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[7] *Okoye v Obiaso* (2010)8 NWLR (pt. 1195)145; para.171-172.
[8] I Imam, 'The Legal Regime of Customary Arbitration in Nigeria Revisited'; <www.unilorin.edu.ng/iman/UNIKOGI>, accessed on 2nd April, 2024.
[9] Ibid.
[10] Ibid.
[11] VC Igbokwe, 'Socio-Cultural dimensions of Dispute Resolution: Informal Justice processes Among the Igbo Speaking People of Eastern Nigeria and their implication for Community/Neighboring Justice System-Africa' *Journal of International and Comparative Law* (1988) vol. 10(3) p.1.
[12] Ibid.
[13] A. Emiola, *The Principle of African Customary Law* (….: Emiola publishers Nig. Ltd, 1997) p.1.
[14] Ibid.

4. Validity of Customary Arbitral Award

On the validity of an arbitral decision otherwise called award, the court in *Kpo v Ajom*[15] has restated that 'for an arbitral award to be valid, it must exhibit four basic characteristics, to wit: (a) voluntary submission of the disputed to the arbitration of the individual or body; (b) agreement by the parties expressly or by implication that the decision of the arbitrator will be accepted; (c) that the arbitration was in accordance with the customs of the parties, and (d) that the arbitrators reached a decision and published their award.'

The Court further held that:

> *It is key to the validity of a customary arbitration that there be an indication of the willingness of the parties to be bound by the decision or have the freedom to reject the decision where not satisfied and that neither of the parties had resiled from the decision so pronounced.*[16]

Therefore, where arbitration is not conducted in accordance with the customary law of the community of the parties or the law application of which they chose, the arbitration will not be recognized. In other words, the arbitration must comply with the particular relevant customary law.

5. Challenges to Customary Arbitration

Customary arbitration, generally, has contributed immensely towards the maintenance of social equilibrium and the reduction of friction especially in commercial transactions in Nigeria. Despite the acceptance of the relevance of this important aspect of the legal system, the application is not devoid of some challenges. These challenges are getting more prominent with the evolution of Nigeria's justice system and the contemporary complexities of commercial disputes. Sometimes, conflicting pronouncements of the courts on what constitute a valid customary arbitration and award and their characteristics underscore the problems of the practice of customary commercial arbitration in Nigeria. To highlight these problems, it is necessary to discuss some relevant salient issues that have been identified as conferring validity and acceptability on customary commercial arbitration.

5.1 Voluntary Submission

The basis of arbitration is voluntary submission by the parties to arbitration. It is an essential element of customary arbitration which determines the validity and recognition of arbitration.[17] The term "voluntary" means 'exercising will or free choice.'[18] Voluntary submission means that a party entered into the arbitration agreement based on his own free will without any external influence or force whatsoever from any quarters.[19] One problem with this position is that in almost all transactions in the rural communities where customary arbitration is resorted to in the event of disputes, there are no prior agreement, at the point of entering into such transactions to resort to arbitration in settling any resultant dispute; rather, submission to arbitration is mostly in compliance with existing custom and tradition in such community. Therefore, while the concept of "voluntary submission" as a basis of arbitration in arbitration under the statute, it is disputable in customary arbitration whether there is, indeed, a prior voluntary submission of the parties by *ab initio* agreeing to resort to arbitration in the event of a dispute.

In addition, we agree with the submission that voluntary submission is more of a concept under the common law system of arbitration that considers private agreement of parties freely entered into by

[15] (2015)8 NWLR (Pt. 1461) 201; also *Nwosu v Ekeigwe* (2015) NWLR (Pt. 1472) 80.
[16] *Kpo v Ajom* (Supra); *Egesimba v Onuzurike* (2002)15 NWLR (pt. 791) 466 pp. 207-208, paras. G.B.
[17] *Kpo v Ajom* (supra); *Raphael v Ezi*, see also *Agu v Ikewibe*.
[18] Merriam-Webster's Comprehensive Dictionary, 1409 <https://www.merriam.webster,com.>
[19] 'Challenges of the practice of customary arbitration in Nigeria' being an article by Abdulrazag A. Daibu and Lukman A. Abdulranf; reported in The Nigerian Judicial Review Vol. 12 (2014), edited by Dr. (now Prof.) Edith O Nwosu and others, and published by the Faculty of Law, University of Nigeria, Enugu Campus, p. 112.

parties as sacred.[20] At common law, there is a prior express agreement to submit to arbitration, while under customary arbitration, an aggrieved party reports an infraction to a body of persons who then summons the offending party. In practice, parties to commercial transactions in the villages do not generally at the inception of the transaction, agree on the method of resolving any dispute that may arise from such transactions. Rather, where any disagreement arises in the course of executing the terms of the transactions, one of the parties may make a report to a third party, an arbiter for intervention. In most cases, some items are, by tradition presented by the aggrieved party to the arbitrator or arbitrators who subsequently summons the party against whom the complaint is made. This sequence, it is submitted is similar to the institution of an action in litigation rather than a voluntary submission of the dispute by the parties to a non-judicial body.

Parties in the customary setting do not have the prerogative of deciding whether to be bound by the decision of an arbitral body or not. The awards made by these bodies are most often final and binding. There are even consequences for failure to abide by the decision of the arbitral body. These include fines, denial of communal assets, and even ostracism. However, with the advent of the court system and arbitration statutes, these conditions, it is submitted are not strictly considered in the practical realities of the traditions. It is rather the position of the law that once there is evidence of the fact that the parties agreed to arbitrate and that an award was made by the arbitral tribunal in accordance with the customary law of the place, the matter is settled.[21]

5.2 Prior Agreement to be Bound by the Customary Arbitration

This envisages that the parties will agree at the inception of the arbitration proceeding to be bound by the arbitrator's award. This is important, especially as it limits a situation where a losing party refuses to accept the decision reached.[22] However, the problem of whether there was a voluntary submission to admission before arriving at the stage of this prior agreement to be bound by the award constitutes a challenge. Where there is no clear voluntary submission *ab nitio*, this subsequent agreement cannot be deemed to be valid. Also, even where there exists such agreement, it will be subject to the fulfillment of the other conditions for a valid customary award. It is submitted that this agreement, standing on its own, is merely persuasive since a court can refuse to enforce an award where it is found that the standard for a valid customary award has not been met.

5.3 Party's Option to Resile from Arbitration Decision

One of the conditions for the validity of customary arbitration is that neither of the parties has resiled from the decision so pronounced.[23] This is understood to mean that a party can, after the pronouncement of the decision of the arbitrator, refuse to accept the said decision. A justification for this condition is that it is a protection against the possibility of bias of the arbitrator. It is submitted that it is unconscionable for a party to refuse the decision of an arbitration process he voluntarily submitted to and participated in. This will lead to uncertainty in adopting arbitration for dispute resolution as a dissatisfied party can abandon the decision. This defeats the purpose of arbitration.

5.4 Non-codification of Customary Law

Customary arbitration as part of customary legal system is largely unwritten. Its application under the Nigeria legal system is subject to judicial review to test its enforceability.[24] The non-codification substantially makes customary law uncertain. This uncertainty does not engender confidence in customary arbitration as a viable method of settling disputes, especially for commercial purposes.

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[20] AA Daibu and L.A. Abdulranf; p. 113.
[21] GC Nwakoby, op. cit. p. 13; referred in Njoku *v Ekeocha* [1972] 2 EECSLR 1990; *Aguocha v Ubiji* [1975] 5 ECSLR 211; *Onusike v Onusike* [1962] 2 ECSLR 10; *Ekwueme v Sani Zakari* [1972] 2 ECSLR 631.
[22] *Egesimba v Onuzurike*, supra; Raphael *v Ezi*, supra.
[23] *Raphael v Ezi*, supra; *Odonigi. Oyeleke* [2001] 6 NWLR; *Agu v Ikewibe,* supra.
[24] *Ohiaeri v Akabeze,* supra; *Eke* v *Okwaeanyia*, supra.

5.5 Arbitrability

This simply refers to what extent can a subject matter of a dispute lawfully be referred to customary arbitration. *Idornigie* explained that the subject matter for arbitration must be one which can be the subject of compromise by those capable of legally disposing their rights.[25] It is therefore, to be deduced that not every dispute can be referred to arbitration. The underdeveloped nature of customary arbitration in Nigeria appears to have limited its scope to land related matters and domestic relations.[26] Transactions that are established to be contrary to the norms of a given society cannot be settled by arbitration.[27] In similar vein, matters codified as crimes are not subject of arbitration.

5.6 Publication of Customary Arbitral Award

The preservation of the privacy and confidentiality of the parties and the dispute is one of the principal advantages arbitration has over litigation. The requirement of publication of customary arbitral award negates this important ideal.

5.7 Acceptance of Arbitral Award

In a recent decision of the Court of Appeal, it was still held that one of the conditions for the recognition of customary arbitration is if parties indicate willingness to be bound by the decision of the non-judicial body or freedom to reject the decision where not satisfied.[28] This implies that despite all the efforts invested in a customary arbitration, a party can decide to reject the award. This position seems to follow the rule laid down *Agu v Ikewibe*[29] that

> *....arbitration is a mode of referring a dispute to the family head or an elder of the community for a compromise solution based upon 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 steps of the proceedings up to that point*.[30]

It is submitted that this rule exposes customary arbitration to avoidable uncertainty and unnecessary prolonging of disputes. It is also illogical that a party who was part of a process, without objections, would without any objective justification; reject the outcome of the process. We, rather, align ourselves with the ruling in *Awonusi v Awonusi*[31] where the court held, per Fabiyi JCA (as he then was) that where arbitration under customary law is pronounced valid and binding, it would be repugnant to good sense and equity to allow the losing party to reject or resile from the decision of the arbitrators to which he has previously agreed. Curiously, several court decisions seem to retain the decision in *Agu v Ikewibe*[32] to the effect that a dissatisfied party can reject a customary award even after the ruling in Awonusi's[33] case.

As has been noted, this position of the courts does not allow for finality and certainty in customary arbitration.

7. Relevance of Artificial Intelligence to Customary Arbitration in Africa

Artificial Intelligence is the ability of a digital computer or computer-controlled robot to perform tasks ordinarily associated with human beings. It is a stimulation of human intelligence processes

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[25] PO Idornigie, *Commercial Arbitration Law and Practice in Nigeria* (Abuja: Lawlord's Publications, 2015) p. 109; Article 510 (4) of the Egyptian code of Civil Procedure.
[26] A Asouzu, *International Commercial Arbitration and African States Practice, Participation and Institutional Development* (United Kingdom: Cambridge University Press, 2001) p. 146, cited by A.A. Daibu and L.A Abdulranf, p. 119.
[27] *Adenle v Olude* [2002] 18 NWLR (pt. 799)413; *Adejuwo v Ayantegbe* [1989] 3 NWLR (Pt. 110) 417.
[28] *Raphael v Ezi* [2015]12 NWLR (Pt. 1472) 39.
[29] *Agu v. Ikewibe,* supra.
[30] [2007] 3 WRN 43 *Awonusi v Awonusi.* Supra.
[31] *Agu v Ikewibe,* supra; Nwosu *v. Ekeigwe,* supra
[32] [2015] 12 NWLR (Pt. 1472) 80; *Odornigie v Oyeleka,* supra.
[33] *Awonusi v Awonusi,* supra.

by computer. Artificial Intelligence relevance has gone beyond experimental stage to problem-solving in all fields of human activities. A compute does not perform task without human inputs information. Due to the globalisation of human activities in recent times, it becomes germane that information storage, research and problem-solving are computerised in the interest of the present and future generation.

African indigenous legal system is hinged on inquisitorial administration of justice. Arbitrators' mouths are not sealed to asking question aimed at unearthing the truth for the purpose of resolving the dispute. Where disputants submit themselves to arbitration, the arbitrators are laden with the duty of employing various methods acceptable under the customary law for the purpose of unrevealing the truth in order to amicably resolve the dispute. The friendly atmosphere created in the scene of arbitration under African jurisprudence made the process to continue to strive even in this day. The methodology of resolving dispute in Africa is fading away as a result lack of documentation and precedence. Education and urbanization became challenge to paying attention and closeness to elders for the purpose of continuous unwritten documentation of African customs. It has become germane to fill the gap through the inbuilt of the intelligence of the elders in the computer for prosperity. At least if human intelligence fails in future, computer can be called upon to perform the task.

The relevance of artificial intelligence to customary arbitration in African jurisprudence is not an end to itself rather it is the nucleus for the common existence, coherence, harmony and bond to indigenous African societies. Artificial intelligence will be able to revolutionize, preserve and improve on African cultural heritage and promote global recognition. By using machine learning algorithms, customary practices in Africa can be analysed to enhance efficiency and reflect on the custom values and relevance.

8. Conclusion

The paper has traverse through the tortuous journey of reviewing the concept of customary arbitration, some judicial decisions in favour or against customary arbitration, the challenges and the blessings of customary arbitration and why Africa cannot wash-away customary arbitration hasty due to its continuous relevance to promotion of peace in our communities. It is the light of the above therefore that the paper calls for the inputs of the relevant stakeholders in straightening the prospects of customary arbitration in Africa because of numerous advantages it injects to our societies. The paper submits that the sustenance of customary arbitration in Africa lies on the development and adoption of Artificial Intelligence for preservation, posterity and documentations.