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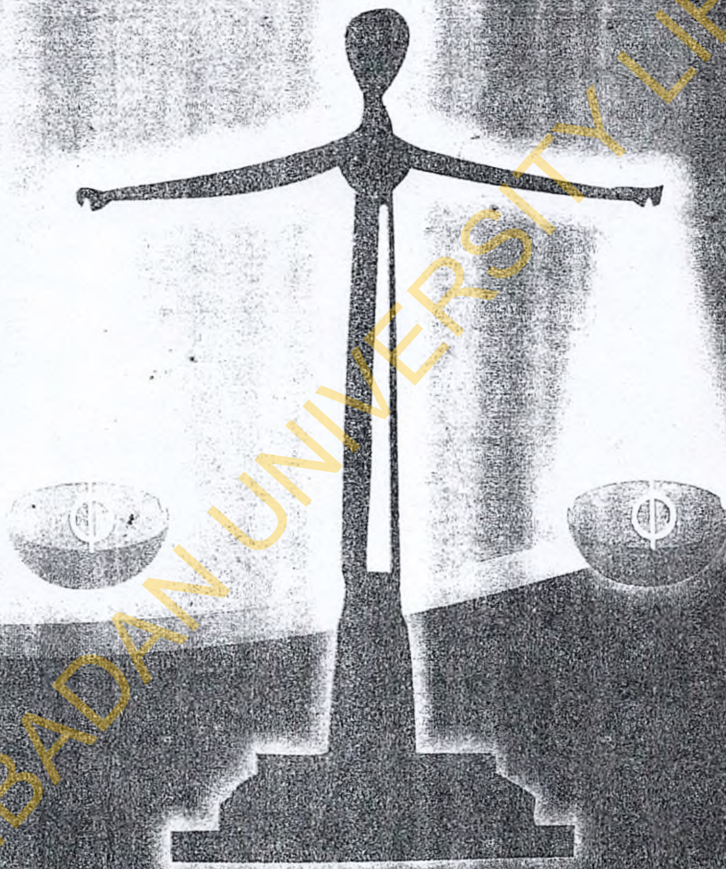

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TABLE OF CONTENTS

CONSTITUTIONALIZING THE PRACTICE OF ALTERNATIVE DISPUTE RESOLUTION IN NIGEIRA; AN URGENT NEED FOR LEGISLATION BY THE NIGERIAN LEGISLATURE
Omidoyin Taiye Joshua & Ogunkorode Oluwayei O 1-14

INSANITY AS A DEFENCE TO CRIMINAL LIABILITY UNDER THE NIGERIAN CRIMINAL LAW WITH ISLAMIC PERSPECTIVE
Adam idris Tanimu & Adam A. Adams 15 -21

LAWS REGULATING STRIKES IN NIGERIA AND THE DESIRABILITY OF COMPLIANCE WITH INTERNATIONAL BEST PRACTICES
Matthias Zechariah & Grace Dalong-Opadotun 22 – 37

LIABILITY AND COMPENSATION FOR ENVIRONMENTAL DAMAGE IN NIGERIA
Nwufo, Cecilia Chinwe & Okoro, Jude H.E 38-50

LIBERAL JUDICIAL INTERPRETATION OF DEFAMATION LAWS IN FREE SPEECH CASES
Ayeni A Macaulay & Okhiria Regina J 51-62

PEACE AND SECURITY: THE CHALLENGES FACING THE UNITED NATIONS IN THE 21ST CENTURY
Foluke Dada & Vincent O. Adedara 63 -74

THE POWERS, FUNCTIONS AND ROLE OF THE MINISTER OF LABOUR AND PRODUCTIVITY IN THE SETTLEMENT OF TRADE DISPUTES IN NIGERIA: AN ANALYSIS
David T. Eyongndi 75 -90

PROTECTING THE RIGHTS OF THE ELECTRIC POWER CONSUMERS UNDER THE ELECTRIC POWER SECTOR REFORM ACT, 2005.
Mohammed Yaro Zakari & Habiba Musa 91-101

PUBLIC NUISANCE UNDER THE NIGERIAN LAW: ENFORCEMENT AND SANCTIONS
Adeniyi Adebola Olumide 102 -112

RESURGENCE OF NATIONAL INDUSTRIAL COURT AS A SUPERIOR COURT OF RECORD UNDER THE 1999 CONSTITUTION (AS AMENDED): EFFECT OF ITS JURISDICTION ON OTHER SUPERIOR COURTS OF RECORD
Gimba Shaba & Sampson Shaba 113 -129

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ANALYSIS OF JURISDICTIONAL POWERS OF FEDERAL HIGH COURT AND TAX APPEAL TRIBUNAL
Ademola A Taiwo 130-137

THE ADVERSARIAL SYSTEM OF CRIMINAL JUSTICE AND LOSS OF CONFIDENCE IN THE NIGERIAN JUDICIARY
Richards U. Ekeh 138 -148

THE QUANTUM NATURE OF LAND AND THE FULANI HERDSMEN INSURGENCY IN BENUE STATE: IMPLICATIONS FOR ECONOMIC
Agbo J. Madaki 149 -160

THE JUDICIAL TREATMENT OF ELECTRONICALLY GENERATED EVIDENCE IN POST-2011 ELECTION MATTERS
Ayodele A adewole 161-172

THE PRACTICE OF THE UNITED NATIONS COMMISSION ON THE LIMITS OF THE CONTINENTAL SHELF (CLCS) AND STATES IN MPLEMENTING ARTICLE76 OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA (UNCLOS)
Fatihu A. Abba 173 -200

ARBITRATION AND HUMAN RIGHTS: SYNERGY OR PARALLEL
Sunday Akinlolu Fagbemi 201-212

THE SCOPE OF COMPLIANCE WITH THE PRINCIPLE OF DISTINCTION DURING THE GAZA WAR, 2014
Yilkang Wulengkah G & Wuyep Vivien P 213 -228

TOWARDS SINGLE MEMBER COMPANIES IN NIGERIA
Pereowei Subai 229 -245

UNDERSTANDING THE GLOBAL LEGAL RESPONSE TO AVIATION EMISSION: AN OVERVIEW OF THE GLOBAL ENVIRONMENTAL IMPACT OF AVIATION AND THE INTERNATIONAL LEGAL REGIME
Murtala Ganiyu Murgan 246 -262

INTERNALTIONAL HUMAN RIGHTS' INSTRUMENTS AND ENVIRONMENTAL POLLUTIONS: NIGERIA IN PERSPECTIVE
Emily I. Alemika; Ajepe T. Shehu & Jairus B. Alemeru 263 -276

IBADAN UNIVERSITY LIBRARY

'CASHING IN' OF FEMINISM: A CRITICAL APPRAISAL OF SOME PROPOSALS FOR MODERN INTERPRETATION OF ISLAMIC PROVISIONS ON WOMEN IN INTERNATIONAL HUMAN RIGHTS LAW.
Amoloye-Adebayo Azizat Omotoyosi 277 -285

CHILD MARRIAGE AND ABDUCTION IN NIGERIA: EXPLORING THE ESE ORURU SAGA AND THE LEGAL IMPLICATIONS
Adekunbi imosemi & Taiwo Ademola 286 -304

EXAMINATION OF PROJECTIONS AND PROBLEMS OF REKINDLING NIGERIA'S DEPLETED INFRASTRUCTURAL THROUGH PUBLIC PRIVATE PARTNERSHIP (PPP)
Abdulsalam la-kadri & kudirat Magaji Owolabi 305 -318

INTELLECTUAL PROPERTY RIGHT IN NIGERIA, ARE THERE ADEQUATE REMEDIES FOR DAMAGES?: COMPARATIVE ANALYSIS OF UNITED KINGDOM AND NIGERIA
Mahwel, John B. 319 -342

PRIVATIZATION OF ENERGY SECTOR: A LEGAL RETHINKING
Eric A. Okojie & Oghomwen Rita Igbinedion 343 -358

RE-EXAMINATION OF THE LAW RELATING TO TREATMENT OF VICTIMS OF GUNSHOT WOUNDS AND ROAD ACCIDENTS IN NIGERIA
Arome M. Okwori 359 -368

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ARBITRATION AND HUMAN RIGHTS: SYNERGY OR PARALLEL

Sunday Akinlolu Fagbemi*

Abstract

The crux of this paper is to examine arbitration agreement from the perspective of the question of whether or not it is not a violation of human rights of access to court. To tackle this vexed question, the paper first considers the legal framework for arbitration agreement from the viewpoint of waiver of the right to state administered justice. The paper analyses the relationship between human rights and arbitration proceedings with a view to determine whether arbitration agreement is not an encroachment on human rights? Coming down to Africa, this paper examines whether or not arbitration is antithetical to the human rights provisions in the various African constitutions on access to courts, fair and public hearing of disputes and public delivery of judgment. The paper argues that arbitration does not breach these rights and that recourse to arbitration is a waiver of the parties' rights of access to court. The paper concludes that arbitral tribunals do not fall into category of courts and tribunals which African legal system requires to hold public hearing and public delivery of judgments or findings. The paper therefore takes position that arbitration and human rights are different means to the same end.

INTRODUCTION

Arbitration has proved to be the most popular way of settling disputes based on the agreement between parties. Its prominent feature is that it is a confidential way of settling disputes because its proceedings are not open to the public. The concept of human and peoples' rights, on the other hands, are issues of prime importance the world over and has indeed gained a worldwide acceptability due to the creation of the United Nations, the Universal Declaration of Human rights and its codification in the Constitutions of virtually all nations of the world where it ideal holds sway. These are the rights of access to court and to a fair hearing within a reasonable time, as well as the right to a public hearing and public declaration of judgment.[1]

The right of access to court ensures that all citizens are able to enforce their rights against government or any other citizen before impartial umpires paid by the state for determination according to law.[2] A public hearing and a public delivery of judgment minimizes the risk of deliberate miscarriage of justice. They promote probity and public scrutiny of the administration of justice which is the hallmark of fair hearing.[3] As at today,

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[1] These rights are provided for under the United Nations Charter 1945 and African Charter on Human and Peoples Rights. 1981. The African Charter on Human and Peoples Rights. 1981 is otherwise called the "Banjul Charter", because it was adopted in 1981 by the 18th Assembly of Heads of State and Government of Organisation of African Unity. The Charter had been domesticated in Nigeria and christened African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act. Cap A9 Laws of the Federation of Nigeria (LFN) 2004. See also section 36 of the Constitution of the Federal Republic of Nigeria 1999 (as amended).

[2] See sections 6 (1) and (2) and 36 (1) of CFRN 1999 (as amended)

[3] See the dictum of Ademola CJN in the case of *Isiyaku Mohammed v Kano Native Authority* (1968) 1 All NLR 424. In the case of *CAN v Lamido & Ors.* [2012] 4 SCM 1 at 24-25 SC. Rhodes-Vivour JSC said as follows: 'It has been long settled that the test whether a party in a case was given a fair hearing is the impression of a reasonable person who was present at the trial or who was aware of the proceedings. From his observation he would have no difficulty concluding if justice has been done in the case'.

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arbitration law and practice grow in importance globally as people are warming up to it especially in the commercial world where time is of the essence.[4]

The development of arbitration, more specifically international arbitration, was responsive to problems of international litigation. These include, *inter alia*, provincial attitudes of courts, expenses and delays in litigation and lack of commerciality shown by the judges in their practices and conclusions. Thus, international arbitration allows for control by the parties, it provides an opportunity, if not a guarantee, that the process will be as neutral as possible, it safe time and cost effective, it is mostly conducted by individuals with the necessary expertise and result in a final verdict which may be enforced in most jurisdictions.[5] However, the development of arbitration proceeding and practice *vis-à-vis* the concept of human rights to fair and public hearing as well as access to court has raised the question of whether or not arbitral proceedings violate this cherished rights. Again, whether or not an infringement of any of the rights is arbitrable is becoming a very important question.

Evidently, there are conflicts between these rights and some of the sacred principles of arbitration. For instance, against constitutional provisions guaranteeing unfettered access to courts for the determination of practically all manners of causes and matters, recourse to arbitration is in all African countries as well as in Europe is a waiver of the right of access to court for the particular dispute.[6]

This universal principle of human rights imposes responsibility upon individual nations around the world to enforce them. It is this responsibility that brings about the collusion with arbitration. The question whether arbitration and human rights are parallel or have similarities towards achieving a similar aim remains unresolved and therefore debatable. This is because, there are some fundamental human rights such as: unfettered access to court, which by its very nature can be argued to be against the rule of arbitration.[7] The question that arises from the foregoing is whether, if a party voluntarily enters into an agreement to go to arbitration with another party, can he, when a dispute actually arises, refuse to go to arbitration on the allegation that the arbitration agreement or a consequent arbitral proceeding would be in breach of his right of access to court? Put in another way; is there any justification to deny access to court on the ground of sanctity of arbitration? Again, does the making of an arbitration agreement amount to a waiver of party's constitutional right to litigation? This paper is an attempt to find answers to these questions.

The paper is divided into five sections, having dealt with the introduction in this first part; the second section defines few terms that will constantly feature in this paper for ease of understanding. The third part examines the legal frameworks for arbitration and human rights. In the fourth section, this paper discusses the relationship between arbitration and the hallowed principle of human rights. The last section is a concluding part of this paper.

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[4] Chukwuemerie, A.I. 'New Hopes and Responsibilities in the Maturing Process of Arbitration Law and Practice in Africa: Nigeria as a case Study' (2004) 2 *Nigerian Bar Journal: 55;* Adebayo Adenipekun. ' Arbitration' (2008) (2) *The Lord Justice Journal*. 9

[5] Waincymer, J. 'Procedure and Evidence in International Arbitration' (2012) *Kluwer Law International, 1-3*

[6] Miller, V and Gill, J. 'Uk Cases at the European Court of Human Rights since 1975' (2014) *House of Commons Library: International Affairs and Defence Section 3*< www.iea.org.uk/....Entry23> accessed 20 June 2016

[7] The right of access to court is so fundamental in any society that it is recognized as constitutional rights even in jurisdiction with unwritten constitutions, unless it is expressly excluded by law. See the case of *Raymond v Honey* [1983] 1 AC 1. In the case of *R v Secretary of State for the Home Department, EXP Leech (No. 2)* [1994] QB 198, Steyn LJ declared that 'it is a principle of our law that every citizen has a right of unimpeded access to a court.

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DEFINITIONS OF TERMS

Arbitration: According to *Black's Law Dictionary*,[8] 'arbitration' is a method of dispute resolution involving one or more neutral third parties who are usually agreed to by the disputing parties and whose decision is binding. According to Nwakoby,[9] arbitration is a procedure for settlement of dispute under which the parties agree to be bound by the decision of an Arbitrator, whose decision is in general, final and legally binding on both parties. Also the Supreme Court of Nigeria in the popular case of *KSUDB v Fanz Construction Ltd*[10] adopted the definition offered by the learned authors of the Halsbury's law of England. According to them, arbitration is the reference of a dispute or difference between not less than two parties for determination, after leaving both sides in a judicial manner, by a person other than a court of competent jurisdiction. Arbitration could therefore be described as a reference of dispute between two or more parties to a third neutral party chosen by them for prompt, economically and fair settlement, and whose decision they have agreed before-hand to bind them. In summary, it is a procedure by which parties voluntarily refer their dispute to an impartial third person, an arbitrator, for a final decision based on the evidence and argument to be presented in the hearing before the arbitration tribunal. The parties agree in advance that this decision, the award, will be accepted as binding upon them.[11]

Human Rights: The *Black's Law Dictionary*[12] defines 'human rights' as the freedoms, immunities and benefits that, according to modern values especially at an international level, all human being should be able to claim as a matter of right in the society in which they live. The United Nations in 1987 described human rights as 'those rights which are inherent in our nature and without which we cannot functions as human being'[13]
Human Rights are rights that are taken to inhere in human begins solely on account of their human begins. Such rights may be taken to derive from reason, God, nature or any other source. Whatever the case, they are supposed to apply to human begins regardless of their codification in any positive law.[14]

Arbitration of Human Right Claims: Arbitration of human rights claims means the settlement of human right matters through arbitration by arbitrators. This is usually preceded by agreement between the disputing parties usually before the dispute arises. It has long been the position that tortious claims are not arbitrable.[15] This may be explained on at least two

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[8] Bryan A Garner. *Black's Law Dictionary*, USA: (8th edn, West Publishing Co. 2009) p.112

[9] Nwakoby, F J, *The Law and Practice of Commercial Arbitration in Nigeria*, Enugu: (Snap Press Ltd. 2014) p. 111; Odoh Ben Uruchi, 'Alternative Dispute Resolution (ADR) as Important Component in the Promotion of Social Justice in Nigeria' (2015) 6 (2) *Ebonyi State University Law Journal*, 117.

[10] [1999] 4 NWLR (Pt. 142) 1 at 32

[11] Martin Domke, *Commercial Arbitration*, New Jersey: (Prentice-Hall, Inc. 1965) p.2

[12] Bryan A Garner (n8) 758

[13] Tokunbo Ige and Olumide Lewis, *Human Rights Made Easy* Lagos: (Florence and Lambard Nig. Ltd. 1999) p.6

[14] Tijani, M.B, 'Human Rights and Democracy: An Exploration of the Socio-Economic Obstacles to the Realisation of Social Justice in Nigeria' in Bankole, O. and Olusola, A. (eds). *Human Rights, Democracy and Development in Nigeria*. (1) Lagos: (Florence and Lambard Ltd. 1999) p.68: In the case of *Uzoukwu v Ezeonu II* [1991] 6 NWLR (Pt. 200) 708 at 760/761 (CA). Nasir PCA while describing human rights said *inter alia* that '....it may be recalled that human rights were derived from and out of the wider concept of natural rights. They are rights which every civilized society must accept as belongings to each person as a human being. These were termed human rights. When the United Nations made its declaration, it was in respect of 'Human Rights' as it was envisaged that certain rights belong to all human beings irrespective of citizenship, race, religion and so on. This has now formed part of international law'; see generally Sunday A Fagbemi, 'An Appraisal of the Fundamental Human Rights and the Fundamental Objectives and Directive Principles of State Policy Provisions of the 1999 Constitution' (2015) 15(2) *A Journal of Constitutional Development*, 26-52.

[15] *Kano State Urban Development Board v Fanz Construction Company Ltd* [1990] 4 NWLR (Pt. 142) 1

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grounds. In the first place, tortious wrongs, particularly breaches of fundamental rights, seldom arise out of contractual relationships. There would therefore not be any pre-dispute agreement between the parties allowing a resort to arbitration. Nor is it particularly easy for an aggressor – a flouter of a citizen's right – and his victim to sit down and conclude an agreement about anything after the dispute has arisen.

Right of Access to Court
This is the right a person has to bring an action in court. Arbitration agreement usually withholds this access. But since the parties agreed to arbitrate, they have indirectly agreed to waive their rights.**Fair Hearing**

Fair hearing is a court hearing conducted so as to accord each party the due process required under the law. In this area, it can be said that arbitration corresponds with most statutory provisions by seriously upholding the rule of fair hearing. The fair hearing requirement is fundamental to the administration of justice. As such, even minor breaches cause the proceedings to be null and void. It is in this regard that most African constitutions require courts and tribunals to be both independent and impartial.

LEGAL FRAMEWORKS FOR ARBITRATION AND HUMAN RIGHTS

One essential feature of arbitration is that it rests on an agreement of the parties according to which disputes between them are to be determined by an arbitral tribunal.[16] The concept of human rights, on the other hands, can basically be regarded as the fundamental rights that are inherent in a person by virtue of his humanity. Such rights are not created nor can be derogated from by the government. Of course, different legal frameworks govern arbitration and human rights hence, the two are treated separately hereunder:

Legal Framework for Arbitration

As could be seeing from the discussion above, arbitration is consensual in nature, which is why it is contradictory to refer to various forms of state-imposed mechanisms of dispute resolution as 'arbitration'. This is the case regardless of whether, or even more so when, the adjective 'statutory' is used in order to qualify the noun. An agreement to arbitrate may refer to future disputes between the parties as well as to disputes that already exist. The arbitration agreement is the proof that the parties have consented to resolve their dispute by arbitration and to remove their dispute from a state court system[17] Arbitration is therefore the preferred means of resolving international commercial disputes mainly because of its perceived advantages over litigation, including the preservation of relationship and the preservation of reputation, party autonomy, flexibility of procedure, suitability for multi-party dispute, durability of agreement, privacy, neutrality, international enforceable award, collaborative and likelihood of speed of settlement and parties choice of neutral third party amongst others.[18]

The law that governs Arbitration in most countries is sourced from local statutes and International Conventions. For example, in France, the main sources are specific provision of the code civil and the code de civil via cases decided by the French courts (primarily the *cour*

[16] Akinola. O B. *Basic Principle of Nigerian Law and Practice* (Publication of Chenglo Limited 2010) p 83
[17] Godwin Obla, 'Arbitration as a Tool for Dispute Resolution in Nigeria: How Relevant Today' in Jide Olakanmi, *ADR Alternative Dispute Resolution: Cases and Materials.* Abuja: (LawLords Publication, 2013) p. 7
[18] Odo Ben Uruchi, (n 9) p117

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de cassation and cour d'appel de paris) and various International Conventions of 1961, the New York Convention and the European Convention on Human Rights (ECHR).

In England the principles of fairness, party autonomy and Limited Court Intervention that underline the Arbitration Act 1996 Act are largely sourced from United Nations Commission on International Trade Law[19] and the New York Convention. In similar vein, the Indian arbitral proceeding was modeled after the New York Convention 1958 and the UNCITRAL Model Law.[20] The primary statutory provision for arbitration in Nigeria is the Arbitration and Conciliation Act (ACA) 1988[21]. However, the customary arbitration[22] which was in practice before the advent of British rule, the New York Convention on the Recognition and Enforcement of Foreign Awards[23] June 10, 1958, UNCITRAL Arbitration Rules and the UNCITRAL Model Law influenced the statute and practice of arbitration in Nigeria.

In addition, the legal frameworks for mainstreaming arbitration and other forms of ADR into justice sector in Nigeria include the following provisions amongst others:

i. Rules 15 (3) (d) of the Rules of Professional Conduct for Legal Practitioners 2007 makes its mandatory for lawyers to inform their clients about the option of ADR before or during litigation
ii. The High Court Laws confer jurisdiction on the courts to promoted amicable settlement of cases pending before the court.[24]
iii. Laws creating certain agencies, institutions and organisation specifically enjoin them to promote the use of ADR in resolving dispute arising from their areas of statutory mandate.[25]
iv. Most High Court (Civil Procedures) Rules currently in operation in most states of the Federation requires that a major agenda on the pre-trial conference is to promote amicable settlement of the case or the adoption of alternative dispute resolution (ADR).[26] The procedures and practices that guide International arbitral proceedings is the UNCITRAL Rules.

Legal Framework for Human Rights

Human rights are rights which are inalienable. The concept of human rights is observed by various civilized countries of the world, albeit in varying forms. Etymologically,

[19] UNCITRAL Model Law
[20] Mallika Taly, *Arbitration Law – A Primer*, Lucknow: (Eastern Book Company 2011) pp.5-11
[21] The Act is now Cap A18 Laws of the Federation of Nigeria 2004
[22] There is no doubt that customary law remains a very important part of the law or legal system of practically every African country. However, it varies from place to place and completely based on the culture and traditions of the people which vary from tribe to tribe on the continent. Even within one tribe, there sometimes are differences amongst different communities or groups of communities. It also changes with time as it tends to adapt to any changes that may occur in a particular community over time. Thus, in the case of *Lewis v Bankole* [1908] 1 NLR 81, 100-101, Osborne CJ said as follows: 'one of the most striking features of West African native custom is its flexibility, it appears to have been always subject to motives of expediency and it shows unquestionable adaptability to altered circumstances without entirely losing its character': see also Chukwuemerie, A. I, 'Commercial and Investment Arbitration in the African Customary Law: Myths or Realities?' (2007) 26 *Abakaliki Bar Journal* 108
[23] Now incorporated as Second Schedule to the ACA
[24] Federal High Court Act Cap F12 LFN 2004 s. 17; High Court of Federal Capital Territory Abuja Act Cap F6 LFN 2004 s. 18
[25] National Health Insurance Scheme Act. Cap N42 LFN 2004 s. 26; Nigerian Investment Promotion Commission Act. Cap N117 LFN 2004 ss. 92-94
[26] For instance, see Osun State High Court Amended (Civil Procedure) Rules 2008 O 25, r. 2(c); Oyo State High Court (Civil Procedure) Rules 2010 O 25, r. 2(c) and Ekiti State High Court (Civil Procedure) Rules 2011 O 25, r. 2(c); Odoh Ben Uruchi (n 9) p122.

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the universal dignity and acceptability of human being was advocated by philosophers like John Locke and Jean Jacques Rousseau in their writings. John Locke noted that 'human beings are by nature free, equal and independent'[27] and that political societies exist for the protection of those freedom, equality and independence. Rousseau was also firm on the freedom of the human being. He opined that Man should never surrender his freedom and that "[a] man who renounces his freedom renounces his quality as human being".[28] These principles became enshrined in the Magna Carta of the United Kingdom (1215), the Declaration of the Rights of Man by the French People after the French Revolution (1789) and the American Bill of Rights (1791) after series of revolutions.[29] In modern time, when human right is mentioned, the Universal Declaration of Human Rights readily comes to mind.

The Universal Declaration of Human Rights (UDHR) was passed by the UN General Assembly in 1948. The declaration contains a remarkable range of rights, which include civil and political rights, social, economic and cultural rights and group of people's rights and these have continued to be a reference point till date for the acceptability and universality of human rights.[30] Taken cue from the foregoing, the Africa region in 1981 adopted the African Charter on Human and Peoples' Rights stating that every individual shall have the right to liberty and to the security of his person and as such no one may be deprived of his freedom except for reasons and conditions previously laid down by law and in particular that no one may be arbitrarily arrested or detained.[31]

The adoption of the Charter in 1981, according to Yerima et al,[32] suggested a formal commitment of African States to conform their international laws and practices to international standards.[33] This is evidence from the point that the Charter takes into consideration and recognises historical traditions and values of African civilisation, which inspires and characterizes the concept of human and peoples' rights.[34] African Charter recognises the theoretical trends in the development of human rights regime.[35] It reflects the three generations of rights, which human rights has undergone; picturing it as an amalgam of both traditional and contemporary formulations on human rights. African Charter protects not only civil and political rights but also economic and social rights.

Premised on the foregoing, a salient feature of human rights is that they are rights which are antecedent, and existed before the organized society, government and constitutions. They are rights which are fundamental to the existence of man as social being. Given impetus to fundamental human rights, the Constitutions of civilized countries the world over, including Nigeria, contain a declaration making its provision binding on government and all

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[27] Locke, J, Second Treaty on Civil Government, paragraph 140 6th ed < www.gutengerg.org/files> accessed on 26th June, 2016

[28] Rousseau, J. J, *Du Contrat Social,* Paris: (ed, Bordas 1987) Chap. xix

[29] Iloh, F. O, 'Fundamental Rights Enforcement in Nigeria: Wearing a New Garb?' (2012) 2 (1) *University of Ibadan Law Journal,* 119-151; Sunday A Fagbemi, (n 14) 30-35

[30] Rehman , J, *International Human Rights Law,* England: (2nd edn, Pearson Education Ltd, 2010) p. 77; Odoh, B. U (n 9) p.123

[31] Okene, O. V. C. 'National Human Rights Commission and the Promotion and Protection of Human Rights in Nigeria: A Reflection, Emerging Challenges and Suggestions for Effectiveness' (2009) 3 (1 & 2) *International Journal of Law and Contemporary Studies,* 110, 112-113.

[32] Timothy F. Yerima and Ekpa F. Okpanchi, 'Environmental Degradation as a Human Rights Violation in Nigeria: A Re-Analysis (2016) 8 *Kogi State University Law Journal, 86*

[33] Ndombana, N. J, *Human Rights and Contemporary Issues in Africa,* (Malthouse, 2003)p.121

[34] Elias, T. O, *New Horizons in International Law, (*second revised edn: Martinus NijHoff Publishers . 1992) p. 110; Timothy F. Yerima *et al* (n.32)

[35] Eze, O. C. 'African Concept of Human Rights' in A. U. Kalu and Yemi Osinbajo (eds), Perspective on Human Rights, (1992) 12 *Federal Ministry of Justice Review Series,* 19

authorities and on all persons within its purview of jurisdiction.[36] For instance, the Constitution of the Federal Republic of Nigeria 1999 (as amended) provides for fundamental rights.[37] To provide a ready avenue for the enforcement of these rights at the domestic level, section 6 (1) and (2) of the 1999 Constitution vests judicial powers in the country on the superior courts established within the federation of Nigeria.[38] Section 6 (6) of the Constitution further confers on all superior courts powers to adjudicate all matters between persons or between government or authority and any person in Nigeria involving civil rights and obligation of those persons. In similar fashion, section 36 (1) of the 1999 Constitution states *inter alia* that in the determination of his civil rights and obligations including any question or determination by or against any government or authority, a person shall be entitled to fair hearing by the court or other tribunal established by law. Section 46 (1) of the 1999 Constitution in specific term provides *inter alia* that any person who alleges that any of the provision of the Chapter IV of the Constitution bordering on that person's fundamental human rights has been violated may apply to the High Court in that State for redress.

The sum total of the above provisions is that enforcement of human rights does not exclude any authority or person in Nigeria. Fundamental rights are therefore binding on government as well as private persons.[39] The import of provisions on the human rights is that all Nigerian Citizens as well as their relations, friends and associates have free access to court and in that instance, no procedural formulae or arid legalism shall be allowed to hamper, inhibit, hinder, or obstruct human right enforcement litigations in courts in Nigerian.[40] The courts are also enjoined to take proactive steps to enhance access to justice for all classes of litigants especially the poor, the illiterate, the uninformed, the vulnerable, the incarcerated and the unrepresented.[41] However, human rights seem to be in conflict with the practice and operation of arbitration proceedings. Hence, the next section is devoted to discussion on the relationship between arbitration and human rights so as to determine the synergy or otherwise of arbitration and human rights.

THE RELATIONSHIP BETWEEN ARBITRATION AND HUMAN RIGHTS

As stated earlier in this paper, the main feature of arbitration is that it rests on agreement by parties of which disputes between them are to be determined by an arbitral tribunal. Arbitration proceedings are generally of two types: institutional and *ad hoc*. In institutional arbitration, the parties agree to have their dispute administered by an arbitral institution.[42] In practice, arbitration institutions formulate rules and provide facilities for the conduct and supervision of arbitral proceedings which usually take place in countries other than those they have their permanent offices. By referring a dispute to an arbitration

[36] In this connection, section 1 (1) of the 1999 Constitution provides that: 'this constitution is supreme and its provisions shall have binding force on all authorities and persons throughout the Federal Republic of Nigeria'.

[37] Constitution of the Federal Republic of Nigeria 1999 (as amended) ss 33-46

[38] Akinbosade Ade, *The Legislature: Law-Making Organ of Government*, Akure: (O & A Books Publishers. 2007) pp. 8-9.

[39] Sunday A. Fagbemi, (n14)

[40] See Order 1, Rule 3 (h) of the Fundamental Rights (Enforcement Procedure) Rules, 2009.

[41] Lawal, I. B and Fagbemi, S. A. 'An Appraisal of the Doctrines of Exhaustion, Ripeness and *Locus Standi* as Means to Preventing Frivolous Action against Administrative Decisions in Nigeria' (2015) 6 (1) *Ebonyi State University Law Journal*, 215.

[42] A number of organisations, located in different countries, provide institutional arbitration services, often tailored to particular commercial needs. These institutions amongst other include: the London Court of International Arbitration (LCIA), America Arbitration Association (AAA), International Chamber of Commerce (ICC), International Court of Arbitration in Paris, the Stockholm Chamber of Commerce, the Asia-African Legal Consultative Committee (AALCC), the International Centre for the Settlement of Investment Disputes (ICSID) and Dubai International Arbitration Centre etc.

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institution, the parties in general agree to have their dispute dealt with and in accordance with institution's rules.[43]

Basically, the functions of institutional arbitrations amongst others include: constitution of arbitral tribunal; provision of administrative and logistic services as well as supervising the arbitral proceeding.[44]

Ad hoc arbitration, on the other hands, does not involve administration by any arbitration institution. Instead, the proceedings are based on the parties' agreement, which of course, often modifies and supplements the governing national law.[45] According to Orojo et al,[46] in order to save themselves the problem of drawing up comprehensive rules which may, in any case, be very ineffective, parties often adopt a set of arbitration rules, of a non-commercial international organization, which are usually set out in a small booklet. The adoption of the UNCITRAL Arbitration Rules is becoming increasingly popular around the world.[47] It was generally considered that human right had little or no relevance to International Arbitration. This was because arbitration is used by the International business community to resolve disputes involving International Commercial transactions. The parties did not need the protection of human rights regimes as they are presumed to be adequately protected by the obligation of due process which is upheld through the New York Convention.

In view of the foregoing, the relevant questions to ask is whether, if a party voluntarily enters into an agreement to go to arbitration with another party, can he, when a dispute actually arises, refuse to go to arbitration on the allegation that the arbitration agreement or a consequent arbitral proceeding would be in breach of his right of access to court? Or whether the making of an arbitration agreement amount to a waiver of party's constitutional right to litigation?[48] To answer these questions, the positions in Europe and Africa are considered hereunder.

The Relationship between Arbitration and Human Rights in Europe

In Europe, the human rights instrument makes no specific reference to arbitration. However, by virtue of the European Convention on Human Rights (ECHR) 1950, which is considered to be relevant to International Arbitration,[49] the provision of Article 6 (1) contains

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[43] Madsen, F. *Commercial Arbitration in Sweden*, (Stockholm, 2004) pp.13-14

[44] Sunday Akinlolu Fagbemi, 'Recognition and Enforcement of Arbitral Awards: The Law and Practice' (2006) 5 UIJPL 121.

[45] *Ad hoc* arbitration in Nigeria is governed by the provisions of ACA

[46] Orojo, J. O and Ajomo, M. A, *Law and Practice of Arbitration and Conciliation in Nigeria*, Lagos: (Mbeyi and Associates (Nigeria) Limited. 1999)p.55

[47] Sunday Akinlolu Fagbemi (n44). For instance, UNCITRAL Arbitration Rules do not demand the participation of any arbitral institution.

[48] For instance, the concept of waiver presupposes that a person who is under no legal disability and who has full knowledge of rights or interests conferred on him by law and who voluntarily decide to give them, or some of them up, cannot be heard to complain that he has not been permitted the exercise of those rights or that he has been denied the enjoyment of those interest. See the case of *Mkpedem v Udo* [2001] FWLR (Pt. 66) 830 at 843(CA). In the case of *Adewumi Bakare v Lagos State Civil Service Commission & Other* [1992] 8 NWLR (Pt.262) 641 at 701-702 SC, it was held that 'waiver is an abandonment of a right. It could be either express or implied from conduct. A right that has been waived is as good as lost in that once the other side acts upon the waiver, the party waiving his right can no longer go back on the waiver and act as if it was never waived. He will be bound to accept the legal relations between the parties subject to the qualification which himself has introduced'.

[49] The ECHR has since been ratified by all members of the council of Europe and incorporated into the national law by an Implementing Act or an Act of Ratification. The ECHR provides for a comprehensive system of

provision that guarantees right to fair trial. For instance, Article 6(1) of the ECHR provides *inter alia* that: 'in the determination of his civil rights and obligations, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law....[50] These fair trial rights under Article 6(1) ECHR apply to all civil right and obligations created under domestic law and according to all civil proceedings including court proceedings relating to arbitration such as reviewing an arbitral award or appointing an arbitrator. The purpose of this provision is to ensure that every party to court proceedings will have a fair and public opportunity to put forward his case and to defend himself.

The above is the position of the Europe as far as the issue of access to court as well as public hearing and public declaration of judgment is concern. However, by contrast, arbitration is a private process and is generally intended to be confidential. The implication of this is that the right of access to the courts is not absolute.[51] According to Petrochilos,[52] this view is natural given the fact that Article 6 (1) of the ECHR is considered to provide only a possibility for one to have access to a court of law. It does not stipulate an absolute requirement that all disputes concerning civil rights and obligations should be dealt with by way of court judgment. Relating this to arbitration, it means that the right of access to court in principle is waived when parties agree to arbitrate and by implication the right to public hearing.[53]

In the case of *Bramelid and Malmstorm v Sweden,*[54] the European Commission on Human Right considered the relationship between Arbitration and Human rights. The commission distinguished voluntary from compulsory arbitration and stated that in the case of the former it was unlikely that infringement of Article 6 rights could be successfully contested.

In spite of the foregoing, it is indisputable fact that arbitration tribunal shall guarantee a number of principles that constitute the procedural "Magna Carta of Arbitration,"[55] which are the constitutional cornerstone of arbitration proceedings namely: due process, fairness and the application of the appropriate law or other standard to the substance of the dispute. These constitutional principles are not only guaranteed under Article 6(1) of ECHR but they are safeguarded in most arbitration laws[56] and in particular, the New York Convention.[57]

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human rights protection and most states have agreed to allow individual petitions to the European Commission and the European Court of Human Rights. However, this is possible only after the exhaustion of local remedies. Irrespective of the individual petition, the ECHR when implemented and ratified provides also for protection before state courts as well as judicial review of domestic legislation.

[50] There is also a similar provision under Article 10 of the Universal Declaration of Human Right. This is to the effect that "Everyone is entitled to equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations...

[51] The general position in Europe and as severally held by the European Court and Commission is that the right of access to court may be waived. See the cases of *Deweer v Belgium,* judgment of 27 February, 1980, series A, No. 35, para. 49; Axelsson and Others v Sweden, App. No. 11960/86, decision of 13th July, 1990.

[52] Petrochilos, G. *Procedural Law in International Law* (Oxford 2004)p 133

[53] The question of the relationship between arbitration and ECHR was considered by the European Commission on Human Rights in the case of *X v Federal Republic of Germany* [1962] Rec 8.68. The commission considered an arbitration clause included in a standard contract of employment concluded by a German teacher employed by a German school in Spain. The clause provided for arbitration before a qualified representative of the German Foreign Ministry. When a dispute arose, the teacher brought an action before the Spanish Courts which assumed Jurisdiction and found the arbitration clause to be void. The German Courts did not recognise the Spanish decision and the German teacher made a request before the ECHR claiming that his right under Article 6(1) had been infringed. The Commission declined the request and considered the agreement to submit to arbitration to be a question of renunciation of rights under the ECHR.

[54] 38 De'cisions et rapports 18(1983)

[55] The Magna Carta of Arbitration 1215 has two main principles: due process and fair hearing and independence and impartiality of arbitrator

[56] UNCITRAL Model Law Art 15. Belgium. Judicial Code. Art 1694 (1) and England Arbitration Act S.33(1) (a)

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Consequently, all parties shall be treated with equality and each party shall be given a full or at least reasonable opportunity to present his case and none of the party to arbitration even in Europe can denies other these rights.

RELATIONSHIP BETWEEN ARBITRATION AND HUMAN RIGHTS

Some of the rights provided for in the constitutions of most African countries are those that concerns with the proper administration of justice. These rights include: the rights of citizens or residents to have unfettered access to the courts and to a fair hearing within a reasonable time as well as the right to a public hearing and delivery of judgment. To provide a uniform application of these rights within the region of Africa, they have been codified into the provisions of the African Charter on Human and People's Rights (African Charter) to make them easily identifiable.[58] For instance, the right of access to court ensures that all citizens are able to take their grievances against government or any other citizens to impartial umpires paid by the state for determination according to the law. Similarly, the provision for public hearing and a public delivery of judgment is to safeguard litigants against deliberate miscarriage of justice and to ensure public scrutiny of the administration of justice.

With respect to arbitration, it is observed that most African countries, unlike before has embraced arbitration for settlement of both industrial and commercial disputes.[59] It is pertinent to note that before the arrival of statutory provisions on human rights; the issue of fair hearing and public delivery of judgment is not totally alien to the customary law and tradition of African communities. As a matter of fact, customary law, in its various forms, remains a very important part of law or legal system of practically every African country.[60] However, like most of developing societies, early African societies did not have a human rights charter. Such things, according to Chukwuemerie,[61] evolved with time in each society. And due to this factor, it is in some cases possible for human rights to be flouted, even with impunity.[62]

In modern African customary societies, this has changed a great deal. For instance, the institution of slavery has long been abolished and every person enjoys equality before the law. Similarly, on the issues of right of access to courts and the right or choice to arbitrate, the legal position will depend on the courts that are used. For instance, in most African countries that has enacted national statutes that are based wholly or partly on the UNCITRAL Model Law on International Commercial Arbitration 1985,[63] parties to arbitration proceedings are given equal treatment and opportunity to present their case.[64] The principle of fair hearing is sacrosanct in Africa and thus, it is an abuse of office by a tribunal or an arbitrator if any one of the principles of fair hearing is breached.[65] For instance, the concept of fair and public hearing of dispute are well entrenched in the customary system of most

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[57] Article V(1)(b)

[58] African Charter on Human and Peoples' Rights art. 7 (1)

[59] See for example Trade Dispute Act. Cap. T8. LFN 2004 s 9

[60] See the case of *Lewis v Bankole* [1908] 1 NLR 81. 100-101.

[61] Chukwuemerie, A. I, (n 22) 108

[62] Ibid 101; Umozurike. U. O, 'The African Charter on Human and Peoples' Rights' (1998). *The Hague: Kluwer Law International* 15-18

[63] It was adopted in 1985 by the general assembly of the UN on the recommendation of the UNCITRAL. Presently Egypt, Kenya, Nigeria, Tunisia, Ugandan, Zambia and Zimbabwe have enacted statutes based on the UNCITRAL Model Law.

[64] UNCITRAL Model Law art 18.

[65] *Lagos State Development and Property Corporation v Adold Stamm International (Nig) Ltd* [1994] 7 NWLR (Pt. 358) 545: Ghanaian Arbitration Act 1961 s. 38 and Arbitration and Conciliation Act 1988 s.8

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African countries. It is indeed an axiom among the Yoruba tribe in Nigeria that it is only a wicked judge or elder that hears only one side to dispute and give judgment without listen to the other party or preside over a dispute in which he has either proprietary or pecuniary interest.[66]

It is submitted that in the area of fair hearing, arbitration law corresponds completely with the African constitutional ideals, not because the constitutional provisions are applicable to arbitration, but simply because the two legal regimes happen to be similar.[67] Practically all African constitutions provide for a fair hearing.[68] The fair hearing requirement is fundamental to the administration of justice and as such, even minor breaches cause the proceedings to be null and void. It is in this regard that most African constitutions require courts and tribunals to be both independent and impartial.

In Nigeria, under the common law as well as the 1999 constitution, any adjudicatory function performed in breach of any tenets of fair hearing is absolutely null and void and of no effect whatsoever.[69] However, like Europe, constitutional provisions requiring the public hearing of cases and delivery of judgment are in conflicts with privacy and confidentiality of hearing and of awards which are hallmarks of arbitration. While such constitutional provisions secured for every citizen the right to attend and watch and participate in the proceedings of a court or other tribunal set up by law, except in extremely rare cases, an arbitrator or arbitral tribunal is bond in law to exclude the public except those allowed in by the parties themselves. On this note, arbitration and human rights are strange bed fellow and move in opposite directions.

The pertinent question to ask at this juncture is whether human rights matter is arbitrable? Human rights causes and matters normally arise when party's right has been abused or an abuse is imminent either by government or its agents. Such abuses occur in the realm of torts or delict not contract. For instance, in the case of *Kano State Urban Development Board v Fanz Construction Company Ltd,*[70] it was held that tortious or delictual claims are not arbitrable.[71] However, in some African countries, the position on whether human rights are arbitrable seems to have been left open by statutes and constitutions. For instance, in section 46 of the Constitution of the Federal Republic of Nigeria 1999 (as amended) it is provided *inter alia* that any person alleging that his right or rights is being or is likely to be contravened in any state may apply to a High Court in that state for redress. It is submitted that the operative word in this section is the word 'may' which symbolizes probability or discretion.[72] Thus, the option open to a party whose rights has been breached is either to go to the High Court for judicial redress or make recourse to arbitration most especially if there was a prior agreement to arbitrate. Even with this, it seems procedurally

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[66] This is expressed in Yoruba adages as: 'Agbó ẹjó ẹnikan dá. Àgbà òsikà àti Bí abá ní Baba ní ìgbẹ́jó, bí abá ro ẹjó ẹ̀bi àre là Ó jẹ. These adages are replica of the common law maxims of *audi alteram partem, and nemo dat non quod habet* respectively, which are the twin pillar of fundamental human rights to fair hearing. These concepts now dotted the provisions of virtually the Constitutions of most African countries and civilized countries the world over including Nigeria; see the Constitution of the Federal Republic of Nigeria s 36

[67] Chukwuemerie, A. I, (n 22) 124

[68] Constitution of the Federal Republic of Nigeria 1999 (as amended) s.36 (1): The South African Constitution s 34 and African Charter art. 7.

[69] *R.C. Okafor v Attorney General of Anambra State* [1991] 6 NWLR (Pt. 200) 659, 662

[70] [1990] 4 NWLR (Pt. 142) 1 SC

[71] See further the case of *G & C Lines & Others v Hengrace Nig. Ltd.* [2001] 7 NWLR (Pt. 711) 51 CA

[72] See the case of *Ajayi Farms Ltd v NACB Ltd* [2003] FWLR (Pt. 172) 1864 at 1888-1889 CA. in that case, it is held that 'the word 'may' is defined in *Black's Law Dictionary* as follows – An ancillary verb qualifying the meaning of another verb by expressing ability, competency, liberty, permission, possibility, probability or contingency. In construction of statutes and presumably also in construction of Federal rules the word 'may' as opposed to 'shall' is indicative of discretion or choice between two or more alternative, but the context in which the word appear must be the controlling factors'. See further the cases of *Ilobi v Uzegwu* [2005] All FWLR (Pt. 285) 595 at 612 CA and *Ejiogu v Onyeagocha* [2004] All FWLR (Pt. 204) 26 at 42 CA

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that, he must satisfies the arbitral tribunal that his fundamental human right breached is commercial nature otherwise, he will be denied access to arbitral proceedings.[73]

By nature, arbitration agreements may be made to cover future disputes. Conversely, an applicant for the enforcement and protection of human rights may bring action on the ground of imminent danger to his human rights. However, no arbitral proceeding can take place in anticipation of dispute, no matter how soon it may happen. In order words, there must be an existing dispute between the parties.[74] Therefore, any application based on an allegation that party's right is 'likely to be contravened' will hardly be arbitral on this ground, since it would not be a dispute in the sense envisage by the arbitration statutes. Thus, in African, the breach of or anticipatory breach of human rights is not arbitral.[75]

CONCLUSION

This paper has examined whether there is synergy between Arbitration and Human Right or whether they are parallel to each other. In doing this, this paper took into consideration various international, regional and national statutory provisions on the concept of access to courts, fair and the public hearing of disputes as well as public declaration of judgment. There is no doubt that the above rights are sacrosanct in judicial proceedings the world over, the breach of any of these rights will render any outcome from the proceedings null, void and of no effect whatsoever. However, the same cannot be said about arbitral proceedings, in fact, by nature, recourse to arbitration is a waiver of the parties' rights of access to court. This is because arbitration is consensual and derives life and authority from arbitration agreement executed by the parties themselves. It follows that parties who have entered into arbitration agreement to have their dispute determine by arbitrator of their choice have waived their rights of access to a court and cannot allege a breach of that right.

Furthermore, this paper has also demonstrated that arbitral tribunal did not fall into the same category of courts and tribunals which African legal systems and other jurisdictions of the world require to hold public hearing and public delivery of judgment or findings. Conversely, arbitration is confidential and its decision, call award, is not subject to public declaration by the arbitral tribunal.

In spite of the foregoing, this paper has established that the different application of key elements on which arbitration is premised *vis-a-vis* human rights does not mean that arbitration and human rights are completely parallel in all ramifications. For instance, the meeting point between the two concepts, as revealed by this paper, is there is a synergy between arbitration and human rights on the hallowed principle of fair hearing and equal treatment of parties. Thus, human rights provisions particularly in African constitutions do not affect arbitration in a negative way. Hence, the two legal concepts are different means to the same end. They are both designed to achieve the same goal albeit through different doors.

While this paper advocates and recommends more education to create awareness on the use of arbitration amongst litigants as well as legal practitioners to decongest the court and promote cordial relationship among litigants, it concludes on the note that arbitration does not violate or antithetical to human rights but rather, the two principles complement one another.

[73] See Arbitration and Conciliation Act. LFN 2004 s. 57 (1)

[74] Chukwuemerie. A. I (n 22) 136

[75] See generally. Chukwuemerie A.I. 'Arbitration and Human Rights in Africa (2007) 7 (1) *African Human Rights Law Journal* 103-104

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