The Role of Received English Law in The Settlement of Labour Disputes in Nigeria: Empirical Paradox of Labour Management

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Abstract

Two forms of arbitration exist in present-day Nigeria; the first is indigenous to the various communities in the country and it is determined by the customs and traditions of the individual community. The second, which was imported, derives its source from the general laws and practice of England. The latter, which are arguably, alien to the culture and tradition of traditional Nigerian communities has often been superimposed and applied by courts. The continuing subjugation of customary arbitration can be seen in the attitude of the Nigerian courts, whereby reliance is placed on the parameters of modern arbitration in the determination of a valid customary arbitration award in Nigeria. This article contends that the attitudes of courts in the determination of the binding nature of an award given under customary arbitration, using the parameters of modern arbitration, has caused considerable damage to the essence and potency of customary arbitration practice in Nigeria. In order to be authentic, it is contended that judicial development of customary arbitration, must respond to the traditions, attitudes and goals of the people whose society is under consideration. It should not be subject to a validity test by reference to orthodox arbitration or arbitration under the received English law. Consequently, the article examines the extant parameters to which the Nigerian courts subject the characteristics of customary arbitration in Nigeria. The article discusses the need for a paradigm shift in order for customary arbitration to respond to the exigencies of customs. Upholding the rule of law and adherence to the principles of justice play

an important role in the economic and social development of a Nation, this is because rule of law and justice to all guarantee peace, security and stability. For a Nation to be ranked among the committee of civilized and developed Nations, rule of law and principles of justice must be upheld.

Keywords: *Arbitration, custom, tradition, dispute resolution, English law, Nigeria.*

Introduction

The practice of disputes settlement using the process of arbitration is as old as the existence of the Nigerian society. Arbitration had existed of the British legal system of court litigation into the country. It was part of the customary norms of Nigerian society. Before the colonial era, customary law operated freely in its areas of influence as a complete and independent legal system. There was also in existence a separate, independent and organized dispute resolution system based on the individual customary law of each community. This system of dispute resolution is generally referred to as customary arbitration and customary arbitration tribunals constituted by elders of that community administer it. The tribunals derive their authority from the custom and tradition of the community, which are accepted by members as binding on them. Customary arbitration is also recognized under Nigerian law as a valid dispute resolution mechanism. The arrival of the British colonialists in the 19th century had a radical impact on the hitherto existing system of customary dispute resolution. They came with their own strange judicial system and dispute resolution mechanism. The process of colonization did not replace the practice of dispute resolution through arbitration in the local communities, as customary arbitration is still one of the modes of resolving disputes in contemporary indigenous communities of Nigeria. Igbokwe notes that the British colonization of Nigeria witnessed the interaction of English law with customary law. But the British colonization did not result in complete obliteration of the customary laws of Nigeria in the various indigenous communities in Nigeria long before the advent and the local level dispute resolution mechanism such as customary arbitration. The judicial system, introduced by the colonialists, however gained superiority over traditional judicial systems, and customary law became only enforceable on their terms and parameters. This state of affairs dealt a fatal blow to customary arbitration, as a customary arbitral award would not be binding and enforceable if it is not in tandem with the parameters laid down by the courts. More significant to this article is the philosophy and essence of arbitration under both laws. Arbitration under the common law is rigid and strictly contractual based on agreement of the parties. This is unlike customary law of indigenous Nigerian society, which is highly flexible. Customary arbitration is mainly to ensure peace and order in the society and also to preserve existing relationships. The philosophy and essence of practice of arbitration under both systems therefore fundamentally differs. Moreover, there is no single customary law in Nigeria. Customary law differs from society to society. It is, therefore, astonishing to see general rules being laid down for the validity of customary arbitral awards based on the superimposed common law features of arbitration.

Received English Law

When heard of "Received English law", what erroneously comes to mind is the law converted in English. But the truth is that received English law has nothing to do with the language composition. In a nutshell, "Received English law" refers to the rules of law and legal principles that have their roots or origin in England but were adopted into Nigerian legal system to form

part of Nigerian laws. The influence of colonialism resulted to adoption of received English law into Nigerian legal system upon Independence in 1960. Components of "Received English law" include the common law, the doctrines of equity, statutes of general application in force in England on January 1, 1900, statutes and subsidiary legislation on specified matters and English law (statutes) made before October 1, 1960 and extending to Nigeria which are not yet repealed. Laws made by the local colonial legislature are treated as part of Nigerian legislation. The failure to review most of these laws especially in the field of criminal law has occasioned the existence of what may be described as impracticable laws or legal provisions which are honoured more in breach than in observance. Despite the influence of English Law, the Nigerian legal system is very complex because of legal pluralism (Dina, Akintayo and Ekundayo, 2005).

The Origin of the Common Law

The English common law originated in the early Middle Ages in the King's Court (Curia Regis), a single royal court set up for most of the country at Westminster, near London. Like many other early legal systems, it did not originally consist of substantive rights but rather of procedural remedies. The working out of these remedies has, over time, produced the modern system in which rights are seen as primary over procedure. Until the late 19th century, English common law continued to be developed primarily by judges rather than legislators. The common law of England was largely created in the period after the Norman Conquest of 1066. The Anglo-Saxons, especially after the accession of Alfred the Great (871), had developed a body of rules resembling those being used by the Germanic peoples of northern Europe. Local customs governed most matters, while the church played a large part in government. Crimes were treated as wrongs for which compensation was made to the victim.

The Norman Conquest did not bring an immediate end to Anglo-Saxon law, but a period of colonial rule by the mainly Norman conquerors produced change. Land was allocated to feudal vassals of the king, many of whom had joined the conquest with this reward in mind. Serious wrongs were regarded mainly as public crimes rather than as personal matters, and the perpetrators were punished by death and forfeiture of property. The requirement that, in cases of sudden death, the local community should identify the body as English and, therefore, of little account or face heavy fines reveals a state of unrest between the Norman conquerors and their English subjects. Government was centralized, a bureaucracy built up, and written records maintained. Controversy exists regarding the extent to which the efficient government of the Anglo-Norman realm was due to the legacy of Anglo-Saxon institutions or to the ruthlessness of the Norman invaders. Elements of the Anglo-Saxon system that survived were the jury, ordeals (trials by physical test or combat), the practice of outlawry (putting a person beyond the protection of the law), and writs (orders requiring a person to appear before a court; see below the development of a centralized judiciary). Important consolidation occurred during the reign of Henry II (1154–89). Royal officials roamed the country, inquiring about the administration of justice. The Normans spoke French and had developed a customary law in Normandy. They had no professional lawyers or judges; instead, literate clergymen acted as administrators. Some of the clergy were familiar with Roman law and the canon law of the Christian church, which was developed in the universities of the 12th century. Canon law was applied in the English church courts, but the revived Roman law was less influential in England than elsewhere, despite Norman dominance in government. This was due largely to the early sophistication of the Anglo-Norman system. Norman custom was not simply transplanted to

England; upon its arrival, a new body of rules, based on local conditions, emerged. There are, from a legal perspective, two broad categories of employees in Nigeria: "Workers", who are defined under the Labour Act as those "who are generally employees who perform manual labour or clerical work"; and employees who perform administrative, executive, technical or professional functions (referred to as "Non-Workers"). The Labour Act, which prescribes the minimum terms and conditions of employment, is limited in its scope as it applies only to Workers. The terms and conditions of employment of Non-Workers are primarily subject to the terms of their respective contracts of employment. Although the Labour Act recognizes that an employment contract could be oral or written, express or implied, section 7 of the Labour Act requires every employer to issue a written contract to the employee within three months of the commencement of the employment relationship. With respect to Non-Workers, there is no statutory requirement for their employment contracts to be in writing. It is, however, advisable that contracts be made in writing for ease of reference and clarity of the employment terms.

Theoretical Framework

This study is built on the Sociology of law. The sociology of law is concerned with the nature of law, its sources and functions, its relation to other social control mechanisms and the complex relationship between the legal system and the society. It studies the materials from which laws are made, the institutions that make the laws, and the influences on such an exercise. It is also concerned with the institutions and processes of law enforcement, interpretation, adjudication and administration. Components of the legal system such as the legislature, the police, the justice departments, courts, prisons, social welfare agencies and so on, are all examined with a view to sociologically unraveling and explaining their functions. Questions are posed and answered as to the nature of the organization of such institutions, their underlying ideologies, their actual operations, their latent and manifest functions, as well as their relationship with the social structure within which they operate. Functionalist theorists of law, such as Talcott Parsons (1951) and Harry Brede Meier (1962) conceive of law as the major mechanism for ensuring social integration by maintaining control and coordination among the constituent elements of society. Thomas Hobbes (1651:34) was very emphatic that without the instrumentality of law to restrain the evil nature of man, men will live in "continual fear and danger of violent death and the life of man is solitary, poor, nasty, brutish and short". To functionalists, law is an embodiment of the agreed upon and cherished values and sentiments of the whole community. Overall, they view State law as fair, impartial, benevolent, and beneficial to everyone. Conflict theorists view the society as characterized by many conflicting interests and groups with conflicting values. As such, the values enacted as law are the values of most powerful groups, not of the whole society. It follows therefore that law is not the beneficial thing that Functionalist theories portray it to be. Marxist theories are most prominent amongst the conflict theories of law. Although Marx himself did not explicitly articulate a theory of law, it is implicit in his vast theoretical system. Marx and Engels had written in the German Ideology that the ideas of the ruling class are in every epoch the ruling ideas: i.e., the class which is the ruling material force of society is at the same time its ruling intellectual force. The class which has the means of material production at its disposal, consequently also controls the means of mental production, so that the ideas of those who lack the means of mental production are on the whole subject to it. (Cited in Anleu 2009:7). Marxist theories of law depict it as an ideological instrument, which reflects class interests, creates false consciousness, and distort reality. Since the two classes in a capitalist society have opposing interests, the law

cannot at the same time embody opposite values. It ends up taking sides with one of the parties to the conflict, namely the capitalist or dominant class. In Marxist parlance, the law becomes, simply, an aspect of the superstructure twitching to the dictates of the economic infrastructure. This attribute of the law is reflected by all the other components of the legal system. That is to say, the police, courts, prison, and other judicial agencies are on the side of the capitalist class and cannot be impartial, neutral or benevolent (see Taylor et al 1973, 1975; Chambliss 1974; Spitzer, 1975; Thompson, 1975, Quinney 1978). Regardless of the debates over its character, law remains the most visible and dominant social control mechanism in all modern societies. It is the policy instrument that is most relied upon, by governments and society, to bring about change and reforms in many areas needing intervention. Policy directions of government ultimately have to be enacted as law to give policies some bite. The law, in transforming policy into reality, however does not work in isolation. The enactment, enforcement, interpretation, and sanctions of law are dependent on other social forces as well as on politics and power (both local and international). The nature and character of these forces are in turn dependent on the overall social context. The extent to which law, as a formal social control measure, is sourced, shaped, and reinforced or undermined by other social control measures (especially informal ones) to achieve obedience and conformity from societal members is a major concern of Sociology of Law.

The Social Context of Law

The social context of law is the social environment (including political, economic, historical, cultural, psychological), which influences and is influenced by the nature, content, and operation of law. It manifests at major levels of social control, particularly in law making, enforcement, adjudication and corrections. According to Friedman (1967), rules devolve upon human operators, not machines. The law-maker is under various pressures regarding the content of what is eventually enacted as law. The police officer who stumbles upon a brawl between two men may ignore the fight, break up the fight and say nothing further, arrest the two men, detain or grant them bail, interrogate them by any of several methods, throw them into cell, arraign them before a court or dispose the case at a police station. The court judge may decide to let both of them go, or book them for trial. At trial, the judge may dismiss the case if he wishes, or grant the minimum or maximum (or in between) penalty available. The prison officer may employ subjective criteria in running the prisons. So, there is always an operating level, at which laws are personally administered by criminal justice operators using criteria that may not be visible or even reviewable. The ideas and values that are codified as law must ultimately reflect the aspirations of the society and this is why laws are largely derived from the norms and values of a society (at least of the more powerful groups in that society). Even when laws are a product of a deliberately convened assemblage of people with the express aim of legislating new laws to change society, the ideas that such a body will codify as law can still not be divorced from their lived social realities and context. The concept of "rule of law" is closely linked with that of legal freedom. It requires that things are done in society according to law rather than by the whims and caprices of man or arbitrarily. Dicey (1915) reduced the concept to the presence of three elements in any society: absolute supremacy or predominance of regular law over arbitrary power; equality of every one before the law; and independence of the courts in administering the laws as the custodians of peoples' right. These requirements have been expanded to include; a system based on law and order, the existence of a democratic system of Government, a separation of powers between the three major arms of government,

and operation of the twin principles of legality and due process. The content of law is also influenced by power equation in society and the pressure that groups and individuals bring to bear on the legislature. In modern societies, lobby groups are formed around various interests to exert pressures relating to the enactment, repeal, and content of legislation. The content of law may therefore vary from society to society to reflect the dynamics of social context and power play. According to Lloyd (1987:187) "supreme legal power is purely theoretical since no legislator that ever lived has been able in practice to pass any law he wished in disregard of the moral values, traditions, sentiments and prejudices prevailing in the community".

The number of individual disputes arising from day-to-day workers' grievances or complaints has been rising across the world (ILO, 2013). The causes are complex, and vary across countries and regions. Common features include an increased range of individual rights protections; a decrease in trade union density and/or collective bargaining coverage; higher risks of termination of employment and unemployment (ILO, 2015); reduced job quality and security due to greater use of various contractual arrangements for employment and other forms of work; and increased inequality as a result of segmented labour markets. This greater complexity and diversity of individual disputes is reflected in the evolution of processes and mechanisms for preventing and resolving them. The increase in the number and variety of individual disputes has given rise to a wide range of challenges. These include cost concerns; case overloads and delays; a lack of independence and impartiality; complicated and formalistic procedures; the fragmentation of services; limited access; ineffective remedies; and reduced scope for voluntary prevention and settlement through social dialogue. Countries have responded with reviews and reforms. Some jurisdictions have created new dispute resolution institutions. Others have reconfigured existing institutions, or modified procedural rules.

The main alternative dispute resolution (ADR) processes are mediation and conciliation, and the Consultation Paper and this Report have focused on these. The Commission recommends in this Report that a Mediation and Conciliation Act should be enacted to provide a clear framework for mediation and conciliation, and the Appendix contains a draft Mediation and Conciliation Bill to give effect to the Commission 's recommendations. In that respect, the Commission places significant emphasis on the key principles involved in ADR, including its voluntary nature, the need for confidentiality, its efficiency and the transparency and quality of the process. The Commission is also conscious that a number of related processes have also emerged in specific areas, such as collaborative practice in the family law setting and early neutral evaluation in the context of personal injuries. While the Report and draft Bill therefore concentrate on providing a legislative framework for mediation and conciliation, the Commission has also had regard to these emerging developments.

Alternative Dispute Resolution (ADR) is simply a process of initiating alternative methods and procedures of resolving a civil or commercial dispute without resorting to litigation, which can be expensive, cumbersome, and time-consuming. ADR processes and litigation cannot run together, it has to be one process at a time. Ideally, ADR is usually resorted to before instituting a court action but subject to the circumstances of each case, it can be resorted to before judgment is given in a matter. If litigation is pending and the party's resort to ADR, the terms of the settlement reached by the parties would be brought to court and entered as a consent judgment. Alternative Dispute Resolution is regulated by the Arbitration and Conciliation Act (ACA), applicable to the whole federation. The Constitution of the Federal Republic of Nigeria 1999 (as amended) also gives constitutional backing to ADR in Section 19, which provides for the settlement of international disputes by Arbitration, Mediation, Conciliation, Negotiation, and

Adjudication.

Methods of Alternative Dispute Resolution in Nigeria

Flowing from the above, the following are the main methods of alternative dispute resolution methods available for settling disputes in Nigeria.

Negotiation - Negotiation is a problem-solving process in which the parties to a dispute or an imminent conflict voluntarily come together either personally or by their representatives, to discuss their differences and attempt to reach a joint decision or resolution of the conflict, on their own and without the involvement of a third party. Negotiation is different from other types of alternative dispute resolution mechanisms as no third party is involved.

Mediation- Mediation is an alternative dispute process in which a neutral and impartial third party called the mediator is invited by the disputing parties to facilitate the resolution of the dispute by the self-determined agreement of the disputants. The mediator facilitates communication, promotes understanding, focuses the parties on their interests, and uses creative problem-solving techniques to enable the parties to reach their own mutual settlement/agreement. The mediator is usually jointly procured by both parties and the process is voluntary as the parties are not under any obligation to accept the suggestions of the mediator.

Conciliation- Conciliation as an alternative dispute method involves a neutral third party who can give an opinion or suggestion. It is a system of ADR where a third party known as the conciliator uses his best endeavours to bring the disputing parties to a voluntary settlement of their dispute. Conciliation is regulated by the Arbitration and Conciliation Act (ACA) Laws of the Federation of Nigeria (LFN) 2004.

Arbitration- Arbitration is the most initiated method of ADR where parties to a dispute submit to a third party called an arbitrator or arbitral tribunal for the resolution of their dispute. The decision of the arbitrator or arbitral panel called an award, is binding on the parties and enforceable by the courts. Arbitration is regulated by the Arbitration and Conciliation Act (ACA) Laws of the Federation of Nigeria (LFN) 2004 and also regulated by the Lagos State Arbitration Law, 2009. An arbitration clause is sometimes found in contractual agreements executed between contracting parties and the position of the law is that parties to an agreement that contains an arbitration clause must first abide by the arbitration clause before going to court. When a party to an arbitration clause in an agreement proceeds to court contrary to the arbitration clause, the other party can apply for a stay of proceeding, and the court, upon the fulfillment of the relevant conditions will stay the action as provided by Sections 4 & 5 of the Arbitration and Conciliation Act.

Advantages of the Alternative Dispute Resolution Process

1. It is cheaper than litigation- ADR can be more expensive than litigation but in long term, it is cheaper than litigation. In ADR, all the expenses are borne by the parties while in litigation; some of the expenses are not borne by the parties.
2. It is faster than litigation- in litigation, there is a competition of so many litigants with different cases, but in ADR, the parties' case is likely to be the only one. ADR is less time-

consuming unlike instituting a court action which can be time-consuming from factors such as adjournments, the unwillingness of parties, etc.

3. It is less formal- The courtroom where litigation is carried out is usually tense. For the lawyers, it is difficult, there are a lot of rules and procedures which must be followed, and also for the layman, it is extremely difficult. An ADR session is more of a business meeting where coffee can even be served. Hence the layman is likely to prefer such an environment.
4. The parties to the dispute can determine the Coram. This implies that they determine the mediator or arbitrator or conciliator who will preside over their case, but where they fail to agree, there are provisions of the law for such appointments to be done either by the court or an agency.
5. Involvements of people- ADR processes are parties driven. Parties can determine the time, venue, and pace in the ADR process, unlike in litigation where parties are not involved. It is controlled by the court.

Initiating the Arbitral Proceedings- Where a dispute arises about a particular transaction, which the subject of an arbitration agreement, one of the parties is required to notify the other in writing, called a Notice of Arbitration. It serves as a notification of the dispute to the other party as well as a request for the parties to go into arbitration. Section 17 of the ACA provides that "the arbitral proceedings in respect of a particular dispute are deemed to commence on the date the request to refer the dispute to arbitration is received by the other party".

Appointment of Arbitrators- at this stage, the parties appoint the arbitrator(s) following the procedure agreed upon. Where no procedure was agreed on, then the appointment will be per the procedure provided by the relevant statute. Where the parties fail to appoint one within the specified time, the court shall make the appointment upon application by any of the parties.

Conclusion

The introduction of a modern system of dispute resolution and the establishment of regular court based on the English common law have, in many ways, hindered the traditional dispute resolution method. Customary arbitration offers disputants a dispute resolution method that is cheap, quick and, above all, more in tandem with their own individual local circumstance. It is more responsive to their yearnings and aspirations. It is suggested that once a customary arbitration award has passed the requirement for validity of customary law, it should be enforceable by the court. The requirement for the validity of customary law is that the law must not be repugnant to natural justice, equity and good conscience; it must not be contrary to public police and it must not be incompatible with a law being in force. Consequently, once a customary arbitration award is not repugnant to natural justice, equity and good conscience and it is not inconsistent with any law being in force, it should be upheld by the court. Furthermore, if the customary arbitration award passes the test of public policy, it should be upheld and enforced by the court. This, arguably, is a fair position. In Nigeria, the ADR process is becoming an acceptable and best method of resulting in commercial disputes. Howbeit, the ADR process, especially the arbitration is not without its disadvantages. One of the major disadvantages of such process is the situation by which a losing party in the arbitration will institute a court action or file an application in court seeking to set aside the arbitral award on grounds of misconduct of arbitrator or an award has been improperly procured or an award contains decisions on matters not submitted to the arbitrator. However, such application must be filed in court within 3 months after the arbitral award has been delivered.

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