The continuing relevance of customary arbitration in Nigeria: Critical Evaluation of Contemporary Developments

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Forthcoming in the African Journal of International and Comparative Law (2024)

Abstract

Dispute is a natural consequence of human interactions and dispute resolution mechanisms are critical to the peace and harmonious coexistence of every society. In pre-colonial times when there were no western styled public courts in many African societies, customary arbitration was an integral part of the dispute resolution mechanisms, and it is argued that it has remained even so today. In Nigeria, customary arbitration remains relevant and has received judicial approval by the Supreme Court in a plethora of cases. This paper discusses recent judicial developments on customary arbitration focusing on a recent judgment of the Nigerian Supreme Court - *Umeadi v Chibunze* and its implications on customary arbitration in the highly plural Nigerian legal system. *Chibunze v Umeadi* recognised the validity of traditional oath-taking as a feature of customary arbitration for parties who rely on it. This paper argues that customary arbitration remains one of the most common indigenous dispute resolution mechanisms in Nigeria. This paper seeks to interrogate the practice of customary arbitration in Nigeria, ascertain the conditions for its validity and evaluate the utility of traditional oath-taking as a constituent

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process or feature of customary arbitration in Nigeria. This paper will also suggest some reforms to improve the utility of customary arbitration in Nigeria.

Keywords: Nigeria, Customary Law, Customary Arbitration, Judiciary, Reforms

1. Introduction

In pre-colonial times when there were no western styled public courts in many African societies, customary arbitration was an integral part of the indigenous dispute resolution mechanisms, and it is argued that it has remained even so today. Customary arbitration can be defined as an indigenous or traditional mode of settling disputes whereby disputes are referred to the family heads or elders of the community for resolution.[1] In Nigeria, customary arbitration remains relevant and has received judicial approval by the Supreme Court in a plethora of cases.[2] Traditional oath-taking is a process or feature of customary arbitration in many parts of Nigeria.[3]

Traditional "oath taking is a method of ascertaining veracity of evidence in traditional African dispute settlement proceedings."[4] For example, where parties to dispute in customary arbitration decide to be bound by traditional oath-taking, the common law principles of proof of title to land becomes inapplicable. In such scenario, the proof of title or ownership will now be based on the customary arbitration accentuated by traditional oath-taking. In Nigeria, traditional oath-taking is an integral part of the customs and practices of many communities,

[1] C. I. Umeche, 'Customary arbitration and the plea of estoppel under Nigerian law', 35 (2) *Commonwealth Law Bulletin* (2009): 291 -297.
[2] See *Okereke & Anor v. Nwankwo & Anor* (2003) 9 NWLR PART 826, p. 592
[3] E. Ekhator, 'Traditional oath-taking as an anti-corruption strategy in Nigeria', in A. Akogwu (ed) *Combating the Challenges of Corruption in Nigeria: A Multidisciplinary Conversation*, (Black Tower Publishers 2019) 309-336; A. A. Oba, 'Juju oaths in customary law arbitration and their legal validity in Nigerian courts', 52 (1) *Journal of African Law* (2008) 139 -158; O. Oluduro, 'Customary arbitration in Nigeria: development and prospects', 19 (2) *African Journal of International and Comparative Law* (2011) 307-330.
[4] Oba *ibid* 139.

and it is one of the means of ascertaining the truth in a matter. Thus, in such communities, traditional oath-taking is done in accordance with the prevalent customary law and practice.

Recently, in *Umeadi v Chibunze*,[5] the validity of traditional oath-taking as a process or feature of customary arbitration was the crux of the Nigerian Supreme Court judgment where it was held that traditional oath-taking is a valid feature of customary arbitration in Nigeria. This case concerned a dispute over the ownership of a family or communal land of the Umuofuonye family. The facts of the case are stated below:

> The respondent's case [Chibunze] as pleaded in their amended statement of claims [at the trial court] was that they were members of Chibunze family in Egbeagu Village, Amansea, Awka North Local Government Area of Anambra State of Nigeria. They stated that the land in dispute was part of family land of the Umuofuonye kindred to which they and the appellants belonged to. That sometime in 1940, one Emmanuel Uba a member of the Umuogbocha kindred in Egbeagu Village trespassed into the land in dispute. The Egbeagu village intervened in the dispute and invited both Umuogbocha and Umuofuonye kindred for customary arbitration. At the arbitration, the Egbeagu village decided the Umuogbocha kindred should bring a juju and place it on the land in dispute for the Umuofuonye kindred to swear by removing the same.[6]

The main issue in *Umeadi v Chubunze* at the Supreme Court was whether the respondents (Victor Chibunze and Williams Chibunze) were able to establish by evidence that a member of a family who "defended family land by oath taking automatically became the exclusive owner of such land so as to entitle the respondents to the declaration sought."[7] The Supreme Court of Nigeria seems to have restated the scope or remit of traditional oath-taking as a constituent part or process of customary arbitration when it held, that:

> Where parties who believe in the efficacy of a juju resort to oath-taking to settle a dispute, they are bound by the result and so the common law principles in respect of proof of title to land no

[5] *Pius Umeadi and ors v Victor Chibunze and Williams Chibunze* (2020) 10 NWLR(PT.1733) 405 at 412,
[6] (2020) 10 NWLR(PT.1733) 405 at 408-409
[7] *Ibid* at 408

> longer applies since the proof of ownership of title to land will be based on the rules set out by the traditional arbitration resulting to oath-taking.[8]

Thus, according to the Supreme Court, traditional oath-taking is a valid and recognised process under customary arbitration, and it is one of the approaches known to customary law for establishing or providing the truth of a matter.

At the trial court (High Court of Anambra State), the respondents (Victor Chibunze and Williams Chibunze who were the plaintiffs at the High Court) relied on evidence provided by witnesses to corroborate that the first respondent (Victor Chubunze)'s father was the person who single-handedly took the traditional oath without the support of his family who deserted him but he lived to survive the specified customary period of the oath taking and subsequently became the exclusive owner of the land in dispute according to customary law and custom. On the other hand, the appellants (Umeadi and others were the defendants at the High Court), contended that under the customary law and practice of Amansea community and Igbo land in general, one man does not swear a traditional oath alone in land disputes or matters.[9] However, the appellants were unable to establish the evidence of this customary practice. The High Court gave judgment in favour of the respondents (plaintiffs at the High Court – Chibunze). The appellants (Umeadi and others) appealed this judgment, and the Court of Appeal affirmed the decision of the High Court and dismissed the appeal. They further appealed to the Supreme Court and the Supreme Court also held in favour of the respondents (Chibunze) and affirmed the judgment of the Court of Appeal and dismissed the appeal.

Based on the judgment in *Umeadi v Chibunze*, traditional oath-taking still plays a major role in customary arbitration in Nigeria as the parties voluntarily submitted to customary arbitration and agreed to oath-taking with an intention that the outcome will bind them. However, it can

[8] *Ibid* at 411
[9] *Ibid* at 409

be argued that in customary arbitration, parties can conclusively establish ownership of the disputed property (for example, land) independently of reliance on traditional oath-taking process.[10] The view of this paper is that notwithstanding the valid criticisms by scholars,[11] of the traditional oath-taking as a feature of customary arbitration, traditional oath-taking is also part of the religious leanings of some communities (including individuals) in Nigeria and a valid process or feature of customary arbitration in some parts of the country. Hence, if traditional oath-taking is not forced on parties, and do not involve human rights violations of the oath-takers, traditional oath-taking should continue to play a role in the communities or individuals who ascribe to it as constituent part of customary arbitration in Nigeria. Furthermore, section 38 of the Constitution of Nigeria 1999, recognises freedom of religion for every Nigerian and hence, parties who willingly partake in traditional oath-taking in customary arbitration are exercising their right to practise their religion.

Furthermore, the Supreme Court decision in *Umeadi v Chibunze* appears to have been favourably received by the legal profession and other relevant stakeholders in Nigeria. For example, some lawyers and newspapers have written about the implications of the *Umeadi v Chibunze* decision in Nigeria.[12]

To mitigate the criticisms of traditional oath-taking, parties in customary arbitration should be made to understand the implications of traditional oath-taking regarding their claim to

[10] Generally, see the dictum of Justice Kutigi of the Supreme Court of Nigeria in *Marcus Nwoke and Ors v Ahiwe Okere and Ors* [1994] 5 NWLR (pt 343) 159 at 172 -173. Also see Oba, *supra* note 3, 146-147 for analysis of this case.

[11] Generally, see N. H. Msuya, 'Traditional "juju oath" and human trafficking in Nigeria: A human rights perspective', 52 (1) *De Jure Law Journal* (2019): 138-162; G. Nwakoby, 'Customary law arbitration practice: Validity of arbitral award based on oath taking', unpublished lecture to LLM Students, UNIZIK, Awka, 2007. Cited in I. Oraegbunam, 'The principles and practice of justice in traditional Igbo jurisprudence', 6 *Ogirisi: A New Journal of African Studies* (2009) 53-75, at 78.

[12] Olaniwun Ajayi Law Firm, 'Notable Cases 2020' (March 2021); Editor, 'Proof of Customary Law in relation to oath-taking in land matters' The Guardian (Nigeria) (7 April 2020) Proof of customary law in relation to oath-taking in land matters — Features — The Guardian Nigeria News – Nigeria and World News; E. Ekpenyong *et al* 'Nigeria: Is Customary Arbitration the Solution to congestion of cases in Nigerian Courts?' (2021) Is Customary Arbitration The Solution To Congestion Of Cases In Nigerian Courts? - Arbitration & Dispute Resolution - Nigeria (mondaq.com)

ownership of the property in question (for example, ownership of disputed lands). Furthermore, traditional oath-taking should not be used as means to take advantage of the already vulnerable (for example, women, elderly, and children) in the Nigerian society. Hence, traditional leaders and traditional arbitrators should ensure that, the necessary safeguards are put in place to protect the parties who have relied on traditional oath-taking as feature of their customary arbitration. For example, in Edo State of Nigeria, traditional oaths have been used to silence some victims of modern-day slavery and human trafficking.[13] Hence, to stop this practice, in 2018 the Oba of Benin Ewuare II (who is the major traditional authority in that part of Nigeria) reversed any traditional "oaths undertaken by victims of human trafficking."[14] Different stakeholders have argued that this action by the Oba of Benin will prevent traditional oaths been used as means of silencing modern-day slavery and human trafficking victims in Edo State of Nigeria.[15]

Umeadi v Chibunze seems to infuse some form of religious or metaphysical element into customary arbitration. Arguably, it is fear and cultural beliefs that sustains traditional oath-taking as a dispute resolution mechanism.[16] Notwithstanding the strident academic and judicial criticisms of the utility and validity of traditional oath-taking under customary arbitration in Nigeria, it should be noted that traditional oath-taking in customary arbitration "is valid when both parties willingly partake in swearing to an oath where the arbitration process so demands in order to confirm the genuineness of the parties' claims."[17] Also, traditional oath-taking in customary arbitration is done in accordance with the custom or traditions of the parties.

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[13] S. O. Oyakhire, 'Expanding the scope of 'appropriate measures': do traditional institutions play a role in facilitating the protection of witnesses of trafficking in persons?', 6 (2) *Journal of Comparative Law in Africa* (2019): 80 -105.

[14] A. Baker, 'An Ancient Curse kept Nigerian Women bound to Sex Slavery. Now, It's been Reversed.' Time, 17 April 2018 Reversing the Curse Binding Nigerian Women to Sex Slavery | Time

[15] Baker *ibid*; Oyakhire, *supra* note 13.

[16] P. Diagboya, 'Oath taking in Edo: Usages and misappropriations of the native justice system', IFRA-Nigeria (2019); A. A. Oba, 'The Future of Customary Law in Africa' in Jeanmarie Fenrich, Paolo Galizzi, & Tracy Higgins (eds), *The Future of African Customary Law* (Cambridge: Cambridge University Press 2011a) 58-80.

[17] Oluduro, *supra* note 3, at 326.

This paper seeks to interrogate the practice of customary arbitration in Nigeria, ascertain the conditions for its validity and evaluate the utility of traditional oath-taking as a constituent process or part of customary arbitration in Nigeria. The implications of *Umeadi v Chibunze* in the highly plural Nigerian legal system is also in focus in this paper. This paper will also suggest some reforms to improve the utility of customary arbitration in Nigeria. This paper argues the British colonisation and the various legislative and judicial developments in post-colonial Nigeria did not lead to the total elimination of customary arbitration in the country and customary arbitration remains one of the most common indigenous dispute resolution mechanisms in Nigeria.

The next section focuses on the evolution of customary law in Nigeria.

2. Evolution of Customary Law in Nigeria

Before the advent of British colonialism in what is now known as Nigeria, customary law was the prevailing norm in southern and some parts of northern Nigeria.[18] Hence, customary law is the beginning "of Nigeria's legal history. Before the emergence of colonial rule, customary law held sway and enjoyed monolithic application in the geographical territory currently known as Nigeria, composed of erstwhile politically and legally independent nationalities."[19]

In many parts of pre-colonial Nigeria, each of the settlements or ethnicities had their distinct identity, administrative techniques, and methods of governance. Customary law is one of the sources of the Nigerian legal system.[20] Generally, customary law is said to be unwritten as

[18] M. M. Akanbi, *et al*, 'Customary arbitration in Nigeria: a review of extant judicial parameters and the need for paradigm shift', 6 (1) *Journal of Sustainable Development Law and Policy* (2015): 199-221. However, see K. Olatoye and A. Yekini, 'Islamic Law in Southern Nigerian Courts: Constitutional and Conflict of Laws Perspectives', 6 *Benin Journal of Public Law* (2019): 120-145, for analysis of the role of Islamic Law in the lives of people living in what is now known as South-west Nigeria in the pre-colonial era. On the other hand, A. A. Oba, 'Religious and customary laws in Nigeria', 25 (2) *Emory Int'l L. Rev.* (2011b): 881-895, at 882 states that in precolonial Nigeria "… apart from some isolated instances, there was no state enforcement of Islamic law in the precolonial south."

[19] R. N. Nwabueze, 'The dynamics and genius of Nigeria's indigenous legal order' 1 *Indigenous Law Journal* (2002): 153-200, at 155.

[20] O. Aigbovo, *Introduction to Nigerian Legal System*, 3rd edition (Sylva Publisher Limited 2018).

opposed to English law which is written.[21] Arguably, there is no generic or uniform customary law in Nigeria. Hence, the different communities or ethnicities possess their unique customary law practices.

There is a plethora of academic, judicial, and statutory definitions of customary law in Nigeria.[22] For example, Aigbovo states that "Customary law has been described as customs accepted by members of a community as binding among them."[23] Similarly, Enabulele and Bazuaye suggest that the definitions of customary law in Nigeria are well established and generally recognised.[24] Therefore, Enabulele and Bazuaye define customary law as "a law that reflects the practices, culture and consciousness (what historical law legal theorists call *Volksgeist*) of the people subject to its sway."[25] Thus, customary law is an integral part of the Nigerian legal system.[26] Customary law regulates the important aspects of the lives of many Nigerians. Furthermore, Enabulele and Bazuaye suggest that "At some point, between the cradle and the grave, customary law regulates essential parts of all Nigerians' existence."[27] In many parts of Africa, customary law plays an invaluable role in the lives of the people. For example, Chirayath *et al* aver that in many developing countries, customary law which operates outside official, or state institutions are often the predominant type of rule and dispute resolution, covering about 90% of the population in parts of Africa.[28] They further suggest that

[21] In *Ojisua v Aiyebelehin* (2001) 11 NWLR (pt. 723) 44, where Justice Tobi highlighted the characteristics of customary law and noted that the flexibility of customary law is connected to its unwritten nature.
[22] Oba (2011a), *supra* note 16; A. O. Enabulele and B. Bazuaye, 'Validity and enforceability of customary law in Nigeria: towards a correct delimitation of the province of the courts.', 63 (1) *Journal of African Law* (2019): 79-104; Aigbovo, *supra* note 20.
[23] Aigbovo, s*upra* note 20, at 50.
[24] Enabulele and Bazuaye, *supra* note 22, at 80.
[25] Enabulele and Bazuaye *ibid*.
[26] O. Lewis, 'The tension created by legal pluralism and the impact on land and mineral ownership and control in Nigeria', (PhD diss., University of Aberdeen, 2021); O. Lewis, 'Legal Pluralism and Land Ownership in Nigeria: A Tale of Two Unworkable Systems,' (January 24, 2023), SSRN: https://ssrn.com/abstract=4335865
[27] Enabulele and Bazuaye, *supra* note 22, at 79.
[28] L. Chirayath *et al*, 'Customary law and policy reform: Engaging with the plurality of justice systems', (2005). Prepared as a background paper for the World Development Report 2006: Equity and Development.

in Sierra Leone, about 85% of its citizenry falls under the jurisdiction or remit of customary law.[29] A similar situation occurs in the Nigerian context.[30]

There are a plethora of statutes or laws in Nigeria providing definitions of customary law.[31] For example, section 258(1) of the Evidence Act 2011 defines custom as "a rule which, in a particular district, has from long usage, obtained the force of law." Similarly, section 2 of the Plateau State Customary Court of Appeal Law 1979 defines customary law as "…the rule of conduct which governs legal relationships as established by custom and usage and not forming part of the common law of England nor formally enacted by the Plateau State House of Assembly but includes any declaration or modification of customary law… "

Furthermore, the court in *Oyewumi v Ogunsesan* defined customary law as: "The organic or living law of the indigenous people of Nigeria regulating their lives and transactions."[32] Also, the Supreme Court in *Umeadi v Chibunze* adopted the definition of customary law in *Omaye v. Omagu*[33] stating that "Customary law is defined as an unwritten law and it depends on what the appropriate authority believes or is persuaded to believe by evidence as customary law. That is, customary law is a question of fact to be proved by evidence."[34]

Notwithstanding, that much of modern or post-colonial customary law is unwritten in Nigeria and other parts of Africa, there has been a rising body of "treatises and court decisions setting down customary rules of law as the authors judge them to be. Therefore, it is now much easier to state the rule of customary law on a particular issue."[35] Hence, according to Oba, "Writing

[29] Chirayath *et al ibid.*
[30] C. A. Odinkalu, 'Poor Justice or justice for the poor? A policy framework for reform of customary and informal justice systems in Africa,' in *The World Bank Legal Review, Volume 2: Law, Equity and Development*, Brill Nijhoff, (2006) 141-165.
[31] Enabulele and Bazuaye, *supra* note 22; Oba, *supra* note 3.
[32] *Oyewumi v. Ogunsesan* (1990) 3 NWLR 182 at 20.
[33] *Omaye v. Omagu* (2008) 7 NWLR (Pt. 1087) 447.
[34] *Umeadi v. Chibunze* (2020) 10 NWLR (PT.1733) 405 at 410
[35] M. Ocran, 'The clash of legal cultures: The treatment of indigenous law in colonial and post-colonial Africa',39 *Akron L. Rev.* (2006): 465-481, at 467.

is now recognised in customary transactions. Some customs are now contained in statutory declarations."[36] Some characteristics of customary law include flexibility, diversity, and its largely unwritten nature.[37]

In the Nigerian legal system, customary law or practice must be proved in court "while one need not prove the other laws in courts as the judge is taken to have known them ..."[38] Furthermore, by virtue of section 16(1) of the Evidence Act 2011, there are two methods of proving or ascertaining customary law in Nigeria: by proof, for example, giving evidence to establish it and by judicial notice.[39] Furthermore, section 17 of the Evidence Act 2011 provides that "A custom may be judicially noticed when it has been adjudicated upon once by a superior court of record."[40]

The matters with which customary law is predominantly concerned include "simple cases of contract (mainly debt), torts, land, family law and succession."[41] Customary law has been relegated to the backwaters of the Nigerian legal system.[42] However, customary law is still important in personal matters such as marriages, land contracts, and succession amongst others, especially in rural (and some urban) areas in the country.[43] For example, the concept of 'igiogbe'[44] or the principal house in Benin customary law in Nigeria "is the most litigated

[36] A. A. Oba, 'The Administration of Customary Law in a Post-Colonial Nigerian State', 37 *Cambrian Law Review* (2006): 95 -111, 97.
[37] P. E. Oamen and P. Aigbokhan, 'Customary Law Arbitration in Nigeria: An Appraisal of Contentious Legal Issues', 1 (1) *Benin Bar Journal* (2018): 214-247.
[38] Oraegbunam, *supra* note 11, at 79.
[39] Ekhator, *supra* note 3; A. O. Ewere, 'Safeguarding the rule on judicial notice of custom in Nigeria: preference for repealed rule of evidence', 45 (3) *Commonwealth Law Bulletin* (2019): 454 - 476.
[40] However, generally see Ewere *ibid* for some criticisms of section 17 of the Evidence Act
[41] P.O. Isibor, 'Economic crimes and corruption: the customary law perspective'. Paper delivered at a refresher course for Judges and Kadis Abuja 10th March 2010.
[42] Oba (2011a), *supra* note 16; O. Okogeri, & G.E. Oaikhena, 'A Legal Reappraisal of Customary Adjudicatory System in Nigeria', 10 (1) *University of Benin Law Journal* (2007) 85-103.
[43] For instance, in *Obiesie v Obiesie* (2015) LPELR-40649 (CA), the Nigerian Court of Appeal upheld the application of the customary law of the Osile Ogbunike people of Eastern Nigeria on succession.
[44] Lewis (2021), *supra* note 26, at 65 defines 'Igiogbe' under Benin customary law, as "a custom whereby the eldest son of a deceased person or testator is entitled to inherit without question, the house known as the "igiogbe" in which the deceased/testator lived and died." Generally, see A. I. Fenemigho, and D. O. Oriakhogba, 'Statutory limitations to testamentary freedom in Nigeria: a comparative appraisal', 4 *Nnamdi Azikiwe University Journal of International Law and Jurisprudence* (2013): 69-83; E. B. Omoregie, 'Validity of the Benin custom of male primogeniture for succession to property', 20 (2) *East African Journal of Peace and Human Rights* (2014): 265-

customary law of succession issue in the Nigerian Court of Appeal and Supreme Court."[45] Furthermore, traditional palace courts are relevant in the resolution of customary law disputes in modern-day Nigeria.[46]

Prior to the coming of the British colonialists, customary law extended to both civil and criminal cases. In today's Nigeria, customary law does not extend to criminal cases but solely for civil matters.[47] Also, section 36(12) of the Constitution of Nigeria 1999 is in tandem with the assertion that there is no criminal customary law in Nigeria.

3. Customary Arbitration

African societies before the advent of colonialism were socially organised with clear governance structures and indigenous dispute resolution mechanisms conducted in accordance with the customs and traditions of the people.[48] Customary arbitration is an example of indigenous dispute settlement mechanism utilised by many African societies in the precolonial era.[49] Currently, customary arbitration is one of the several mechanisms of settling or resolving civil disputes in Nigeria.[50] There are different types of informal dispute settlement mechanisms

278; and O. Aigbovo, 'The Principal House in Benin Customary Law', 8 (1) *University of Benin Law Journal* (2005): 16 for critical analysis of the Igiogbe concept.

[45] C. S. Okoli *et al*, 'Igiogbe Custom as a Mandatory Norm in Conflict of Laws: An Exploration of Nigerian Appellate Courts' Decisions' (2023) at 2 'Igiogbe Custom as a Mandatory Norm in Conflict of Laws: An Exploration of Nigerian Appellate Courts' Decisions' by Chukwuma Samuel Okoli, Abubakri Yekini, Philip Oamen :: SSRN

[46] R. O. Ehiemua, 'Trends in informal injustice system in Nigeria: lessons from traditional palace courts trials in Ekpoma and Uromi', 17 (1) *University of Benin Law Journal* (2016-2017): 20 – 42.

[47] Isibor, *supra* note 41.

[48] S. A. Fagbemi, 'Scope and relevance of customary arbitration as mechanism for settlement of dispute in the 21st century', 10 (1) *Nnamdi Azikiwe University Journal of International Law and Jurisprudence* (2019): 32-40.

[49] According to T. O. Elias, *The Nature of African Customary Law*, Manchester University Press (1956) 212, indigenous dispute resolution mechanisms in pre-colonial Africa are generally referred to as "customary forms of dispute resolution". On the other hand, A. N. Allott, *Essays in African Laws*, Butterworth (1960) 126 states 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."

[50] A. A. Daibu *et al*, 'Women's Right to inheritance in Africa: The Nigerian experience', 6 (1) *Africa Nazarene University Law Journal* (2018): 28-56.

outside the conventional western court systems in many African states (including Nigeria).[51] In Nigeria, customary arbitration is an example of an informal dispute settlement or justice system. Informal dispute justice system refers to a range of institutions that serve to resolve conflicts or disputes distinct from official state institutions or policy.[52] Furthermore, different types of informal or customary and/or non-state law operate in most nations across the world.[53] Hence, Chirayath *et al* suggests that informal institutions include dispute resolution systems functional "in different markets across the globe to customary ways of ordering life in remote villages and communities. In fact, the vast majority of human behavior is shaped and influenced by informal and customary normative frameworks."[54]

Customary arbitration in Nigeria has been defined as "arbitration of dispute founded on the voluntary submission of the parties to the decision of the arbitrators who are either the chiefs or elders of their communities, and the agreement to be bound by such decision."[55] Also, the Supreme Court of Nigeria had on several occasions provided definitions or explanations of customary arbitration, for example, in *Ufomba & Anor v Ahuchaogu & Ors* [56] the court held that:

> 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 take decisions, which are majorly designed or aimed at bringing some amicable settlement, stability and social equilibrium to the people and their immediate society or environment. Customary arbitration is only a convenient forum for the settlement of indigenous disputes and arguably cannot be raised to the status of a court in Nigeria.

[51] According to O. S. Adelakun-Odewale, 'Role of Traditional Leaders in Conflict Resolution and Management in Nigeria', 20 (2) *Nigerian Law Journal* (2017): 303-31, examples of informal dispute settlement mechanisms in African traditional societies include self-help, negotiation, customary arbitration, and tribunal amongst others.
[52] T.J. Röder, Informal Justice Systems: Challenges and Perspectives. *Innovations in Rule of Law*, (2012) 58.
[53] Chirayath *et al*, *supra* note 28.
[54] Chirayath *et al*, *supra* note 28, at 2.
[55] G. C. Nwakoby, 'Enforcement of Customary and Common Law Arbitration Awards in Nigeria', 20 *Int'l Legal Prac* (1995): 142.
[56] (2003) LPELR-3312(SC) 1 at 37 para-E-G. Per Tobi JSC.

Similarly, in *Raphael Agu v. Christian Ikewibe*, Justice Karibi-Whyte defined customary arbitration:

> as 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 decision or freedom to resile where unfavourable. A decision by a Court of competent jurisdiction creates an *estoppel per rem judicatam* but an award by a customary arbitration will have the same consequence if certain pre-conditions are satisfied.[57]

The decision in this case is said to have solidified the basis or foundation for customary arbitration practices in modern day Nigeria.[58]

Customary arbitration differs from western type arbitration in some ways, for instance, it was part of the socialisation process of the society and was generally conciliatory as it encourages harmonious relationship of the disputants afterwards and the whole community are witnesses to the award and part of the enforcement mechanism.[59] The customary arbitration process is designed to promote reconciliation amongst the parties and there is "always a declaration that no one is entirely guilty or innocent."[60] The elders and family heads play an integral role in customary arbitration in Nigeria by being actively involved in the resolution of disputes at the family or community level.[61] Notwithstanding that customary law (including customary arbitration) is not generally codified in Nigeria, the parties to customary disputes mostly adhere to the decisions reached in the customary arbitration and its binding resolutions.[62]

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[57] (1991) 3 NWLR (Pt. 180) 385 at 407.

[58] V. C. Igbokwe, 'The law and practice of customary arbitration in Nigeria: Agu v. Ikewibe and applicable law issues revisited', 41 (2) *Journal of African Law* (1997): 201-214; A. J. Bamgbose, 'Towards a Suitable Domestic Arbitration Practice in Nigeria', PhD diss., University of Warwick, (2016); Prince N. C. Olokotor, 'Judicial attitudes to enforcement of transnational awards under the New York convention: A Critical Assessment of the English and Nigerian courts,' PhD diss., SOAS University of London, (2017).

[59] Fagbemi, *supra* note 48.

[60] Okogeri and Oaikhena, *supra* note 42, at 85.

[61] E. Ukala, 'Gas flaring in Nigeria's Niger Delta: Failed promises and reviving community voices,' 2 (1) *Washington and Lee Journal of Energy, Climate, and the Environment* (2010): 97-126.

[62] Ukala *ibid*. However, Oluduro, *supra* note 3, at 311 who suggests that "It is also important to emphasise that a decision or an award of a customary arbitration, though binding on the parties and their privies, is not a judgment of a court of law and therefore, its decisions cannot be equated with those of courts of law capable of creating judicial precedent."

Unfortunately, the courts in Nigeria "have not been consistent in stating the essential ingredients of a valid customary arbitration."[63] However, a long line of cases in Nigeria[64] have established that the conditions of a valid or binding customary arbitration to include the following:

1. That the parties voluntarily submitted the matter in dispute to an arbitration of one or more persons
2. That the parties agreed either expressly or by implication that the decision of the arbitration will be accepted as final and binding.
3. That the arbitration was in accordance with the custom of the parties or of their trade or business
4. That the arbitrators reached a decision and published their award and
5. That the decision or award was accepted at the time it was made.

Thus, in Nigeria, customary arbitration will be valid or enforceable if these conditions or essential elements are met. However, there have been divergent judicial and academic views regarding the essential elements or characteristics of valid customary arbitration in Nigeria.[65] Furthermore, Akanbi *et al* argue that the reliance by Nigerian courts on these criteria for valid customary arbitration in Nigeria is "an attempt to smuggle in the parameters for the validity of arbitration under common law [which] has affected the practice of customary law in Nigeria."[66] An integral process of customary arbitration in many parts of Nigeria is the reliance on traditional oath-taking by some individuals and communities.

[63] Oluduro, *supra* note 3, at 319.
[64] See *Okereke & anor v Nwankwo & Anor* 9 NWLR PART 826 at 592. See also *Ojibah v Ojibah* (1991) 5 NWLR Pt. 191, 296; *Ihenacho v Ihenacho*, (2018) LPELR-44124(CA) 15- 16; *Ekeh & ors v Ibekwe* (2018) LPELR-45029(CA), 37-38.
[65] E. S. Nwauche, 'State Response to Outcomes of Traditional Justice Resolution Mechanisms in Commonwealth Africa: Customary Arbitration in Nigeria and Ghana', 4 *Journal of Commonwealth Law* (2022): 73-105; Akanbi *et al*, *supra* note 18.
[66] Akanbi *et al*, *supra* note 18, at 218.

The next section of this paper focuses on the role of traditional oath-taking in customary arbitration in Nigeria.

3.1 Traditional Oath-Taking in Customary Arbitration in Nigeria

Traditional oath-taking in customary arbitration is an integral part or process of dispute resolution process in some parts of Nigeria as many Nigerians believe more in the invocation of the supernatural to settle disputes through traditional oaths rather than the conventional (formal justice system) methods of dispute resolution.[67] Traditional oath-taking as a feature of customary arbitration is common amongst the Igbo, Edo and other ethnic groups in Nigeria.[68] Hence, traditional "Oath-swearing is a method of ascertaining veracity of evidence in traditional African dispute settlement proceedings."[69] Traditional oaths take diverse forms in customary arbitration; however, swearing by the medium of 'juju' is often commonly used.[70] Here, parties or one of the parties swear with the juju and it is expected that if he is lying, he will die within a specified time and if he dies within the time it implies, he lied.[71] This may be an exception to the general rule that customary arbitration is designed to promote reconciliation amongst the parties. According to Edu:

> Oath-taking is a common feature of resolving dispute in Africa. Its use was very frequent in crime detection. It was undertaken in respect of very serious crimes. Women and children are not allowed to take the more destructive forms of oath. Oath-taking was also used as a last resort in settling other disputes such as land, adultery and defamation.[72]

Traditional oath-taking as part or feature of customary arbitration is quite popular and regularly utilised amongst some individuals and communities in Nigeria because the supernatural plays

[67] However, it should be noted, there are plethora of scholarly and judicial views stating that traditional oaths are ineffective. This will be discussed in a later section of this paper.
[68] Okogeri and Oaikhena *supra* note 42; Diagboya, *supra* note 16.
[69] Oba, *supra* note 3, at 139.
[70] Ekhator, *supra* note 3.
[71] Oba, *supra* note 3.
[72] O.K. Edu, 'The effect of customary arbitral awards on substantive litigation: setting matters straight', 25 *J Private Property Law* (2004): 43, 49.

an important role in the development and sustenance of most indigenous customs and by extension customary law.[73] However, it is not every customary arbitration in Nigeria that contains traditional oath-taking as a constituent process or feature. Hence, it should be noted that if the parties or disputants to customary arbitration are Christians or Muslims (including individuals or communities) who do not ordinarily believe in the efficacy of traditional oaths and if some part of the customary arbitration involves swearing upon a juju, unless the disputants voluntarily partake in swearing upon the traditional oath, such customary arbitration award or decision may not be valid or enforceable.[74]

Furthermore, Ekhator observes that there are many barriers militating against traditional oath-taking in Nigeria and "These include: the negative perception of oath taking by westerners and followers of the mainstream religious groups in Nigeria… and the conflicting views emanating from the Supreme Court" on customary arbitration amongst others.[75] Of all the impediments, the greatest threat is the disposition of the judiciary which possesses enormous powers to determine validity or otherwise of customary arbitration (including traditional oath-taking as a constituent process).[76] However, the Nigerian judiciary had on many occasions recognised the validity of traditional oath-taking in customary arbitration.[77] For instance, the Supreme Court in 2004 held in *Onyenge v Ebere*[78], that traditional oath-taking is a valid process of customary arbitration, and it is legally binding.[79] Thus, traditional oath-taking is a valid process in customary arbitration in Nigeria when done in accordance with customs and beliefs of the disputants. For example, customary arbitration is valid when the parties or disputants voluntarily take part in swearing to a traditional oath where the dispute resolution process so

[73] Oba, *supra* note 3.
[74] Oluduro, *supra* note 3; Oba *supra* note 3; Akanbi *et al*, *supra* note 18.
[75] Ekhator, *supra* note 3, at 328. Also, see Oba, *supra* note 3, at 142.
[76] This is because in Nigeria by the provisions of section 18(1) of the Evidence Act 2011 for customary law to be established if it has not been judicially noticed, it must be proved as a matter of fact.
[77] Oluduro, *supra* note 3; Nwauche, *supra* note 65; Oba, *supra* note 3.
[78] (2004) ALL FWLR (Pt. 219) 98; (2004) 6 SCNJ 126
[79] The oath taking was done before the Okija Shrine.

demands to "confirm the genuineness of the parties' claims."[80] Furthermore, it should be noted that disputants are not under any obligation to swear to traditional oath, and they have the freedom to opt for it (or not) under customary law.[81]

Furthermore, courts have been inconsistent in their pronouncements on the validity or legality of traditional oath-taking in Nigerian.[82] For instance, in *Marcus Nwoke and Ors v Ahiwe Okere and Ors*[83], Kutigi JSC who read the lead judgement criticised traditional oath-taking in customary arbitrations and held that:

> The 'juju' method as cheap and quick as it might appear to have been had [sic] its own disadvantages. For example, you cannot put a 'juju' in the witness box for any purpose. Its activities, methods and procedure would appear to belong to the realm of the unknown even though the effects may be real in the end… We have come a long way from the oracle.

Also, in *Umeano Achiakpa and Anor v Nduka and Ors*,[84] the efficacy of traditional oath-taking was questioned by the courts and the trial court insisted on strict proof of the efficacy of the traditional oath system before it will give effect to it. Thus, the Supreme Court indicated that swearing of traditional oath-taking to a juju is an outdated and unconventional method of deciding a matter. The court further stated that it was more appropriate for courts to appraise and assess conflicting evidence, instead of relying on the finality of traditional oath-taking in customary arbitration.[85] In the same vein, the Supreme Court in *Umeano Achiakpa and Anor v*

[80] Oluduro, *supra* note 3, at 326.
[81] See Oluduro, *supra* note 3. Arguably, it can be contended that people can be summoned or compelled by the traditional authorities to swear a traditional oath, and this negates the ability of parties' freedom or otherwise to reject or swear to traditional oath in customary arbitration in some parts of Nigeria. Also, see Oba, *supra* note 3 and Akanbi *et al*, *supra* note 18. However, Oluduro, *supra* note 3, 319 argues that "It follows that if the parties have not voluntarily submitted their disputes to traditional arbitrators, an arbitration has not taken place and any decision reached by the said arbitrators cannot be valid or binding on the parties."
[82] See Oba *supra* note 3.
[83] [1994] 5 NWLR (pt 343) 159
[84] [2001] 7 SCNJ 585. Also, see *Cypiacus Nnadozie v. Nze Ogbunelu Mbagwu* [2008] LPELR-2055 (SC), where the Nigerian Supreme Court held that reference by a Customary Court to the Chukwu oracle as a means of resolving the dispute (this resort to the oracle was agreed by both parties) was not the proper approach by Nigerian courts. The Supreme Court stated that Nigerian courts are not expected to rely on traditional oracles as means of resolving evidence relied upon by parties to a suit. Generally, see Olaniwun Ajayi, *supra* note 12.
[85] Nwauche, *supra* note 65, at 90.

Nduka and Ors, while affirming the decision of the Court of Appeal which upheld the decision of the trial court stated as follows:

> that not only must the parties have accepted the finality of the settlement of dispute consequent upon the oath swearing, but also, for the oath to operate as an estoppel per rem judicatam, the form, nature and effect of the oath must be strictly proved and the records must show that the oath refers unequivocally to the subject matter of the oath eg it relates to and encompasses the question of title to land.[86]

Thus, the Supreme Court stated that the decision of a native court cannot constitute *estoppel per rem* (*res judicata* – which is a final and binding decision by a competent tribunal).[87]

Also, some scholars have criticised traditional oath-taking. For instance, Nwakoby states that the "practice of oath-taking is not only fetish, barbaric, uncivilised, outdated, anachronistic, criminal, illegal but also contrary to Nigerian jurisprudence as it is superstitious, mysterious, and spiritualistic." [88] This position is strongly supported by Oviasuyi *et al*.[89] Also, traditional oath-taking has been described as "very crude and a denial of the right to fair hearing against anyone who does not believe in traditional oath-taking due to religious beliefs or personal philosophy/conditions."[90] These criticisms are largely influenced by the westernisation of civilisation and religion in Nigeria. This is further accentuated by the fact that the two dominant religions; Christianity and Islam are averse to anything juju as it is perceived as idol worship (including the swearing of traditional oaths). Nigeria is a highly religious society and prior to the advent of colonialism, African Traditional Religion (ATR) was the dominant religion. Currently, majority of its citizens are now adherents of Christianity and Islam, although, there

[86] [2001] 7 SCNJ 583 at 604.
[87] See Oba, *supra* note 3 for an incisive analysis of this decision.
[88] G. Nwakoby, 'Customary law arbitration practice: Validity of arbitral award based on oath taking', Unpublished lecture to LLM Students, UNIZIK, Awka, 2007. Cited in Oraegbunam *supra* note 11, at 78.
[89] P.O. Oviasuyi *et al*, 'Fetish Oath Taking in Nigerian Politics and Administration: Bane of Development', 27 (3) *Journal of Social Sciences* (2011): 193-200.
[90] Ehiemua, *supra* note 46, at 20.

are still Nigerians who subscribe to ATR.[91] Because of the religious consciousness of Nigerians, you find the mention of God in some existing laws in the country.[92] Furthermore, under the Nigerian Evidence Act 2011, witnesses in court are expected to swear to an oath before they testify using the object of their religion or by affirmation.[93] Adherents of ATR are allowed to swear using an object representing their god in fulfilment of this condition. Thus, traditional oaths "are accommodated within the modern Nigerian legal system as forms of statutory oath, where traditional oaths perform the same role as English style oaths, and as a feature of customary law arbitration. Statutory oaths are oaths regulated by statute."[94]

Traditional oath-taking is a valid process of proof or ascertainment of a disputant's case in customary arbitration. However, this is not akin to the English style oath or the English adversarial system. In the English adversarial system, oaths are mere pre-requirements to providing evidence in courts whereas in customary arbitration, traditional oath-taking is an essential process (in some communities in Nigeria); and "the failure to administer the [traditional] oath renders the court incompetent to attach any serious weight to the evidence of a witness."[95] Also, there are fundamental differences or implications arising from the reliance on traditional oaths in their statutory and traditional settings. For example, traditional oath-taking in customary arbitration is anchored on the possibility of spiritual or metaphysical sanctions, while traditional oaths in the context of statutory oaths have secular implications and any person "who swears falsely on a statutory oath, no matter its form, is liable to prosecution and to be punished for perjury."[96]

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[91] E. Onyema, 'Shifts in dispute resolution processes of West African States' in M. Moscati, M. Roberts, & M. Palmer (eds.) *Comparative Dispute Resolution Handbook* (Edward Elgar Publishing, 2020) 519-531.
[92] Even in the Constitution of the Federal Republic of Nigeria 1999, the oath of office for all elected officers and Judicial officers end with 'So help me God'. See the 6th Schedule to the Constitution.
[93] See section 206 and 208 of the Evidence Act, 2011; see also *Maigari v Bida* (2002) FWLR (pt. 88) 917 CA.
[94] Oba, *supra* note 3, 140; Ekhator, *supra* note 3.
[95] T.K. Adekunle, 'The Role of Customary Arbitration in the Resolution of Disputes among Nigerian Indigenous Communities' (2015) 4 (3) *Journal of Advocacy* 175-183, 181.
[96] Oba, *supra* note 3, at 141.

The decision in *Umeadi v Chibunze*[97] by the Supreme Court of Nigeria has arguably fortified the importance of traditional oath-taking in customary arbitration in Nigeria. It is for this reason that the decision of the Supreme Court in *Umeadi v Chibunze* is commendable. Apart from putting an end to the question of the validity and application of customary arbitration in Nigeria, it correctly demonstrates that customary arbitration being a part of Nigerians indigenous dispute resolution process is a veritable dispute resolution process that should be encouraged because of its continuing relevance to many Nigerians. The decision has also helped to resolve the earlier inconsistencies in judicial pronouncements on the validity of traditional oath taking as it fortifies the earlier decision of the supreme court in *Onyenge v Ebere*[98] where it held per Niki Tobi JSC that: "Where parties decide to be bound by traditional arbitration resulting in oath taking, common law principles in respect of proof of title to land no longer apply. In such situation, the proof of ownership or title to land will be based on the rules set by the traditional arbitration resulting in oath." This decision affirms the accommodation of some form of traditional religious practices and metaphysical elements into customary arbitration. Some may argue that the supposed effectiveness of traditional oath-taking is a folk, cure-all remedy that boasts slim anecdotal evidence.[99] Belief in magic, the supernatural and so forth characterized simple societies but not modern cosmopolitan communities (e.g., cities).[100] Hence, traditional oath-taking is arguably not a common or popular dispute resolution tool in many parts of modern-day Nigeria largely due to the influence of Christianity and Islam.

From the foregoing, the perception of traditional oath-taking as being fetish, barbaric, or crude, may be an infringement to the right to profess any religion or faith guaranteed by section 38 of the 1999 Constitution as every Nigerian is free to take an oath in any manner that they consider

[97] (2020) 10 NWLR (PT.1733) 405 at 412,
[98] (2004) ALL FWLR (Pt. 219) 98; (2004) 6 SCNJ 126
[99] Special thanks to Dr Solomon Ukhuegbe for this point.
[100] Generally, see I. O. Ojo and E. Ekhator, 'Pre-colonial legal system in Africa: An assessment of indigenous laws of Benin kingdom before 1897', 5 *Umewaen: Journal of Benin and Edo Studies* (2020): 38-73.

suitable and binding on them and in accordance with their religious belief. Thus, it is against common sense and the spirit of the Nigerian legal system to regard traditional oath-taking in customary arbitration as criminal and illegal. This is more so as customary arbitration being part of the culture, belief, and traditional practices of the people over a long period of time cannot be fairly assessed using a borrowed culture as the parameters considering that Christianity and Islam were imported into Nigeria and the versions presented to Nigeria were largely influenced by the culture of the places from where they were exported to Nigeria.

The next section focuses on the status of customary arbitration in Nigeria.

3.2 Status of Customary Arbitration in Nigeria

Customary arbitration being an integral part of customary law is part of the history of Africans and a critical part of the enforcement mechanism of indigenous laws in pre-colonial times. With the distortions and displacements of African cultures and societies by colonialism, customary law was relegated to the backwaters of the formal legal systems in Africa. Furthermore, customary law ranks lower than state laws in many African countries. According to Oba, the colonial powers introduced new laws which made customary law secondary and

> customary law was widely excluded from matters of public law such as constitutional law, administrative law, criminal law and procedure, labour law, commercial law, torts, and contract law. Customary law became confined to civil matters and was limited to land law, chieftaincy matters, and personal law governing family matters like succession and customary marriages.[101]

Furthermore, the colonial powers eliminated aspects of customary law and practices they considered undesirable or "repugnant to civilized ideas"[102] and the others were "permitted

[101] Oba (2011a), *supra* note 16, at 62.
[102] A. N. Allott, 'The extent of the operation of native customary law: applicability and repugnancy', 2 (3) *J. Afr. Admin.* (1950): 4-11, at 8.

subject to the validity tests."[103] Thus, with the relegation of customary law, traditional African adjudicating bodies were reduced to mere informal methods of settling disputes. [104]

Customary arbitration being an integral part of customary law enjoys the same status as customary law in any society. In Nigeria, customary law is at the lowest rung of the ladder in the hierarchy of laws as its validity is dependent on its consistency with the constitution and any existing law.[105] Customary law was an existing law before the enactment of the 1999 constitution and therefore its existence and application are saved by sections 315(3) and (4)(b) of the Constitution of the Federal Republic of Nigeria 1999 (as amended)[106] and by extension the validity of customary arbitration is guaranteed. This is fortified by the decision of the Supreme Court in *Agu v. Ikewibe* where it held inter alia that customary law included customary arbitration and was saved as an 'existing law' by virtue of section 274 (3) (4) (b) of the 1979 Constitution (which is *impari material* with sections 315(3) and (4)(b) of the 1999 Constitution).[107]

Notwithstanding the foregoing, in trying to adapt customary laws to meet the expectations of modern-day justice delivery system, the repugnancy test was introduced. The repugnancy test states that for any custom to be valid and enforceable it must not be inconsistent with any

[103] Oba (2011a), *supra* note 16. The validity test in Nigeria is also based on section 18(3) of the Evidence Act, 2011 which provides that a custom shall not be enforced by the courts if it is contrary to public policy, or is not in accordance with natural justice, equity, and good conscience.
[104] Oba (2011a), *supra* note 16. Generally, see Enabulele and Bazuaye *supra* note 22 for the criticisms of the validity test of customary law in Nigeria. The validity test is also known as the repugnancy doctrine.
[105] See *Ukeje & anor v Ukeje* (2014) LPELR-22724 (SC).
[106] The Constitution of the Federal Republic of Nigeria 1999.
[107] However, scholars including Allott (1960), *supra* note 49 and A. Allott, 'Customary "arbitrations" in Nigeria: a comment on Agu v. Ikewibe' 42 (2) *Journal of African Law* (1998): 231-234, have argued that customary arbitration did not exist in African societies. Allott believed that dispute settlement in African societies comprised of mere negotiations and not customary arbitration practices. This view by Allott has been stridently criticised by scholars including Oluduro, *supra* note 3, and G. Bamodu, 'Judicial support for arbitration in Nigeria: On interpretation of aspects of Nigeria's Arbitration and Conciliation Act', 62 (2) *Journal of African Law* (2018): 255-279. The Nigerian Court of Appeal in *Okpuruwu v Okpokam* (1988) 4 N.W.L.R. (Part 90), 554 took a similar viewpoint to Allott and held that customary arbitration was not recognised under Nigerian law. However, this case no longer represents the law in Nigeria because the Supreme Court in *Agu v Ikewibe* held that customary arbitration is recognised under Nigerian law.

existing law, it must not be repugnant to natural justice, equity, and good conscience.[108] The problem often is, how does one determine if a culture meets this test? Most customary laws will fail this test because many existing laws are adapted from England. Also, the idea of natural justice, equity and good conscience is largely influenced by Christianity and Islam and thus most customs or traditional practices like traditional oath-taking may likely be perceived as repugnant.

The next section discusses some reforms to enhance the utility of customary arbitration in Nigeria.

4. Proposals for Reform

The Nigerian legal system is known for delay in the administration of justice especially in the criminal justice system.[109] The conventional western legal architecture of dispute settlement in Nigeria is afflicted with a plethora of barriers impacting negatively on access to justice for litigants in the country. Some of these judicial obstacles or barriers in Nigeria, include congestion of cases, limited resources of litigants, paucity of legal practitioners amongst others.[110] Scholars have argued that modern arbitration and litigation practices have worsened the plight of many litigants in Nigeria.[111]

Some of the advantages or strengths of customary arbitration include the fact that it is speedier, familiarity of the process, less cost, less procedural, or less bureaucratic, and less adversarial in nature for the parties and it is underpinned by native or indigenous participation.[112] In Nigeria,

[108] See section 18(3) of the Evidence Act. It is also contained in most State High Court Laws. See for instance, section 15 of the Enugu State Customary Courts Law, Cap 32, Laws of Enugu State of Nigeria, 2004 (as amended in 2011). It has also received judicial approval in a plethora of cases including the decision of the Supreme Court in *Ojiougo v Ojiougo & Anor* (2010), 9 NWLR (pt 1198) 1; *Anekwe v Nweke* (2014) LPELR – 42582 (CA).
[109] Editor, 'Editorial: Clogs in the wheels of justice.' (20 December 2022) Clogs in the wheels of justice - Vanguard News (vanguardngr.com)
[110] D. McQuoid-Mason, 'Could traditional dispute resolution mechanisms be the solution in post-colonial developing countries–particularly in Africa?', 11 (2) *Oñati Socio-Legal Series* (2021): 590-604.
[111] Onyema, *supra* note 91; Oba, *supra* note 3.
[112] A. Aiyedun and A. Ordor, 'Integrating the traditional with the contemporary in dispute resolution in Africa,' 20 *Law, Democracy & Development* (2016): 154 -173.

the traditional or informal institutions play an important role in the justice administration machinery.[113] Like what is taking place in some parts of Africa, there appears to be a renaissance of customary arbitration mechanisms or initiatives in Africa.[114] Therefore, relevant stakeholders (including academics) have contended that traditional or customary arbitration mechanisms should be fully integrated into the existing national legal frameworks in Africa.[115] For example, the United Nations Commission on Legal Empowerment of the Poor underscored the effectiveness of the reliance on informal or traditional dispute resolution measures which the citizens are acquainted with, thereby enhancing access to justice.[116] However, it should be noted that customary dispute resolution mechanisms (including customary arbitration) in Nigeria are not fool proof. Some of weaknesses of customary dispute resolution mechanisms in Nigeria include its non-codification or primarily unwritten nature, lack of trained or specialist arbitrators, fear of social ostracism or reprisals and the impact of English legal system.[117]

Furthermore, it should be noted although traditional or customary dispute resolution mechanisms are imperfect, they have served as enduring means of dispute settlement in Africa.[118] Thus, any future "reform on fully integrating the traditional customary dispute mechanisms into current western-focused legal systems in Africa should not adapt every single

[113] O. Enabulele and E. O. Ekhator, 'Improving environmental protection in Nigeria: a reassessment of the role of informal institutions', 13 (1) *Journal of Sustainable Development Law and Policy* (2022): 162-199; Oyakhire *supra* note 13.
[114] Onyema, *supra* note 91.
[115] Enabulele and Ekhator, *supra* note 113; C. Ogbumgbada and G. Agbaitoro, 'Legal Pluralism and Environmental Law in Former British West African Countries: Establishing Coherence and Common Grounds', presentation at the Legal Pluralism Colloquium held on 19th of November 2021 at the University of Bayreuth, Germany.
[116] United Nations Commission on Legal Empowerment of the Poor, Making the Law Work for Everyone: Report of the Commission on Legal Empowerment of the Poor (New York 2008); McQuoid-Mason, *supra* note 110, at 594.
[117] Akanbi *et al*, supra note 18; Ehiemua, *supra* note 46.
[118] Enabulele and Ekhator, *supra* note 113.

aspect of traditional legal framework."[119] There should be a process to remove some of the traditional or customary practices that are not suitable for contemporary times.[120]

The Arbitration and Conciliation Act (ACA)[121] the erstwhile primary law on arbitration in Nigeria has recently been replaced by the Arbitration and Mediation Act which was enacted into law in May 2023. The Arbitration and Mediation Act (AMA) 2023 contains a plethora of innovative provisions including emergency arbitrators, award review tribunal and third-party funding amongst other reforms and it is said to be in tune with international best practices.[122] Unfortunately, the AMA does not provide for customary arbitration in its provisions. This paper suggests that customary arbitration should be fully integrated into the formal alternative dispute resolution (ADR) architecture in Nigeria. Hence, akin to recent developments in Ghana and Kenya, the AMA should be revised to explicitly recognise or enshrine customary arbitration in its provisions.[123] Furthermore, different stakeholders have argued that traditional or customary dispute resolution mechanisms are already reducing the court congestion or excessive litigation in some parts of Nigeria.[124]

Arguably, the move to formalise customary justice systems has been working successfully in tandem with the traditional modes of dispute resolution in Africa countries, including Nigeria.[125] Also, notwithstanding the weaknesses and the adverse colonial and post-colonial

[119] Enabulele and Ekhator, *supra* note 113, at 194.
[120] Generally, see E. P. Amechi, 'Customary and Indigenous Approaches to Conservation of Natural Resources in Africa', 4 *University of Port Harcourt Journal of Private Law*: 211-229. On the other hand, K. Quashigah, 'Justice in the traditional African society within the modern constitutional set-up', 7 (1) *Jurisprudence* (2016): 93 -110, at 93 argues that "any effort therefore to transform customary practices to fall in line with the universal human rights imbued idea of justice could result in a situation where traditional societies are forced to conform to standards of justice that become impositions."
[121] CAP. A18, Laws of the Federation of Nigeria 2004.
[122] E. Oger-Gross, et al, 'New Arbitration Regime Comes into Force in Nigeria,' White & Case (21 June 2023) New Arbitration Regime Comes into Force in Nigeria | White & Case LLP (whitecase.com)
[123] Onyema, *supra* note 91, at 522, states that "Ghana included customary arbitration in Part III of its ADR Act of 2010, while Kenya notably referred to traditional dispute resolution processes under Article 159 of its 2010 Constitution..."
[124] Ekpenyong, *supra* note 12; Onyema, *supra* note 91.
[125] Onyema, *supra* note 91.

impacts on customary arbitration in Nigeria, traditional dispute resolution systems still maintain legitimacy and occupy a crucial slant in justice administration in the country.[126]

5. Conclusion

The decision of the Supreme Court in *Umeadi v Chibunze* is commendable as it re-echoes the need for Judges to evaluate customary laws from an indigenous perspective. This was aptly demonstrated by the Supreme Court as it avoided the trap of looking at traditional oath-taking in customary arbitration from a foreign perspective or the prism of western civilisation and religious perspectives. Therefore, the attitude of government institutions - the executive, legislature, and the judiciary should be to preserve and strengthen customary arbitration. While customary arbitration is upheld and enforced by the courts in Nigeria – more strategies need to be adopted (especially by the government) to elevate the status of customary arbitration. Notwithstanding the pitfalls of customary arbitration in Nigeria, it plays an integral role in the lives of many Nigerians. Hence, customary law (including customary arbitration) should be given more prominence in the plural legal system in Nigeria.

Furthermore, the decision in *Umeadi v Chibunze* brings to the fore the multiplicity of the mechanisms utilised by different stakeholders to enhance access to justice in Nigeria. As has been noted earlier, informal justice mechanisms in Africa (including customary arbitration in Nigeria) enhances access to justice for litigants and communities that engage in customary arbitration processes. Thus, notwithstanding the impacts of modernity or globalisation and influence of Christianity and Islam in Nigeria, *Umeadi v Chibunze* exemplifies the plural nature of the Nigerian legal system. Therefore, despite the influence of English law on the Nigerian

[126] Also, see O. Abe, 'Conflict Resolution in the Extractives: A Consideration of Traditional Conflict Resolution Paradigms in Post-Colonial Africa', 25 (1) *Willamette Journal of International Law and Dispute Resolution* (2017): 56-77

legal system, indigenous dispute resolution mechanisms (including customary arbitration) continue to play important role in the lives of Nigerians. Hence, Nigerian courts will continue to give judicial endorsement to customary law (including customary arbitration), and this will continue to provide the legal recognition for indigenous dispute resolution mechanisms in the highly pluralist Nigerian legal system.