CUSTOMARY LAW ARBITRATION AND THE CHALLENGE OF PARTY AUTONOMY: A CONTEXTUAL OVERVIEW*

Abstract

Customary Law arbitration has remained a veritable means of resolving disputes in African societies. Its practice has largely been anchored on voluntary submission of disputes to 'chiefs' and 'elders' of the community for resolution in accordance with societal norms, customs, usages, practices and customary law. However, the process of throwing up the customary arbitrators appears systemic and inexorably intertwined with native customs and norms – which constitute the customary law. This systemic nature of customary arbitration appears to completely deprive the parties of the exercise of their right to make certain decisions with respect of their arbitration. This has been a challenge which tends to derogate from the hallowed principle of party autonomy, an alluring element in arbitration practice. What is the way forward? The paper posits that in addition to enhancing more active participation of the disputants in the process amidst systemic constraints, the procedure must also throw up credible 'chiefs' and 'elders' properly so called, who are fit enough to act as arbitrators in accordance with real dictates of customary ethos. This will inspire and sustain interest and confidence in the people who utilise the procedure.

Keywords: Custom, Customary Law Arbitration, Systemic, Party Autonomy, Challenge.

1. Introduction

Peace and the pursuit thereof is a paramount desire of normal human beings in any given society. The importance of peace was emphasized by the Lord Jesus Christ in His popular Sermon on the Mount.[1] He further enjoins His followers '…to have peace one with another'[2] in summary, the Holy Bible enjoins all to '… seek peace all pursue it'.[3] Peace is often understood as the absence of war. Conversely therefore, war is the absence of peace. This conception may not be true for all times as it tends to fall short of the real purport of peace. Peace may not adequately be defined in abstraction. An appropriate and appreciable definition of peace ought to take cognizance of the social conditions of human existence such as poverty, oppression, relative deprivation, marginalization, exclusion, intimidation, etc. Thus, a state or society with pervasive poverty, oppression of the poor, infraction of the rule of law, brutality by security agents of the state, etc cannot be rightly described as peaceful, the absence of war notwithstanding.[4] Disputes and dispute resolution have been a major concern of man with the aim of making the state or society a better place for human settlement. The quest for peace and harmonious co-existence has engaged the attention of philosophers and social contract theorists. Thomas Hobbes for instance sees life in the Hobbesian 'state of nature' as a crass manifestation of conflicts, a condition of strife where the life of man was 'solitary, poor, nasty, brutish and short'. Every man desired not only to preserve his own liberty but also to acquire dominion over others.[5] Man went about armed. The mighty suppressed and expropriated the week with impunity. It was an era of quest and conquest, of kill or be killed, of man a wolf to his fellow man.[6] In order to free himself from the deplorable, vile and worthless life, men resolved to create a social contract by which each gave up his right of self defence to a Leviathan, a powerful force over and above all and to which all else were subject. This brought into being, a more powerful and orderly society for human habitation.[7] According to a classical philosopher, Plato, justice is the most fundamental basis of peaceful societal existence. Justice according to Plato, is achieved by giving to each his due. He conceives every society as fundamentally stratified along production, security and political rulership which respectively translate to corresponding roles of workers, soldiers and rulers. For Plato, society should determine the endowment of each individual member along the aforesaid strata and place each accordingly in order to attain justice and harmony. In his view, it is most desirable that the most knowledgeable person, 'the philosopher king', should rule the society. A distortion of the said stratified roles approximates to injustice. Accordingly, injustice manifests where the rule of the knowledgeable is supplanted by

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[1]The Holy Bible, (King James Version), (Town Falls: World Bible Publishers Inc, 1986) Mathew Chapter 5, verse 9.

[2]*Ibid*, Mark 9, verse 50.

[3]*Ibid*, Psalms 34, verse 14.

[4]Okey Ibeanu, 'Conceptualising Peace' in Shedrack Gaya Best (ed), *Introduction to Peace and Conflict Studies in West Africa: A Reader, (Ibadan: Spectrum Books Ltd, 2006) p.4.*

[5] Dennis Lloyd and M.D.A. Freeman, Lloyd's *Introduction to Jurisprudence,* (5th edn, London: Stevens & Sons Ltd, 1985) p.156.

[6]Chukwudifu Oputa, 'The Independence of the Judiciary in a Democratic society – its Needs, Positive and Negative Aspects', (1990), *JUS,* Vol.1, No. 3, p.18.

[7]Dennis Lloyd and M.D.A. Freeman, *op cit* (n.5) pp. 157-158. See also G.H. Sublime and T.L. Thorson, *A History of Political Theory* (New York: The Dryden Press, 1973) pp. 422 – 434 cited in Okey Ibeanu, o*p cit*(n.4), p.5.

that of the worker or soldier and under such circumstances, there cannot be peace and social harmony.[8] From primordial times, long before formal courts were established, man's odyssey in search of peace and justice has remained recurrent. One of the earliest avenues of resort in this regard is arbitration. And so, arbitration has remained a veritable means of resolving discords, adjusting differences and settling disputes.[9]

2. Meaning of Arbitration

Arbitration is a private adjudicatory process involving the reference of a dispute to private disinterested person or persons appointed by the disputing parties. These arbitrators act in a judicial fashion without attaching legal technicalities, but applying either existing laws, rules or norms agreed by the parties to hand down an award to resolve the dispute.[10] It is a mode of dispute resolution by one or more third persons who derive their authority from the agreement of the parties and whose decision is binding upon the parties.[11] Arbitration is conceived as an alternative approach to litigation. The arbitral process as a means of dispute resolution tends to overcome the ills of procedural delays in formal courts, technicalities, uncertainties, expense and publicity.[12] It must be added however, that it is not in all cases that litigation expenses are far higher that arbitration expenses. Thus, in complex arbitration proceedings such as in the oil industry, aviation and telecommunication concerns, the cost of arbitration may turn out to be even higher than litigation. Arbitration nonetheless, still retains its simplicity, informality, confidentiality, relative cheapness and efficiency. On general comparative terms, its advantages over litigation are quite substantial.[13] Although arbitration must be conducted in a judicial manner, according fair hearing of evidence to both parties to a dispute, it is *per se*, not a court. It is not vested with judicial powers either.[14] Section 6 of the Constitution[15] vests the judicial powers of the Nigerian federation and the states in the courts and not in non-judicial bodies. It is thus, open to the disputing parties to either choose the normal channel for determination of justiciable controversies through the machinery of the courts or to submit same voluntarily to a non-judicial body such as an arbitration for a decision.[16] The enforcement of an arbitral award other than by voluntary compliance is however, facilitated through the machinery of the courts. Thus, an arbitration cannot entirely be an adequate substitute for a court of law.[17] Judicial power could be conceived as the power which every sovereign authority necessarily has to decide controversies with finality of permanence. The exercise of judicial power does not begin until some tribunal clad with power to hand down a binding authoritative decision is duly activated to take action.[18] The emphasis of judicial power is predicated on the ability to enforce a decision. This is the very fundamental manifestation of judicial power.[19] It is scarcely arguable that the sanction behind the exercise of judicial power is the attribute of enforcement. Nonetheless, some judicial decisions may stop short of enforcement and simply be declaratory in nature.[20] This perhaps explains why the courts cannot be wished away from arbitrations and decisions reached therefrom. The purview of this discourse is to examine the systemic functionalism of customary arbitration and the challenge of party autonomy.

3. Customary Law Arbitration in Perspective

Customary arbitration is a process of dispute resolution whereby disputing parties 'almost always' voluntarily refer their dispute to chiefs and elders for adjudication and resolution in accordance with the native customary law, norms, practices and procedures of the people of a given community. The term 'almost always' is instructively used in the context because sometimes a party could be summoned to appear before the chiefs and elders in which case the party would be bound to appear. This is alluded to by Nnaemeka – Agu JSC in the Agu case *supra*. By judicial decision of the apex court, customary arbitration is 'an arbitration in disputes founded on the voluntary submission of the parties to the decision of the arbitrators who are either chiefs or elders of their

[8]See Plato, *The Republic*, Trans. Benjamin Jowett, (New York: Airmont Publishing Co, 1968) cited in Okey Ibeanu, *ibid*, p.6.
[9]F. Kellor, 'American Arbitration, Its History, Functions and Achievements' (1948) cited in Henry P. De Vires, 'International Commercial Arbitration: A Contractual Substitute for National Courts', *Tulane Law Review*, (1982), Vol.57, p.43.
[10]J. Fulton Maxwell, *Commercial Alternative Dispute Resolution,* (Sydney: The Law Book Co Ltd, 1989), p.55
[11]Henry P. De Vires, *op cit* (n.9), p.43.
[12]*Ibid*.
[13]G.C. Nwakoby, *The Law and Practice of Commercial Arbitration in Nigeria,* (2nd edn, Enugu SNAAP Press Nig Ltd, 2014) p.3.
[14]See Nnaemeka –Agu JSC in *Agu v Ikewibe* (1991) 3 NWLR (pt.180) 385 at p.419.
[15]*Constitution of the Federal Republic of Nigeria 1999* as amended, hereinafter, 'the Constitution'.
[16]*Awosile v Sotumbo (1992)* 5 NWLR (pt.243) 514. See also *Global Transport Oceanico SA & Anor v Free Enterprises Nig Ltd (2001)* 5 NSCQR 478 at p.504 per Kalgo JSC.
[17]C.U. Agbo, 'International Commercial Arbitration and National Courts: What Nexus?', *ESUT Law Journal,* Vol.3, Issue 1, June 2021, p.82.
[18]*Shell Company of Australia Lt v Federal Commissioner of Taxation* (1931) AC 275 at p.295.
[19] *Bola Co (Australia) Ltd v The Common wealth* (1944) 69 CLR 185 at p. 199.
[20]B.O. Nwabueze, *Judicialism in Commonwealth Africa,* (London: C. Hurts & Co, 1977) p.9.

community and the agreement to be bound by such decision or freedom to resile where unfavourable.'[21] Elias had earlier expressed a similar view about customary arbitration. According to the judge and jurist, customary law arbitration is a mode of reference of a dispute to the family head or an elder of a given family or community for a compromise solution subject to subsequent acceptance by both parties of the suggested award. The award becomes binding only after indication of its acceptance and either party is free to resile at any stage of the proceedings up to the point of making the award.[22] The foregoing positions of Elias and Ikpeazu apparently influenced the holding of Karibe-Whyte JSC that Nigerian Law recognizes arbitration at customary law which is distinct and different from arbitration under statute ostensibly if and only if the following conditions are satisfied:

(a) If the parties voluntarily submit their dispute o a non-judicial body to wit, their elders or chiefs as the case may be for determination; and
(b) The indication of willingness of the parties to be bound by the decision of the non-judicial body or freedom o reject the decision when not satisfied;
(c) That neither of the parties has resiled from the decision as pronounced.[23]

Nnaemeka-Agu JSC who dissented from the majority decision in the *Agu* case, nonetheless accepts the basic relevance and utilitarian worth of customary arbitration as a means of settlement of disputes in native African communities. The point of dissention of the learned law lord is whether a party who voluntarily submitted to arbitration can reject the decision when made in accordance with the custom of the parties or resile therefrom. In the views of Justice Nnaemeka – Agu, the following ingredients of customary arbitration must be pleaded and proved by evidence for it to be binding and ground a plea of estoppel. They are:

(i) That there has been a voluntary submission of the matter in dispute to an arbitration of one or more persons;
(ii) That it was agreed by the parties either expressly by implication that the decision of the arbitrators will be accepted as final and binding;
(iii) That the said arbitration was in accordance with the custom of the parties or their trade or business; and
(iv) That the arbitrators reached a decision and published their award.[24]

It seems quite settled that the basic principle of arbitration and indeed, the legal basis of same irrespective of the underlying facts is voluntary agreement, voluntary submission based on an exercise of free choice by the parties in dispute. Parties to such an arrangement therefore, are bound by the outcome unless it can be shown that the arbitrator or arbitrators erred substantively or procedurally in course of the arbitral proceedings or otherwise misconducted himself or themselves. Such substantive and procedural errors may include infraction of the rules of natural justice and, or public policy or outright perverseness. Iguh JSC subscribes to this view in *Joseph Onuwu & Ors v Ezekiel Nka & Ors.*[25] According to his lordship:

> The law is well settled that where disputes or matters in dispute between two or more parties are by consent of the disputants submitted to a domestic forum inclusive of arbitrators or a body of persons who may be vested with judicial authority to hear and determine such disputes and matters for investigation in accordance with customary law and general usages, and a decision is duly given, it is as conclusive and unimpeachable (unless and until set aside on any of the recognised grounds) as the decision of any constituted court of the land. Such decision is consequently blinding on the parties and the court in appropriate cases with enforce it.

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[21]*Rphael Agu v Christian Ikewibe* (1991) 3 NWLR (p. 180) 385 at p.407 per Karibe-Whyte JSC. See Nnaemeka-Agu JSC in the same report at p.420.

[22]T.O. Eliias, *Nature of African Customary Law,* (Manchester: Manchester University Press 1956) p. 212. See also *Philip Njoku v Felix Ekeocha* (1972) 2 ECSLR 199 at p.205 per Ikpeazu J, to the same effect.

[23]*Agu v Ikewibe supra* (n.21) p.408.

[24]*Ibid*, pp.418 – 419. See also *Ojibah v Ojibah (1991) 5 NWLR (pt. 191) 296 at p. 304; Igwego & Ors v Ezeugo & Anor (1992) 6 NWLR (pt. 249) 561 at p.576; Awosile v Sotumba supra* (n.16) 514 at p. 532. This position appears to reflect the pre-existing law on customary arbitration prior to the *Agu* case. Thus, where matters in dispute between parties are by mutual consent arbitrated in accordance with native customary law, and a decision is given, it binds the parties and the court shall enforce it. Similarly, in submitting to arbitration, the general rule is that as the parties chose their arbitrator to be the judge in the dispute between them, they cannot when the award is good on its face object to it. See respectively *Kwaku Assampong v Kweku Amuaku & Ors* (1932) 1 WACA 192 at p. 201; *Kobina Foli v Obeng Akese* (1930) 1 WACA 1; *Ezejiofor Oline & Ors v Jacob Obodo & Ors* (1958) 3 FSC 84; *Kwesi & Orss v Larbi* (1932) 79. In *Ohiaeri v Akabueze* (1992) 2 NWLR (pt. 221) 1 at p.24; Akpata JSC who real the lead judgment of the apex court adopted Justice Nnaemeka – Agu's position in the *Agu case supra* but added a fifth requirement that the decision or award, was accepted at the time it was made. See general G. Ezejiofor, 'The Pre-requisites of Customary Arbitration'; *Journal of Private and Property Law,* University of Lagos, April, 1993, Vol. 16, at p. 29.

[25](1996) 7 NWLR (pt. 458) 1 at p. 17.

Customary arbitration agreements are normally oral in nature. Although, with modern development and recent trends, proceedings and decisions reached pursuant thereto are more often than not, reduced into writing and, or committed to print and duly preserved. This recent practice does not *per se* bring customary arbitration within the purview of the Arbitration and Conciliation Act.[26] Customary law arbitration is thus, not governed by the Arbitration Act. It is conceivable that because of the oral nature of agreement pursuant to customary law arbitration and the resultant award, there may arise the real possibility of conflicting evidence as to the existence, authenticity, veracity, or precise purport of same by the parties thereto. In such circumstance, it becomes incumbent on the court to make a specific find of fact in respect thereof.[27] Customary law arbitration is a popular and veritable means of dispute resolution in Africa traditional communities in accordance with their customary norms, practices and procedure.

4. Party Autonomy in Arbitration Practice

Arbitration is a private process of dispute irresolution. And being so, the process requires the participation of parties agreeing on some fundamental issues in regard to the arbitration. These issues include the manner of appointment or constitution of arbitrators; the law, rules or norms to be applied by their chosen arbitrators; the language(s) and venue of the arbitration, etc. Without such a free exercise of choice and voluntary submission, the arbitral process derogates from an essential element of arbitration. Accordingly, the importance of party autonomy is underscored in most arbitration enactments. It also appears indispensable in the light of the private nature of arbitration and the imperatives of consequential impute on some essential aspects of the arbitral process by the parties.[28] Expressions such as 'unless both parties agree', or 'except as otherwise agreed by the parties', or 'the parties are free to agree', etc capture and convey the very purport of party autonomy. Such expressions are contained in the Nigerian Arbitration Act. Thus, parties can determine the number of arbitrators[29], the procedure of their appointment[30] the challenge procedure of arbitration[31] issues relating to interim measures of protection[32], the place commencement date and language(s) to be used at the arbitration,[33] etc. The hallowed principles of party autonomy is predicated on the principle of freedom of contract by which the parties are free to determine the terms of the contract. The principle emphasises the power of the parties to an arbitration to determine some essential issues relating to their arbitration, the arbitration agreement and the conduct of the arbitral proceedings.[34] The importance of the principle of party autonomy finds expression in the parties as it were, determining the 'rules of the game'. It is one of the indispensable hubs of the arbitral process and without it, arbitration will be deprived of its essence'.[35] It is indeed, an alluring element in arbitration practice and to a large extent inspires confidence in parties to arbitration.

5. Customary Law Arbitration and Party Autonomy

Customary Law is based on native customs. 'Custom' is understood to mean the established or commonly accepted usage of a people in a given society.[36] Its acceptance indicates that it is binding among the people[37] and thus, obligatory.[38] Every society from primordial to modern times has a set of customs which regulates its affairs generally from one generation to another. These customs constitute the customary law of the people. The customary law is thus, a body of existing rules regulating rights and imposing correlative duties which are fortified

[26]Cap A18, Laws of the Federation of Nigeria (LFN) 2004, hereinafter, 'the Arbitration Act'.

[27]See Uzo Idika & Ors v Ndukwe Erisi & Ors (1988) 1 NSCC 977 at p. 983 per Obaseki JSC. In the Idika case, the Supreme Court affirmed the decision of the Court of Appeal ordering a *de novo* trial by another judge of the Imo State High Court because the learned trial judge failed to make a specific finding as to the precise purport of the decision of the arbitrators and in which party's favour it was made.

[28]G.C. Nwakoby, *op cit* (n.13) p 366. See also P.O Idonigie, 'The Nigerian Arbitration and Conciliation Act and the Principles of Party Autonomy' in O.D. Amucheazi and C.A. Ogbuabor (led), *Thematic Issues in Nigerian Arbitration Law and Practice, (*Onitsha: Varsity Press Ltd, (2008) pp.9-31.

[29]Section 6, Arbitration Act.

[30]Section 7, *Ibid.*

[31]Section 9, *Ibid.*

[32]Section 13, *Ibid.*

[33]Section 16, 17 and 18, *Ibid.*

[34]A.A Asazu, The Arbitration and Conciliation Decree (Cap 19) As a Legal Framework for Institutional Arbitration: Strategies and Pitfalls, being a paper presented at an International Bar Association African Regional Conference, Nigerian Law School, Victoria Island, Lagos Nigeria, 27 – 28 February, 1995, p. 21.

[35]*Ibid.*

[36]O.N. Ogbu, *Modern Nigerian Legal System,* (3rd edn, London: SNAAP Press Ltd, 2013) p. 92.

[37]A.O. Obilade, *The Nigerian Legal System,* (London: Sweet and Maxwell, 1970) p.83.

[38] *Ibid*

by established usage, appropriately applicable to any given cause, matter, dispute, issue, or question.[39] The customary law is thus, the organic or living law of the people, regulating their lives and transactions.[40] These customs are transmitted by oral tradition from generation to generation. The custom must be in existence at the material time as a binding custom wherever its use is called into question. It must not be ancient custom of 'bygone days'.[41] It is thus, 'a mirror of accepted usage'.[42] Accordingly, a custom must have the assent, recognition and acceptance of the native people to which it applies. Lord Atkin conveys this point in *Eshugbayi Eleko v Officer Administering the Government of Nigeria*[43] as follows: '… It is the assent of a native community that gives a custom its validity and therefore … it must be shown to be recognised by the naïve community whose conduct it is supposed to regulate'. Native Custom is largely unwritten[44] and lacks uniformity.[45] It is also not static. It is flexible and organic, and reflects societal dynamism in accordance with changing times without entirely losing its character.[46] The unwritten attribute of native custom may have influenced the erroneous impression that transactions evidenced in writing were beyond the purview of customary law. It is the law that such written documents evidencing transactions do not *per se* exclude the customary law.[47] Customary law arbitration flows from the customs, norms, practices and usages of a given native community.

As noted earlier, party autonomy is about the power of the parties to an arbitration to determine some essential issues relating to the arbitration. The scenario of arbitration practice under the purview of the Arbitration Act does not quite convey the position under customary law arbitration. Whereas in the former, the parties 'dictation' of the 'rules of the game' is curtailed with respect to domestic arbitration as opposed to international arbitration in the choice of application rules, in the latter, apart from the opportunity of putting forth their evidence in support of their respective positions, parties are ordinarily quite passive in the process.

Article 19 of the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration[48] provides as follows:

> (1) Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.
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> (2) Failing such agreement, the arbitral tribunal may, subject to the provisions of this law, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.

Under the Nigerian Arbitration Act, there is a distinction between domestic arbitration and international commercial arbitration. Thus, while sections 1 to 36 in Part 1 of the Act relate to domestic arbitration, sections 43 to 54 in Part III relate to international commercial arbitration. The Model Law relates to only international commercial arbitration. Thus, whereas sub-section (1) of section 15 of the Arbitration Act provides that arbitration proceedings shall be in accordance with the procedure set out in the Arbitration Rules contained in the First Schedule to the Act,[49] section 53 of the Arbitration Act gives the parties a wider latitude of choice. According to section 53 of the Act:

> Notwithstanding the provisions of this Act, the parties to an international commercial agreement may agree in writing that disputes in relation to the agreement shall be referred to arbitration in accordance with the Arbitration Rules set out in the First Schedule to this Act, the UNCITRAL Arbitration Rules or any other international arbitration rules acceptable to the parties.

It follows from the combined effect of the foregoing provisions of the Nigerian Arbitration Act that autonomy of parties to domestic arbitration with respect to choice of the applicable rules are circumscribed. This is because they are bound to adopt the Arbitration Rules in the first schedule to the Act. This is however, without prejudice

[39]See for instance, section 2, Customary Court Law, Cap 32, Revised Laws of Enugu State 2004 (As Amended in 2011).
[40]Obaseki JSC in *Oyewunmi v Ogunesan (1990)* 3 NWLR (pt. 137) 182 at p. 207.
[41]Speed Ag. CJ in *Lewis v Bankole (1908)* 1 NLR 81 at p.83. Karibi – Whyte JSC in *Kimdey v Military Governor of Gongola State & Ors* (1988) 2 NWLR (pt.77) 445 at p. 461.
[42]*Owonyin v Omotosho* (1961) 1 ALL NLR 304 at p. 309.
[43]Elias CJN in Laiden v Mohssen (1973) 11 SC 1 at p. 2.
[44]A.O. Obilade, *op cit* (n.37) p.83.
[45]Osborne CJ in *Lewis v Bankole Supra* (n.41) pp.100 – 101; Lord Atkin in the *Eshugbayi case supra* (n.44) p. 673; Karibi – Whyte JSC in *Kimdey v Military Governor of Gongola State & Ors supra* (n.41) p.461; Kingdom CJ in *Balogun v Oshodi* (1929) 10 NLR 50 at p. 57; Obaseki JSC in *Oyewunmi v Ogunesan supra* (n.40) p. 267.
[46]*Rotibi v Savage* (1944) 17 NLR 77.
[47]*Ibid*
[48]Hereinafter, 'the Model Law'.
[49]The schedule is essentially modelled after the UNCLTRAL Arbitration Rules.

to some provisions of the Act as earlier stated that are based on the principle of party autonomy.[50] With respect to international commercial arbitration, the parties have a wider and more elastic choice of arbitration rules to guide their arbitral procedure.[51]

The parties at customary law arbitration do not exercise any autonomy in the appointment or choice of arbitrators, nor do they determine the number, appointment or challenge procedure of the arbitrators. They are not usually asked to nominate or appoint arbitrators for any particular proceedings. Although according to Professor Nwakoby, to show that what transports at customary law arbitration proceedings is not an imposition, it is the practice in Igbo speaking areas of Nigeria that the parties to the arbitration are often asked to appear before the arbitral body with kola nuts and palm wine. This is apparently deemed to be a sufficient symbolic signification of the parties 'appointment' and 'acceptance' of the arbitral body to proceed with the subject matter.[52] It is however arguable with due respect, whether this symbolic gesture approximates to munificent exercise of party autonomy at customary law arbitration. This is seemingly so, because other issues relating to the arbitration, such as the place, commencement date and language(s) to be used are not within the competence of the parties to decide. Such decisions appear to be systemic and accordingly, circumscribed and subsumed within the applicable customary law, customs, norms and practices. And so, it follows that submission to customary law arbitration *ipso facto* implies submission to and adoption of the rules of such arbitration with the total passivity of the parties. Thus, important decisions as stated above are left at the mercy and whims of customary arbitrators.

By way of analogy, the practice at customary law arbitration appears *mutatis mutandis* similar to what obtains at international arbitration whereby the adoption of any of the rules of an arbitration institution[53] by the parties without more, transfers important decisions to the named arbitration institution in accordance with the adopted rules, which said rules will be deemed to be part and parcel of the parties contractual agreement.[54] By article 8(1) of the International Chamber of Commerce (ICC) Rules for instance, where the parties have agreed to submit to arbitration by the ICC, they shall be deemed thereby to have submitted *ipso facto* to the present Rules. Thus, the rules governing arbitral proceedings under the ICC regime shall be those resulting from the ICC Rules. Where the rules are silent, then any rules which the parties, or failing which, the arbitrator(s) may settle[55] will apply. The critical question seems to be that he parties must first make a choice.

6. The Challenge of Choice at Customary Law Arbitration.

At customary arbitration, the choice to arbitrate confines the parties to the systemic rules and procedures of the particular customary law. And so, decisions relating to appointment, challenge or removal of arbitrators, etc are determined within the context and confines of the given customary law and the arbitration is conducted in accordance therewith. It is in the context of the correlation between the 'choice' of 'system' and the consequential impact that customary arbitration appears to have semblance with international arbitral institution with a set of binding rules. Since customary law arbitration is acknowledge to be an arbitration of disputes founded on the voluntary submission of the disputants to the decisions of arbitrators who are usually chief or elders of their communities,[56] it becomes necessary to interrogate the real status of the said 'chiefs' or 'elders'. It is assumed that in most, if not all traditional societies in Africa, chiefs and elders and by extension, in Igbo societies, *Ozo* title holders are deemed to be honest and pious individuals who are incapable of lying or perverting the course of justice howsoever. They are usually hallowed and venerated by members of the traditional society to which they belong. Unfortunately, this state of affairs has changed tremendously in most, if not all traditional societies. This impression about chiefs and elders has thus, become a mere facade, very far from the realities of 'modern' times.

These days, chieftaincy titles are up for grabs by the highest bidder. Such titles are disapprovingly almost always sold and bought like shares in the stock market. Even the status of 'elder' is not spared. It has come under severe attacks by relatively young elements who lay claims to the 'elder' status because they are emboldened by sudden wealth into which they have stumbled. Sometimes the young supplant the real elders. *Ozo* title taking is nowadays

[50]See for instance sections 6, 7, 9, 13, 18, 19, 20, etc of the Arbitration Act.

[51] See generally P.O. Idonigie, *op cit* (n.28) pp. 11 – 12; J.O. Orojo and M.A. Ajomo, *Law and Practice of Arbitration and Conciliation in Nigeria* (Lagos: Mbeyi & Associates Ltd, 1999) p. 166. See also C.U. Agbo, 'Party Autonomy in International Commercial Arbitration under the Law in Nigeria', (2012) Vol.1 *Journal of Contemporary Law,* Department of Commercial and Property Law, Faculty of Law, University of Nigeria, pp. 139 – 154.

[52]See G.C. Nwakoby, *The Law and Practice of Commercial Arbitration, (Enugu: Iyke Ventures Production, 2004) p. 89.*

[53]Arbitration Institutions include the Asian African Legal Consultative Committee (AALCC); the International Chamber of Commerce (ICC); the London Chamber of International Arbitration (LCIA); the American Arbitration Association (AAA); the International Centre for the Settlement of Investment Disputes (ICSID).

[54]A.A. Asouzu, *op cit* (n.34) p. 22.

[55]. Article II, ICC Rules.

[56]See *Agu v Ikwibe supra* (n.21) p. 407 per Karibi-Whyte JSC.

similarly a mere bazaar of the absurd. It is now more often than not, politically manipulated in such a way as to grant access to it, to relatively young, brash and rash individuals who often turn out to be misfits for such titles, but for their 'stupendous' wealth. The advantages of age, maturity, experience and wisdom are regrettably relegated to the background while priority is accorded to soulless materialism, mammon worship and political maneuvers. Such hitherto respected and highly revered titles have become so badly bastardised and corrupted that they have in the main, become nebulous, manifesting thereby a crass decline in societal value system. This unfortunate trajectory has thrown up a bunch, of individuals masquerading as customary 'arbitrators'. Those so called 'arbitrators' hold sway at the systemic customary arbitration, dominate public discourse and dictate public morality.

7. Conclusion

There is scarcely any doubt that the principle of party autonomy is one of the indispensible hubs in the arbitral process without which arbitration is deprived of its essence. It is indeed, an alluring element in arbitration practice. It is very doubtful whether the practice at customary law arbitration which seems to take away completely the input of the parties in the appointment or challenge of arbitrator(s) and such similar decisions enhances the arbitral process. It seems quite on the contrary, that such practice palpably conflicts with the cherished arbitration principle of party autonomy in the appointment of arbitrators or choice of applicable custom or rule of customary law. This, *a fotiori* seems to derogate from the hallowed principle, notwithstanding that it could be argued that it was in exercise of the same autonomy that the parties *ab initio* voluntarily opted for and submitted to customary law arbitration instead of the courts. However, since one of the striking features of customary law is its flexibility, it is suggested that a more positive role in terms of at least, the parties determining who is to be the 'judge' over their matter submitted to customary arbitration, be incorporated into the arbitral process. This will inspire and sustain greater confidence of the parties in the arbitral process. There is also urgent need to reconnect with the cherished hallowed traditional value system of African primordial societies. These societies were paradigms where abhorrent conducts were condemned and punished, where children were raised to respect and obey not just their parents but also their elders generally, where human lives were held as sacred and where justice was held uncompromisingly as a common creed. Such an egalitarian society will raise children who through the processes of socialiation, grow into adulthood with entrenched values which impact positively on the society. This will throw up a genuine corps of people with requisite capacity to serve as customary arbitrators. This will also strengthen the systemic process of customary arbitration as veritable institution of dispute resolution.