



Where does Islamic Arbitration fit into the Judicially Recognised Ingredients of Customary Arbitration in the Nigerian Jurisprudence ?

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Abstract

In recent times, there has been a renaissance of the Islamic heritage in the consciousness of adherents of the Islamic faith and this has sought expression in their quests to conduct their affairs in accordance with Islamic injunctions.

This has become noticeable in areas where Islam is the predominant religion. In northern Nigeria, in the past decade, there has been a renewed focus on the Islam Shariah Law system, with six of the nation's thirty-six states symbolically adopting it in public proclamation.

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There is, however, a dearth of scholarly research on the operation of Islamic conflict resolution mechanisms in Nigeria. This situation has led to arbitrariness and uncertainty in the use of these mechanisms.

This article analyses the nature and principles of Islamic arbitration, and its applicability within the wider Nigerian legal framework *vis-à-vis* judicially recognised alternative dispute resolution mechanisms, particularly the principles and practice of customary arbitration.

Introduction

This article examines the tortuous journey of customary arbitration as a valid mechanism for dispute resolution in the Nigerian courts – from its initial acceptance, to the denial of its existence, and to the reconfirmation of its subsistence in the Nigerian jurisprudence. Particular emphasis is placed on the critical juxtaposition of the unsettled nature of the list of ingredients required for a valid customary arbitration as expounded by the Nigerian judiciary *vis-à-vis* the principles of the Islamic customary arbitration – the ‘Tahkim’. The ‘Tahkim’ is a component of the Islamic Shariah law, which system of law has been part of the Nigerian jurisprudence before the introduction of the English common law and statutes. The Shariah has been declared by the Nigerian courts as one of the sources of Nigeria’s customary law.

The Islamic Shariah – although its primary source is the Koran¹ – can be termed a jurist made law because of its development by scholars of various schools of thought.² The most influential of these schools

1 Wali v. Ibrahim (1997) 9 Nigerian Weekly Law Report (hereafter referred to as NWLR) [Part 519] p. 160 at 167 para F.

2 Other sources being the Sunna (the acts and practices of prophet Mohamed and his contemporaries), the Idjma (consensus of the opinions of Islamic scholars on issues not covered by the Koran and Sunna), the Qiyas (analogical deductions based on the afore-mentioned sources) and the Itijad (reasoning by jurists on issues not covered by the major sources).

of thought in the development of the Shariah in Nigeria is the Maliki School.³

Definition of Custom and Customary Law

It is important at this preliminary stage to consider the definitions of the terms ‘custom’ and ‘customary law’; and their nature, an exercise without which the proper scope of Islamic customary arbitration cannot be well appreciated.

There is no single definition of customary law agreed to by lawyers, jurists, social anthropologists and others who are concerned with it. This in itself is not surprising for both the term ‘custom’ and ‘law’ may be used in a number of differing senses depending upon the requirements of a writer’s approach (White 1956:86).

Black’s Law Dictionary describes *custom* as ‘habitual practice or course of action that characteristically is repeated in like circumstances’. It is –

a usage or practice of the people which by common adoption and acquiescence, and by long and unvarying habit, has become compulsory, and has acquired the force of a law with respect to the place or subject matter to which it relates. It results from a long series of customs, constantly repeated, which have, by such repetition and by uninterrupted acquiescence acquired the force of a tacit and common consent. [It is a] habitual or customary practice, more or less wide spread, which prevails within a geographical or sociological area; usage is a course of conduct based on a series of actual occurrences (Black 1999:385).

3 Alkamawa v. Bello (1998) 8 NWLR [Part 561] p. 173 at 182 para G; Obilade 1979 at 83 Section 14 Sharia Court of Appeal Law Cap.122 Northern Nigeria. Laws 1963. Other prominent schools being the Hanbali, Hanafi and the Shafi schools.

The term customary law has also been judicially defined in *Zaidan vs. Mohassen* as:

Any system of law not being the common law and not being a law enacted by any competent legislature in Nigeria but which is enforceable and binding within Nigeria as between the parties subject to its sway.⁴

However, as Austin (1954:162-163) has stated, it must be noted that in practice customary laws are positive laws fashioned by judicial legislation based upon pre-existing custom. Now, till they become the grounds of judicial decisions upon cases, and are clothed with legal sanctions by those in sovereign positions, the customs are merely rules set by options of the governed and sanctioned or enforced morally.

Elegido (2000:57) has pointed out, however, that –

A custom does not acquire legal force because a judge applies it: it already has legal force, and he will come to this conclusion by applying the tests prescribed by the law.

It is only in the light of the above definitions of the terms ‘custom’ and ‘customary law’ that one can conceptualise custom as cutting across geographical groupings, sociological groups and sub-groupings. These include: tribal groupings out of which native customs develop, socio-economic groupings, out of which trade and business customs emanate and socio-religious groupings, out of which faith-based customs evolve. To this end, the Supreme Court of Nigeria has classified the Islamic Shariah as part of the Nigerian customary law, on account of it not being a statutory body of law, but nonetheless enforceable and binding within Nigeria as between the parties subject to its sway.⁵

4 *Zaidan vs Mohassen* (1973) 11 S.C. p. 1 at 21, also reported in the *Journal of African Law* 2 (1) 1976.

5 *Zaidan v. Mohassen supra*, *Adesubukan v. Yinusa* (1971) NNLR p. 77 and *Ahmadu Usman v. Sidi Umaru* (1992) 7 NWLR [Part 254] p. 377. See also *Adesubokan v. Yinusa*

Development of Islamic Law in Nigeria

The earliest adjudged date of arrival of Islam and the Shariah into the geographical region comprising today's Nigeria is between 1085 and 1097 CE. During the centuries that followed, Islam spread both through conquest by *jihad* and proselytising by itinerant preachers (Adetokunbo 2001:197). During the colonial era, Islamic law was regarded by the courts as forming part of customary law (Yakubu 2002), and this remained so until the enactment by the Northern Nigerian government of the Native Courts Law and Moslem Court of Appeal Law, both of 1956, which introduced for the first time an explicit distinction between the Islamic law and the customary law (Anderson 1962:617-631). Subsequently however, the enactments of the states which were carved out of the northern region of Nigeria have regarded Islamic law as part of customary law. For example, section 2 of the Katsina State High Court Law of 1991 provides that 'customary law' included Islamic Law. The fact that Shariah Penal Code Laws have recently been enacted in some states of the northern part of Nigeria has retracted from the position held hitherto, and now suggests that Shariah or Islamic Law is not part of customary law. For example, section 29(3) of the Kano State Shariah Penal Code Law 2000 provides thus:

Islamic and Muslim laws shall be deemed to be statutory laws in all existing laws in the state.

Section 29(4) of the Kano State Shariah Penal Code Law 2000 further provides thus:

The provisions of existing laws in the state which define customary law to include Islamic or Muslim law are hereby accordingly amended and such provisions shall be deemed statutory laws wherever they occur.

(1971) Northern Nigeria Law Reports 77 and *Mariyama v. Sadiku Ejo* (1961) Northern Region of Nigeria Law Reports p. 81.

Despite these recent provisions, it must be noted that these changes in legislation relate only to Shariah penal law and as such their deeming of Islamic law as written law should only be limited to the criminal aspect of the law. And this is logical, when viewed in the light of section 36(12) of the Constitution of the Federal Republic of Nigeria, 1999 which forbids the conviction of any person under unwritten laws.⁶ Written laws are defined in the same section of the Constitution as laws enacted either by the National or a State House of Assembly. By this definition, all Shariah penal provisions not enshrined in the Penal Code Law of Northern Nigeria were deemed unconstitutional and unenforceable prior to the enactment of the Shariah Penal Codes referred to above.

Also to be noted is the fact that not all the recent Shariah Penal Codes either expressly or by implication amend or abrogate the previous provisions regarding Islamic law as customary law, except the Shariah Penal Code of Kano State referred to above. It is submitted that, by virtue of the above reasoning, all non-penal Islamic laws except in Kano State are still to be regarded as forming part of Nigerian customary law.

The foregoing notwithstanding, some jurists and scholars (Oba 2002; Aboki 2006) have queried the classification of Islamic law as part of customary law, and the only ground for their query has been that the Shariah, being a divine law, ought not to be classified with other customary laws which are man made. With utmost respect to these jurists and scholars, reference must be made to the pre-Seventh Century Arabian customs which were some of the sources of what have become the Shariah (Coulson 1959:13ff) and the sunna.⁷ Also to be considered, are the elements used in the continuing dynamism of the Shariah's development.

6 *Aoko v. Fagbemi* (1961) 1 All N.L.R. p. 48

7 Practices of Prophet Mohammed and his contemporaries.

These include the *istihsan*,⁸ *urf*⁹ and *hiyals*,¹⁰ which though they are of customary nature are nonetheless regarded as legitimate sources of Islamic law.¹¹

In the last thirty-five years, there has been a burgeoning interest by Nigerian Muslims, particularly the young and educated, of the northern and south-western parts of Nigeria, in their Islamic heritage (Ballantyne 1988:317ff; Ambali 2001:83ff.).¹² This interest is evident in the clamour for the wider use of the Shariah in more and more spheres of life, beyond its traditional expression in worship, family relations and limited application of Shariah criminal law.¹³ This drive has led to the flourishing of Shariah compliant commercial transactions, financial products and *Halal*¹⁴ investment options which are civil and commercial expressions of their Islamic heritage. It is worthy of note that Nigeria is the only country outside the Arab peninsula and Afghanistan where Islamic law is extensively applied (Anderson 1962:626). However, like all human endeavours, these Islamic civil and commercial expressions, as they become more widely utilised, will naturally lead to conflicts which will require management and resolution. The natural trajectory for the *Halal* savvy Islamic young and upwardly mobile will be to seek Islamic avenues of dispute resolution, which will include not only the traditional option

8 Judicial precedent.

9 Non-Islamic customs which are not incompatible with the Shariah

10 Legal fictions.

11 For more in-depth analysis see, Libson 1997:131-155. See also Meek 1925:269.

12 See also Muhammed 2001. Nigeria has a population of about 140 million people, 50% of which are Muslims and over 65% of which are under the age of 40 years. Source <<http://www.nigerianstat.gov.ng>> and <<http://www.cia.gov/library/publications/the-world-fact-book>>

13 The Shariah is an all encompassing way of life which governs among others, *ibadah* – worship, *Al-Ahwal al Shakhisiyyah* – personal law, *Mu'amalat* – law of commercial transactions, *Ahkam Sultaniyyah* – sovereignty and governance, *Akhlaq* – morals, *Al-Adab* – ethics, *al-Qada* – judicial administration, *Uqubat* – religious offences and *Hudud* – offences committed against fellow human beings.

14 Conduct or practice carried out strictly in accordance with Islamic injunctions.

of litigation, but also Islamic alternative dispute resolution mechanisms as *sulhu* (mediation) and *tahkim* (arbitration). Therefore, there is a need to research these areas of dispute resolution, and propel the building of dispute resolution structures and the training of personnel to provide these services. This paper is a contribution towards meeting the first of the three above identified needs.

On the Existence of Customary Arbitration in Nigeria

The jurisprudential history of customary arbitration in Nigeria as a mechanism for conflict management and dispute resolution extends far back into the pre-colonial era. And this was recognised by the Western styled judicial institutions of the colonial government.

Among the earliest examples of judicial recognition accorded the concept of customary arbitration were the decisions in the Gold Coast (now Ghana) by the West African Court of Appeal (WACA), which became binding on Nigerian courts and still form part of Nigerian case law. The West African Court of Appeal, in *Assampong v. Amuaku & Ors*¹⁵ held that:

... [W]here 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.¹⁶

The same was held in a long string of authorities including *Foli v. Akese*,¹⁷ *Kwasi v. Larbe*,¹⁸ and *Stool of Abinabina v. Enyimadu*.¹⁹ This line of authorities was followed by the Nigerian courts in a long string of

15 (1932) 1 WACA p. 192.

16 (1932) 1 WACA p. 201.

17 (1930) 1 WACA p. 1.

18 (1952) 13 WACA p. 76.

19 12 WACA p. 171.

decisions including *Inyang v. Essien*,²⁰ *Njoku v. Felix Ekeocha*,²¹ *Mbagbu v. Agochukwu*,²² and *Idika v. Erisi*²³

However, this tide changed in the late 1980s when the Court of Appeal denied the existence of customary law in Nigeria. In *Okpuruwa v. Ekpokam*,²⁴ particularly in the lead judgement of Uwaifo JCA²⁵ (as he then was), it was pronounced that:

I do not know of any community in Nigeria which regards the settlement by arbitration between disputing parties as part of its native law and custom.²⁶

The above holding of Uwaifo JCA found an ally in the earlier published opinion of A.N. Allott (1960:126), a scholar of traditional African law, who opined that:

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.

It is respectfully submitted that the pronouncement of Uwaifo JCA, was without due regard to the existing arbitration customs in Nigeria, one of which is the Islamic customary arbitration. Arbitration, known in Arabic as "Tahkim",²⁷ is recognised by Islamic law and provided for by all its sources including the writings of all the major Islamic schools of thought, albeit with slight variations as to practice and procedures.

20 (1957) 2 Federal Supreme Court (hereafter referred to as FSC) p. 39.

21 (1972) 2 East Central State Law Report (hereafter referred to as ECSLR) p. 90.

22 (1973) 3 ECSLR p. 90.

23 (1988) 2 NWLR [Part 78] p. 563.

24 (1988) 4 NWLR [Part 90] p. 554.

25 Justice of the Court of Appeal

26 (1988) 4 NWLR [Part 90] p. 572.

27 An arbitrator is referred to as 'Hakam'.

It is pertinent to note that arbitration as a concept of conflict resolution was assimilated by Islamic law from the practices of the communities of the pre-seventh century Arabia²⁸ which had a virile mercantile culture and had developed arbitral mechanisms to facilitate trade in a community where there was no organised system of governance and judicial structure (Fathy 2000:31).

Islamic law scholars point to a couple of passages in the Koran as the basis for the recognition of arbitration by Islamic law.²⁹ Some of these passages are:

If you fear a breach between them twain (the man and his wife), appoint (two) arbitrators one from his family and the other from hers; if they both wish for peace, Allah will cause them reconciliation.³⁰

...[B]y Allah, they will not believe until they make thee an arbitrator of what is in dispute between them and find within themselves no dislike of that which thou decide and submit with submission.³¹

Happily, the Supreme Court has subsequently in a string of decisions,³² confirmed the existence of customary arbitration in Nigeria. In *Odonigi v. Oyeleke*,³³ the Supreme Court has held that:

[T]he decision of the Court of Appeal in *Okpuruwa v. Ekpokam* (1988) 4NWLR pt 90 p 554 that our legal system does not recognise the practice of elders or natives constituting themselves as customary

28 Islam came into being after the revelation of the Koran to prophet Mohammed in the 7th Century A.D.

29 See generally, Rahman 1982:50-59.

30 Koran 4:35.

31 Koran 4:65.

32 *Agu v. Ikewibe* (1991) 3 NWLR [Part 180] p. 385, *Ojibah v. Ojibah* (1991) 5 NWLR [Part 191] p. 296, *Okere v. Nwoke* (1991) 8 NWLR [Part 209] p. 317, *Ohiaeri v. Akabeze* (1992) 2 NWLR [Part 221] p. 1, *Awosile v. Sotumbo* (1992) 5 NWLR [Part 243] p. 514, *Igwego v. Ezeugo* (1992) 6 NWLR [Part 249] p. 561 and *Osuigwe v. Nwihim* (1995) 3 NWLR [Part 386] p. 752.

33 (2001) 6 NWLR [Part 708] p. 12.

arbitration to make binding decisions between parties in respect of land or other disputes cannot in all cases be correct.³⁴

The Judicially Recognised Ingredients of Customary Arbitration

Though the issue of the existence of customary arbitration has been settled, there is still uncertainty as to what exactly constitute the ingredients of a valid customary arbitration (Igbokwe 1997:201, Nwauche 1999, Elombi 1999:803, Ndukwe 1999:191).

The courts have to-date offered disparate combinations of ingredients of customary arbitration. This uncertainty is epitomised by the Supreme Court decision in *Egbesimba v. Onuzuike*³⁵ where the lead judgment per Ayoola JSC,³⁶ the seemingly concurring opinion of Ogundare JSC and the dissenting opinion³⁷ of Niki Tobi JSC, all set out three different admixtures of ingredients, from the three equally diverse lists of ingredients expounded in *Agu v. Ikewibe*.³⁸

The leading judgment of Ayoola JSC declared that:

The four ingredients usually accepted as constituting the essential characteristics of a binding arbitration are:

- i. Voluntary submission of the dispute to the arbitration of the individual or body.
- ii. Agreement by the parties either expressly or by implication that the decision of the arbitrators will be accepted and binding.

34 (2001) 6 NWLR [Part 708] p. 27-28 para G-A.

35 (2002) 15 NWLR [Part 791] p. 466.

36 Justice of the Supreme Court

37 Though this dissenting opinion, according to Tobi JSC, was not on the ingredients of a valid customary arbitration, but on whether sufficient evidence had been led to prove those ingredients of the report ((2002) 15 NWLR [Part 791] pp. 529-530).

38 (2002) 15 NWLR [Part 791] p. 466.

- iii. That the arbitration was in accordance with the custom of the parties
- iv. That the arbitrators reached a decision and published their award.³⁹

The concurring judgment of Ogundare JSC sets out a different combination of ingredients, to wit:

For a customary arbitration to be valid, it must be shown:

- a. That parties voluntarily submit their disputes to their elders or chiefs as the case may be for determination; and
- b. That there is an indication of the willingness of the parties to be bound by the decision of non-judicial body or freedom to reject the decision where not satisfied;
- c. That neither of the parties has resiled from the decision so pronounced.⁴⁰

While in his opinion, Tobi JSC set out the following ingredients:

- a. That there has been a voluntary submission of the matter in dispute to an arbitration of one or more persons;
- b. That it was agreed by the parties, either expressly or by implication, that the decision of the arbitrators will be accepted as final and binding;
- c. That the said arbitration was in accordance with the action of the parties or their trade or business;
- d. That the arbitrators reached a decision and published their reward;
- e. That the decision or award was accepted at the time it was made.⁴¹

39 (2002) 15 NWLR [Part 791] p. 505 para D-E.

40 (2002) 15 NWLR [Part 791] p. 507 para. F-H.

41 (2002) 15 NWLR [Part 791] p. 530 para A-C.

From all the judicial decisions reviewed spanning from those of the West African Court of Appeal in the pre-independence era to the latest decision of the Supreme Court at the beginning of this 21st Century, the following seven ingredients of customary arbitration have emerged:

- i. The voluntary submission by parties to arbitration.
- ii. Submission to bodies or persons recognised as having judicial authority under the custom of the parties.
- ii. Agreement by parties beforehand to be bound by the decision of the arbitral tribunal.
- iv. Conduct of the arbitral proceedings in accordance with the custom of the parties.
- vi. Non-withdrawal of any party before publication of the award by the arbitral tribunal.
- vii. Publication of the award.
- viii. Acceptance of the arbitral award by the parties.

A Critical Juxtaposition of the Judicially Recognised Ingredients of Customary Arbitration *vis-à-vis* the Practices of the Tahkim

Voluntary Submission

Voluntary submission is the basis of arbitration and it is universal to the concept of arbitration under all legal systems.⁴² The pivotal concept herein is the volition, and the word 'voluntary' is defined as that which is, 'Done by design or intention, intentional, proposed, intended or not accidental, intentionally and without coercion' (Black 1999).

Nnaemeka-Agu JSC (as he then was) harped on the voluntary nature of submission, for arbitration in accordance with custom to be valid.

⁴² With the exceptions being court-ordered arbitration and arbitrations pursuant to statute.

In his dissenting opinion in *Agu v. Ikewibe*,⁴³ his Lordship 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 the pleadings, drafted by a lawyer, must have been deliberate, and should be interpreted technically because it originated from the old common law writ of *summoneas*.⁴⁴ 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.

It should be noted that it is usually difficult for parties to an already festering dispute to agree to submit to an arbitration. This was well enunciated in the Ghanaian decision of *Yaw v. Amobie*,⁴⁵ where it was pronounced 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 upon the dispute.⁴⁶

Furthermore, the fact that a party was 'summoned' or 'invited' by a prospective arbitral tribunal based on a complaint made by an aggrieved party and he responds, does not translate into a submission. In a chronological sequence, there must be a complaint lodged with a potential arbitrator by an aggrieved party, then the invitation of the other party, and subsequently, a meeting of all stakeholders (here the aggrieved party,

43 (1991) 3 NWLR [Part 180] 385 pp. 420 – 425 para F-B.

44 This writ was of judicial authority, and when issued was a command to appear before a judge or court.

45 (1958) 3 West African Law Reports p. 406.

46 (1958) 3 West African Law Reports p. 408.

the invited party and the potential arbitrator). The early stages of these meetings are akin to the pre-arbitration meetings practised in common law arbitrations. It is at these early stages that preliminary issues are sorted and procedures mapped out. These will include whether or not the ‘invited’ or ‘summoned’ party will submit to arbitration before the proposed arbitrator.

In *Asare v. Donkor & Serwah II*⁴⁷ the Ghanaian Supreme Court found objectively from the evidence adduced that the party summoned responded to a chief’s call out of respect, but that he never agreed to submit the dispute to arbitration by that chief.

It follows here et seq that a party could be forced to a meeting by a traditional summons to which a threat of sanction for failure to show up is attached, but beyond that the voluntary submission of such a party must be sought and obtained before any subsequent arbitration proceedings can be validly commenced.

Establishing the voluntary nature of a submission after an ‘invitation’ or ‘summons’ is a matter of evidence, and the Ghanaian Court of Appeal in *Nyaasmhwe & Anor v. Afibiyesan*⁴⁸ has suggested three ways in which evidence of this may be led, viz:

1. The payment by both parties of an arbitration fee to the arbitrator, prior to the alleged arbitration;
2. Expressly written⁴⁹ or oral agreement to submit to arbitration and

47 (1962) 2 Ghana Law Reports (hereafter referred to as GLR) p. 176 at 179-180.

48 (1977) 1 GLR p. 27.

49 It should be noted that the view expressed in a large number of Nigerian judicial authorities is that writing is unknown to customary law. See *Niger Const. Ltd. v. Ogbim* (2001) 18 NWLR [Part 744] p. 83 at 93 para F-H and *Egwu v. Egwu* (1995) 5 NWLR [Part 396] p. 493. However, customs have also been held by the courts to be dynamic, and are what the present generation understands and practises, as opposed to ancient traditions: see *Owonyin v. Omotosho* (1961) 1 All NLR p. 304. Hence if evidence is led to the effect that the particular customs of parties to an arbitration now recognise transactions in writing, it is submitted that the courts will be obliged to enforce such

3. Other conducts which in the opinion of the court unequivocally and irresistibly point to such a submission.

In *Maidara v. Halilu* it was held that Islamic personal law applies to all Muslims, but for Islamic law of contract to apply, parties though Muslims, all have to consent to its application.⁵⁰ Submission is the basis of arbitration under the Shariah and thus must be mutual and emanate from the volition of all the parties. The Shariah prescribes that disputing parties are free to appoint any arbitrator of their choice and in fact parties may agree that a party to the dispute arbitrates, here relying on that party's conscience to do justice (Zeyad 2003:2).

Submissions can be in writing. The dispute between Ali Bin Abi Talib (the fourth Caliph) and Muawiya Bin Abi Sofian, over who was entitled to the seat of the Caliph, resulted in the war of Siffrin, which was referred to arbitration via a written submission by both parties on the 13th of Safar, 37 Anno Hegira,⁵¹ at the instance of Muawiya (Houtsma 1987:407).⁵²

customs by virtue of section 14 of the Evidence Act. Particularly interesting is the fact that courts have been admitting in evidence, written awards of customary arbitrations without challenge: see *Aniekan v. Aniekan* (1999) 12 NWLR [Part 631] p. 491. The above notwithstanding, the fact that writing is known to Islamic Law, which is a variety of customary law, cannot be discounted, more so as it is a fact that the Shariah itself is a codified law.

50 (2000) 13 NWLR [Part 684] p. 257.

51 Corresponding to 13 July 657 A.D. in the Gregorian calendar.

52 Cf the Nigerian Supreme Court decision in *Opebiyi Ors v. Noibi & Ors* (1977) NSCC p. 464, where it was pronounced that a dispute over leadership succession cannot be submitted to arbitration. It is to be noted that though the community seeking to arbitrate its dispute in this case was wholly a Muslim community, no evidence of the existence of Islamic customary arbitration (Tahkim) was led in evidence before the court, as required by law when seeking to prove the existence of any custom: section 14 Evidence Act Cap 112 LFN 1990. This decision was with prejudice to the fact that Mohammed Bello JSC (later Chief Justice of Nigeria) who delivered the lead judgement of the Court was a renowned Islamic law jurist. It is submitted that the Tahkim is applicable to all types of disputes except those that are expressly forbidden by Islamic law, Nigerian statutes or on account of public policy.

Submission to Bodies or Persons Recognised as Having Judicial Authority Under the Customary Law of the Parties

This ingredient first came into reckoning in the decision in *Inyang v. Essien*,⁵³ but it has since been distinguished by Karibi-Whyte JSC in *Agu v. Ikewibe*,⁵⁴ when he held that the Federal Supreme Court (in *Inyang's* case) misconceived the facts in *Assampong v. Amaku* which it sought to rely on,⁵⁵ because in that case (*Assampong's* case), the arbitral tribunal was not a judicial body.

Sadly, however, the courts have continued to pronounce that submission to elders or chiefs is an ingredient for a valid customary arbitration. With respect, it is posited that this position is a generalisation which is incongruous with the facts and realities of some arbitral customs. This is particularly the case in arbitrations based on oath-taking before priests, arbitrations before age groups, women's groups, trade and business groups. The tribunals in the foregoing arbitral customs are obviously not constituted of elders and chiefs.

Under Islamic Shariah arbitration, the qualifications for arbitrators are similar to those for holding the position of a judge (Saleh 1984:22, Zeyad 2003:2), and in principle, a woman can be appointed a judge (Sahcht 1996:188), and therefore by implication an arbitrator. It is worthy of note, that the Islamic Shariah excludes the following classes of persons from assuming judicial office (Sahcht 1996:125):

- i. Persons who have in the past been punished for a grave offence;
- ii. Minors and
- iii. Slaves.

As stated above, parties may even agree that a party to the dispute arbitrates, here relying on that party's conscience to do justice (Zeyad 2003).

53 (1977) NSCC p. 464

54 (1977) NSCC p. 408 para B-D.

55 (1932) 1 WACA p. 192.

Furthermore, there is no restriction on the number of arbitrators that may be appointed. In the matter between Ali and Muawiya, parties appointed one arbitrator each, a total of two arbitrators (Houtsma 1987:407).

From the above, it is unjustifiable for this ingredient of submissions only to elders and chiefs to remain as a pre-requisite for a valid customary arbitration. The proper course to take is to allow each custom to determine the qualifications for its own arbitrators. Parties to court actions relying on customary arbitration would also be advised to plead and lead evidence to prove such qualifications.

Finally, it is submitted that the imposition of this ingredient by the courts amounts to judicial legislation over customary law matters. This with respect is beyond the jurisdiction of the courts, whose jurisdiction is to interpret the *lex lata* (law as it is) and no more.

Prior Agreement of Parties to be Bound by the Arbitrator's Award

This ingredient is fundamental to any proceedings which is tagged arbitration. The whole essence of arbitration – as distinguished from settlement, mediation and conciliation – is that the decisions reached at the end of arbitral proceedings are binding. Therefore, any proceedings involving the resolution of a dispute between or among parties by a third party who acts in a non-judicial capacity and whose decisions are not binding, cannot properly be called an arbitration.

It is submitted that this ingredient of prior agreement to be bound by the award of an arbitrator is inextricably connected with the ingredient of voluntary submission. This is because the word 'submission' itself is a technical term, which means:

A contract between two or more parties whereby they agree to refer the subject in dispute to others *and to be bound by their award* (Black 1999:1426. Emphasis supplied.)

The concept of ‘Tahkim’ is so clear under the Islamic Shariah tradition of the Maliki School and its connotation that once parties submit their dispute to an arbitrator, his award binds them. Hence there is a presumption that any party to a Tahkim submission intends to be bound by its proceedings and award.

Conduct of Arbitration in Accordance With the Custom of the Parties

This is arguably the most fundamental of all the ingredients of customary arbitration, because the pivot of customary arbitrations is that such arbitrations are conducted in a distinct way and in accordance with the peculiar procedures set out by the customs of the parties or the customs to which they submit their dispute.

Two questions arise with regard to this ingredient and they are here-under set out and discussed:

Can a non-Muslim subject himself to Islamic arbitration?

Where a dispute is referred to Islamic arbitration, can another system of laws such as the common law be employed as the substantive law, while Islamic arbitration guides the procedural aspect thereof?

On the first question raised above, it appears that a non-Muslim is allowed to subject his dispute with a Muslim or with a fellow non-Muslim to Islamic law and the jurisdiction of a Shariah court. The Shariah Court of Appeal Law⁵⁶ provides that that court shall have jurisdiction and apply Islamic law:

...[W]here all the parties to the proceedings (whether or not they are Muslims) have by writing under their hand requested the court that

56 Cap.122 Northern Nigeria Laws 1963, which was applicable to the entire Northern Region and has now been adopted and re-enacted by the several states carved out of that Region.

hears the case in the first instance to determine the case in accordance with Muslim law.⁵⁷

And this provision has been adopted and incorporated almost verbatim in the Constitution of the Federal Republic of Nigeria, 1999.⁵⁸ From the foregoing, it can be inferred that non-Muslims may submit their disputes to Islamic customary arbitration.

With respect to the second question raised above, under Islamic Shariah law, where one of the parties to an arbitration in accordance with the Shariah is a non-Muslim, the parties may decide to apply another law for the substantive determination of the dispute, while the Shariah guides the procedural aspects thereof. However, such a law employed for the substantive aspect, must not be contrary to the principles enshrined in the Koran and the Hadith. For example, interests on loans are forbidden by the Shariah. This accommodation of non-Islamic custom by the Shariah is referred to as the doctrine of '*Urf*'.

Non-Withdrawal of any Party Before the Publication of the Award

This ingredient seems to suggest that parties are entitled to withdraw from arbitral proceedings any time before the award is published. However, it varies from custom to custom as to whether it is possible to withdraw after a submission to arbitration, and, if permitted, within which time frame it should happen and which procedures should be followed. Under the Islamic Shariah, particularly of the Maliki School of thought persuasion, once parties voluntarily submit to an arbitration, they cannot withdraw at any stage thereafter.⁵⁹

57 Cap.122 Northern Nigeria Laws 1963, Section 11(e); cf. *Agbebu v. Bawa* (1992) 6 NWLR [Part 245] p. 80 at 90.

58 Constitution of the Federal Republic of Nigeria, 1999, Section 277(d).

59 Zeyad 2003, endnote 26; *Jika v. Jika* (1991) 3 NWLR [Part182] 708 at 714 A-B.

Publication of the Award

Publication here refers to the conveying of an arbitral award to all parties to an arbitration, as opposed to the use of the word in common parlance, which connotes the making available of an information to the general public. This limited use of the term underscores one of the cornerstones of arbitration, which is the privacy ensured in proceedings, except of course where the parties to the arbitration are whole communities as has been observed in some communal disputes.⁶⁰

The Supreme Court in *Odonigi v. Oyeleke* held that the failure to convey an arbitral award to all the parties vitiates the whole process.⁶¹

It is submitted that the answer to the question whether or not the award of a customary arbitration can or ought to be reduced into writing is a matter to be gleaned from individual customs.

It appears that publication of awards is universal to arbitration irrespective of legal tradition, as it is the logical end point to any arbitration. To this extent, publication of arbitral awards is also integral to Islamic customary arbitration proceedings.

Post-Award Acceptance of Award by the Parties

This ingredient developed out of the denial of the existence of binding customary arbitration in Africa and the attempt to dress such proceedings in the toga of negotiations for compromised settlements by scholars like Allott (1960). Elias (1956:212) also followed in the same path, when he opined 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

60 See *Opebiyi Ors v. Noibi & Ors* in footnote 53 above, where a community of Muslims sought to arbitrate the leadership succession dispute amongst themselves.

61 (2001) 6 NWLR [Part 708] p. 29 para A-B.

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. (Emphasis supplied)

It ought also to be noted that the cardinal distinguishing factor of arbitration from other Alternative Dispute Resolution mechanisms, is the binding effect of the decision of a private adjudicator voluntarily consented to by parties to a dispute. Anything short of this falls within the realm of the other third party facilitated settlements like conciliation and mediation.

It should be noted further, that an agreement between parties to submit their dispute voluntarily to private adjudication is a contract and as such they should be entitled to all the privileges and duties of same.

Additionally, this ingredient of the post-award opportunity afforded a party to resile, flies in the face of the doctrine, that it is in the interest of the society that there be an end to adjudicatory 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 or at worst in an unending flux. This is because every party who loses in a customary arbitration will opt to resile from the award and this is aptly captured in the words of Bailay CJ in *Ekua Ayafie v. Kwamina Banea*, cited with approval by the West Africa Court of Appeal in *Larbi v. Kwasi* that:

... after the arbitration was concluded, the Defendant objected to the award because it was against him. The Plaintiff, no doubt, would have objected had the award being [sic] but his way.⁶²

In Islamic arbitration, where an award is delivered, parties are bound by it⁶³ and such an award is enforceable as a judgment of a court, by a *kadi*

62 Elias 1956:80.

63 Cf Sahcht 1996:10.

(judge). This is because an arbitrator has no such powers of enforcement (Zeyad 2003:19). The Koran (4:64) declares that:

... [B]y Allah, they will not believe until they make thee an arbitrator of what is in dispute between them and find within themselves no dislike of that which thou *decides* (*kadayta*) and submit with submission. (Emphasis and translation supplied.)

The word *kadayta* used in this passage refers to an authoritative and binding decision in the manner of a court's judgment. This interpretation is held by the Maliki,⁶⁴ Hanbali and Hanafi schools of thought with only the Shafi's holding otherwise (Zeyad 2003). However, where an award is contrary to tenets of Islam or the doctrines of the Maliki school, then a *kadi* before whom the award is brought for enforcement may set it aside (Sahcht 1984:189).

Conclusion

It is clear from the foregoing analysis that only three out of the seven identified judicially recognised ingredients of customary arbitration are in tandem with the practices and procedures of Tahkim – Islamic customary arbitration of the Maliki School's interpretation – which holds sway in the Nigerian territories. These ingredients are namely: voluntary submission, pre-submission agreement to be bound by arbitral awards, and the publication of awards.

It appears that the preponderance of customary arbitration disputes which have come before the Nigerian appellate courts for adjudication have originated from the Ibo customs of south-eastern Nigeria, which though they bear keen similarities to one another, are not absolutely homogenous, nor are they wholly representative of the

64 *Jika v. Jika* (1991) 3 NWLR [Part182].

customs of other communities in Nigeria, the Muslim *ummah*⁶⁵ inclusive (Potiskum 1990:111).

Now, it is from these Ibo customs that the Nigerian courts have sought to deduce universal 'ingredients' of customary arbitration. With the utmost respect to their lordships, the trend of crystallising a set of universal ingredients for 'arbitration' customs practised in more than one community is antithetical to the very nature of customs, which is their variety and peculiarity in relation to the communities from which they have evolved.

The use of the term 'ingredients' as universally applicable to the subject matter of customary arbitration is a misnomer with respect to the individuality and distinctiveness of the several customary law traditions under which arbitration is conducted.

It is here submitted as an alternative, that what the courts ought to do is to formulate a set of universal validity tests, which though not exclusive in themselves, will be aimed at securing equitable administration of justice through the mechanism of customary arbitration, the results of which the courts will hold as final, binding and in respect of which no litigation may be commenced, as the doctrine of *estoppel* will be applicable to their decisions. To this end, the following validity tests are suggested by the author:

1. Voluntary submission by all parties to an arbitral tribunal of their choice.
2. Conduct of the arbitration in accordance with a custom mutually agreed to by the parties (both for substantive and/or procedural aspects):⁶⁶

65 A term used to describe the Muslim community as a socio-religious and cultural grouping, transcending racial and territorial classifications.

66 See analysis above under the sub-heading 'Conduct of Arbitration In Accordance With the Custom of The Parties'.

Which custom(s) must not be repugnant to natural justice, equity and good conscience nor contrary to public policy⁶⁷ and neither incompatible with the provisions of the Constitution of the Federal Republic of Nigeria, 1999⁶⁸ nor any other enactment.

3. That proceedings be held in a judicial manner based on adduced evidence and that the subsequent award be based on the merits; and
4. The publication of the award by the arbitrator(s) to all the parties.

Any other customary dispute resolution mechanism not in consonance with these tests should not be properly termed customary arbitration, though its practice may be valid among those subject to its sway.

Finally, it is submitted that when next the Nigerian appellate courts have an opportunity to adjudicate over the existence and ingredients of a valid Islamic law arbitration, emphasis should be placed on facts adduced in proof of such custom⁶⁹ and where such is lacking, the court may order *suo motu* for additional evidence to be adduced of such custom, or send such matter back to the trial court for retrial on such grounds. This suggested line of reasoning finds support in the appellate court dictum in *Ogun v. Asemah* where it was held that ‘... customs are peculiar to the localities where they operate and they need facts to establish them in any litigation.’⁷⁰

67 Section 14 Evidence Act, Cap 112 Laws of the Federation of Nigeria, 1990.

68 Section 1(3).

69 There is also a need for legal and legal-anthropological scholars to carry out field surveys on the prevalence and actual practices of Islamic arbitration in Nigeria to serve as checks on judicial decisions in the same sphere. See Holleman 1973:599ff.

70 (2002) 4 NWLR Part 756 p. 208 @ 241-2 para G-E.

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