

Arbitration and human rights in Africa

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Summary

With a colonial background and, in many cases, years of military and other forms of dictatorship, most African countries have elaborate constitutional provisions for the protection of human rights. Colonialism and those dictatorships involved the extensive denial and abuse of citizens' rights. Independence and cessation of dictatorships therefore invariably involved keen resolves to ensure the protection of citizens' rights in all practicable ways. African constitutions are therefore quite elaborate, for instance, with provisions that confer on every citizen or resident of the country in question such rights as those of unfettered access to courts for the determination of causes and matters as well as a requirement of public hearing of cases and pronouncement of judgments or findings. Most African countries are also now embracing commercial arbitration for the resolution of disputes. They are equally making serious efforts to transform themselves into preferred venues for international arbitrations by business people and business entities. Since arbitration is fundamentally a private and confidential process and an election to go to arbitration is in one way or the other a decision not to go to court, whether or not arbitration breaches citizens' human rights, is becoming an important issue on the continent. This article examines the question and finds that, unlike the situation in some other parts of the world, arbitration and human rights are not in any form of conflict on the continent. Therefore, arbitration does not breach human rights in Africa. African countries have rather worked out a synergy between the two streams of law. The article also finds that the situation is the same in the customary law and that, in working out this synergy, the continent

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has shown a worthy example to the world just as it did with the idea of an international customary law arbitration.

1 Introduction

In Africa, human and peoples' rights are issues of prime importance. Some of the rights provided for in the constitutions of African countries are those that concern the proper administration of justice. These are the rights of access to the courts and to a fair hearing within a reasonable time, as well as the right to a public hearing and public declaration of judgment.¹ These rights are also enshrined in the African Charter on Human and Peoples' Rights (African Charter). The right of access to a court ensures that all citizens are able to take their grievances against the government or any other citizen to impartial umpires paid by the state for determination according to law. A public hearing and a public delivery of judgment minimise the risk of deliberate miscarriage of justice. They promote probity and public scrutiny of the administration of justice. Considering that many African countries are developing political cultures, these rights are of enormous importance.²

As arbitration law and practice grow in importance in the different African countries,³ the question whether or not arbitration proceedings violate these cherished rights is assuming tremendous practical importance. In the same way, whether or not an infringement of any of the rights is arbitrable is becoming a very important question in Africa. *Prima facie*, there are conflicts between these rights and some of the sacred principles of arbitration. For instance, against constitutional provisions guaranteeing unfettered access to the courts for the determination of practically all manners of causes and matters,⁴ a recourse to

¹ Details of provisions on the rights of access, fair and public hearing and public declaration of findings are outlined in sec 3 of this article. Whether or not the right to a fair hearing (or natural justice) incorporates the right of access to justice or to the courts is not within the ambit of this work. For more on that question see, eg, A Jaksic *Arbitration and human rights* (2003). I shall therefore treat them (fair hearing and right of access) separately, if not for any other reason than the fact that the various African constitutions and the African Charter provide for them separately, that is, in separate sections or articles, as shown below.

² In developing political cultures, political leaders are often impatient with, and actually persecute, the opposition. They sometimes do so through sham court proceedings and trials.

³ Africa is in recent times progressively, even if slowly, moving away from a general and deep skepticism with which developing countries have normally beheld arbitration, towards a warm embrace of arbitration. On this generally, see A Asouzu *International commercial arbitration and African states: Practice, participation and institutional development* (2001) 119 and Al Chukwuemerie '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.

⁴ See eg art 68 of the Egyptian Constitution; art 37 of the Ethiopian Constitution, 1994. For the wording and their discussion, see sec 3.1 below.

arbitration is in all African countries — as in most jurisdictions — a waiver of the right of access to court for the particular dispute. That, in a sense, is an ouster of the court's jurisdiction to entertain such matters, at least unless and until the parties have attempted arbitration.⁵ In those African countries that have enacted national statutes that are based wholly or partly on the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration, 1985,⁶ statutory provisions even expressly and almost completely oust the jurisdiction of the courts to entertain any cause or matter that is the subject of an arbitration agreement.⁷ Constitutional provisions requiring the public hearing of cases and public delivery of judgments⁸ are in conflict with privacy of hearing and of awards which are hallmarks of arbitration.⁹ While such constitutional provisions secure for every citizen lawfully conducting himself a right to attend and watch/participate in the proceedings of a court or other tribunal set up by law,¹⁰ except in extremely rare cases,¹¹ an arbitrator or arbitral

⁵ See nn 56–59 below and the text thereof for the necessary circumstances for, and extent of, this waiver.

⁶ Adopted in 1985 by the General Assembly of the UN on the recommendation of UNCITRAL. Presently Egypt, Kenya, Nigeria, Tunisia, Uganda, Zambia and Zimbabwe have enacted statutes based on the Model Law. See http://www.uncitral.org/uncitral/en/uncitral-texts/arbitration/1985Model_arbitration_status.html (accessed 15 December 2006). Curiously, though Uganda enacted her Arbitration and Conciliation Act in 2000, it is not listed.

⁷ See, eg, sec 9 of the Ugandan Arbitration and Conciliation Act 2000; sec 34 of Nigeria's Arbitration and Conciliation Act, cap A18 Laws of the Federation of Nigeria 2004 enacted as Arbitration and Conciliation Decree 1988; sec 10 of the Kenyan Arbitration Act, 1995. Each provides that a court shall not intervene in an arbitration except to the extent permitted by the Act. Each Act permits the courts' involvement only in areas that aid arbitration, such as a stay of court proceedings pending arbitration. The Acts also provide that, if a dispute subject to arbitration is taken to court and the defendant applies for a stay of court proceedings to enable the parties to go to arbitration, the court 'shall' (not 'may') stay its proceedings unless the arbitration agreement is itself null and void or inoperable. The Nigerian provision does not include the proviso on the arbitration agreement being null and void, etc, and so completely denies the court any discretion on the application if the envisaged arbitration is of an international character. For more on the matter, see Al Chukwuemerie 'Stay of court proceedings pending arbitration in Nigerian law' (1996) 13 *Journal of International Arbitration* 119.

⁸ Sec 19(14) Constitution of Ghana; sec 34 Constitution of South Africa, 1996; art 28(1) Ugandan Constitution, 1995; art 18(10) Constitution of the Republic of Zambia, 1991 ('... all proceedings of every court and proceedings ... before any other adjudicating authority, including the announcement of the decision of the court or other authority, shall be held in public').

⁹ Being purely private proceedings between the parties thereto and the arbitrators, arbitration is confidential in every respect.

¹⁰ Such other formal tribunals as tribunals of inquiry.

¹¹ In juvenile matters and matrimonial causes, generally, where appropriate (sec 103 Matrimonial Causes Act cap M7, Laws of the Federation of Nigeria 2004); public morality (sec 19(14) Constitution of Ghana, art 28(2) Ugandan Constitution); national security.

tribunal is bound in law to exclude the public — all persons except those allowed in by the parties themselves.¹²

Ordinarily, these are areas of conflict between fundamental rights and arbitration. It is a conflict that has been recognised by, and is worrisome to, arbitrators, arbitration practitioners, constitutional lawyers and foreign investors. These stakeholders have recognised the conflict as existing not only in Africa but in practically all parts of the world.¹³ In foreign investment-seeking or -receiving countries, which most African countries presently are, the matter is of even greater importance. Investors may be encouraged or discouraged from investing in a particular economy depending on whether or not the conflict has the capacity of compromising a vibrant recourse to commercial or investment arbitration in or by that country.¹⁴

This article examines these issues and finds that beneath the surface there is really no conflict between arbitration and human rights in Africa. The article finds that, rather, a very good symbiosis has been worked out, even if unwittingly, by African countries, between human rights and arbitration. It canvasses the view that the right to a fair hearing within a reasonable time is far more secure during arbitration than before courts and other tribunals. It finds further that, in working out the symbiosis referred to above, Africa has taken the lead, just as it has done in another area with respect to commercial and investment arbitration.¹⁵ It is further the argument of the article that this symbiotic relationship between human rights and arbitration, which enables the continent to profit appropriately from two otherwise conflicting but very necessary streams of law, was not worked out merely to engender foreign investment, but in the search for substantial justice. It is also my view that, even if there was any conflict, it is in the interest of African countries, as of all countries, to make exceptions in favour of arbitration with respect to those rights. This would be notwithstanding the enormous importance of the rights of access to courts and of public hearing and delivery of judgment. As international commercial arbitration gains popularity in study and use in Africa, everything must be done to ensure

¹² If parties allow any person into the venue, the arbitrators cannot exclude him either. These are very trite principles which African arbitration statutes do not bother to spend time dealing with.

¹³ See, eg, Jaksic (n 1 above); A Asouzu 'The protection of human rights and private arbitration' (1998) *Africa Legal Aid Quarterly* 6; Mustil & Boyd *The law and practice of commercial arbitration in England* (1989).

¹⁴ See Asouzu (n 3 above).

¹⁵ The idea and principle of international customary law arbitration, which is obtainable in Africa, Asia and the Caribbeans. For more on the matter, see Al Chukwuemerie 'The internationalisation of African customary law arbitration' (2006) 14 *African Journal of International and Comparative Law* 143.

that it thrives and brings to African countries the tremendous benefits which other countries and regions have derived and are deriving from it.¹⁶

The article also examines whether or not human rights disputes ought to be arbitrable in Africa. This is an issue which hardly attracts scholars' attention. Such disputes are routinely taken to courts. However, in Africa the question deserves careful examination, even if circumstances in other parts of the world are different. Human rights abuses by governments and state agencies often occur on the continent. More than in most other parts of the world, congestion and delays in the court system make the dispensation of justice by the courts far less effective than by arbitration.¹⁷ For this and other reasons, the risk that justice will not be done is particularly so when the state — which sets up and funds the courts and also appoints judges — is a party. Also, the state (embodied by the government or government agencies) is generally the defendant in human rights matters.¹⁸ On the other hand, arbitration remains the most effective dispute resolution mechanism in the world.¹⁹ What is more, though arbitration is generally consensual — flowing from private agreements — and human rights disputes often arise in ways and manners that do not enable or permit the parties to reach an agreement to arbitrate, statutory arbitrations thrive on the continent. These statutory arbitrations, such as trade dispute arbitrations, also involve governments and their agencies. There is no reason why human rights arbitrations fashioned after statutory arbitrations

¹⁶ For some such benefits, see Al Chukwuemerie 'Commercial arbitration as the most effective dispute resolution method: Still a fact or now a myth' (1998) 15 *Journal of International Arbitration* 83; Al Chukwuemerie 'Enhancing the implementation of economic projects in the Third World through arbitration' (2001) 67 *Arbitration* 240.

¹⁷ For more on this, see Al Chukwuemerie 'Arbitration and the ADRs as panacea for the ills in the administration of justice in the Third World' (2005) 1 *Ebonyi State University Law Journal* 102.

¹⁸ As in other ages and climes, some judges tend to defer to governments and their agencies when they appear as parties in court. This is not a problem unique to Africa. Lord Atkin was displeased with its very pronounced occurrence in a case he participated in, *Liversidge v Anderson* (1942) AC 206, and he said: 'I view with apprehension the attitude of judges who on a mere question of construction when face to face with claims involving the liberty of the subject show themselves more executive minded than the executive . . . In this country, amid the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace. It has always been one of the pillars of freedom, one of the principles of liberty for which on recent authority we are now fighting, that the judges are no respecter of persons and stand between the subject and any attempted encroachments on his liberty by the executive, alert to see that any coercive action is justified in law. I protest, even if I do it alone, against a strained construction put on words with the effect of giving an uncontrolled power of imprisonment to the minister.' For more on this and how this is impossible in arbitration, see Al Chukwuemerie 'Salient issues in the law and practice of arbitration in Nigeria' (2006) 14 *African Journal of International and Comparative Law* 1.

¹⁹ See eg Chukwuemerie (n 16 above).

should not thrive. The article argues that as of now, arbitration is the best, if not indeed the only way to secure real independence of adjudicators and real speedy justice against most African governments and their agencies in human rights matters.

The article examines arbitration and human rights in African customary law, both in historical and contemporary perspectives. This is necessary because customary law remains a very important part of the law or legal system of practically every African country.²⁰ In its various forms²¹ and variance in details from place to place on the continent,²² it remains the private law of a good percentage of African people. Such people are not just illiterate village dwellers. In many cases they are also well-educated persons resident in cities but who have chosen, even if unwittingly in some cases, to have customary law regulate their intimate personal affairs.²³ However broadly the African constitutional provisions on human rights may be framed, there will always be patterns of behaviour following 'the contours of norms' that are indigenous to the people within or outside the constitution and there will always be interactions that will be shaped by (and disputes resolveable only by) standards and procedures emanating directly from the day to day traditional life of the people and the reality of their society.²⁴ In this writer's view, therefore, this discussion will be grossly incomplete, and

²⁰ See, eg, TW Bennett *A sourcebook of African customary law for Southern Africa* (1991), where different writers examined the issue from anthropological and other perspectives.

²¹ It is either customary law in the pure sense of being the traditional practices with binding force of law or religious law that has acquired such totality of governance of the people's lives such as to replace the traditional practices/law. It is in the second sense that Islamic law is recognised as customary law.

²² This varies from place to place since it follows, and is 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. The position was captured by a Nigerian colonial judge when he said: '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.' Osborne CJ in *Lewis v Bankole* (1908) 1 NLR 81,100–101. See also the South African case of *Hlophé v Mahlalela & Another* 1998 1 SA 449.

²³ Examples are well-educated persons who, eg, contract their marriages in the customary way and refuse to convert it into a statutory marriage, ie a marriage under the Marriage Act. Some go on to become traditional rulers and live their lives completely in abidance with the customary practices of their people. This writer has shown that even expatriates such as Europeans and Americans who by their own volition get so integrated into the customary practices of traditional African society that they go ahead to take chieftaincy titles and so on, automatically make themselves subjects of the customary law. See Al Chukwuemerie 'Commercial and investment arbitration in the African customary law: Myths or realities?' (2006) *Abakaliki Bar Journal* 26.

²⁴ L Sheleff *et al* *The future of tradition: Customary law, common law and legal pluralism* (1999) 186.

indeed a denial of the very nature of Africa and African laws, if it does not also examine the subject from the perspective of customary law. There is nothing in any African constitution suggestive of an intention to abrogate customary law rules. On the contrary, customary law, at all appropriate points, complements the constitutions and other statutory provisions on relevant subjects, including human rights. Indeed, with respect to human rights, just as in other areas, the constitutions 'leave a wide range of matters *in personam* by what may be referred to as "operative rules and norms"', which include indigenous or customary legal institutions and rules.²⁵

After discussing the relevant issues as they relate to customary law, the article examines human rights provisions in the different African constitutions under appropriate subheadings. It also considers relevant provisions of the African Charter and examines the meanings that have been attached, or are likely to be attached, to these constitutional and Charter provisions. The provisions as interpreted are juxtaposed with arbitral proceedings to see how they affect arbitration positively or negatively. Where decisions have not yet been made on any relevant constitutional or Charter provision, reference is made to decisions on similar conventions and statutes in other parts of the world. In this respect, decisions on the European Convention on Human Rights and the English Human Rights Act, 1998, are useful. All such decisions are, of course, mere examples of what African courts or the African Commission on Human and Peoples' Rights (African Commission) may decide to do or pronounce in similar circumstances; that is, they are only of persuasive influence or value.

2 Customary law arbitration and human rights

This writer has attempted to show in different ways in other works that arbitration and alternative dispute resolutions (ADRs), such as conciliation, mediation and negotiation, were firmly entrenched in the old traditional African societies and were part and parcel of the people's life, though not called by these English names.²⁶ Those works also showed that as of now, customary law arbitration has grown to cover disputes in even such matters as oil and gas operations as well as some

²⁵ L Juma 'The legitimacy of indigenous legal institutions and human rights practice in Kenya: An old debate revisited' (2006) 14(2) *African Journal of International and Comparative Law* 176 181.

²⁶ See, eg, AI Chukwuemerie 'International commercial arbitration and the UNCITRAL Model Law under written federal constitutions: Necessity versus constitutionality in the Nigerian legal framework' (1998) 15 *Journal of International Arbitration* 83; AI Chukwuemerie 'The recent odyssey of customary law arbitration and conciliation in Nigeria's apex courts' (1998) *Abia State University Law Journal* 1; Chukwuemerie (n 16 above) and chs 4, 9 & 10 of AI Chukwuemerie *Studies and materials in international commercial arbitration* (2002). See also Chukwuemerie (nn 15 & 23 above).

aspects of international trade and investment. These issues do not bear repetition here.

Like all incipient societies, however, early African societies did not have a human rights charter. Such things evolved with time in each society.²⁷ The effect was therefore that, in ancient African societies, most of which were organised into empires and kingdoms, little importance was attached to the observance of human rights. It was therefore in some cases possible for human rights to be flouted, even with impunity.²⁸ In many societies, human rights generally depended on the social status of the person in question.²⁹ A slave was for all intents and purposes an object or subject of ownership (a piece of property as it were) and was not entitled to many of the rights guaranteed by law — such as access to courts, a right to a fair hearing and a public hearing.

Slaves were not entitled to go to court and could not appoint an arbitrator. It was the practice that they could complain to a person outside the slave owner's house or state their case in any dispute with an outsider through their owner. A complaint or case against a slave would be made to or through that slave's owner. An owner would therefore pursue in his own name any arbitral or court proceeding between the slave and a freeborn. The slave owner in such proceedings occupied a higher position than a parent, guardian or friend does today in proceedings involving an infant.³⁰ The question of whether or not a resort to arbitration amounted to a breach of his right of access to court or of fair and public hearing therefore did not arise at all.

Generally amongst freeborns outside the monarchy, there was equality of persons before the law. Each person had a right of access to the courts just as much as he had to arbitration and alternative dispute

²⁷ The exception is the USA, which itself was established on the tenets of equality of all men, and of justice. Nevertheless, even in America that had such a hard-worn beautiful national heritage and foundation, slavery continued for decades. There was also the official policy of extermination of native Indians as well as other forms of racial segregation. Even now blacks are yet to enjoy being elected president. Even with the Magna Carta in England, social justice for the masses as different from the barons was not immediately entrenched.

²⁸ For some of the notable abuses, see UO Umozurike *The African Charter on Human and Peoples' Rights* (1998) 15–18.

²⁹ This was the general trend in practically all contemporary societies and indeed in all societies organised along the pattern of empires and kingdoms. For the position in Europe (the present UK, France, Germany, etc), see eg H Peacock *A history of modern Europe 1789-1978* (1980) and V Cronin *Napoleon* (1982).

³⁰ This was learnt or confirmed in interviews held with elders and custodians of the traditional societies' history and culture in several parts of Igbo land in Eastern Nigeria. The author was informed that the position is the same amongst all the Asante of Ghana, the Zulu of South Africa and the people of Benin Republic, by lawyers indigenous to those tribes. For a confirmation that in such matters similarity existed between the different traditional societies across the length and breadth of Africa, see TO Elias *The nature of African customary law* (1956).

resolution generally.³¹ There were no statutory or constitutional provisions that made access to courts a superior right over access to arbitration, or granting an exclusive or preferential jurisdiction to the courts over other dispute resolution fora in the manner that the present provisions on access to court seem to suggest. As a matter of fact, the traditional African environment did and does give preference to arbitration and alternative dispute resolution over litigation. Therefore, a separate or exclusionary right of access in favour of the courts could only be a mirage.³²

Whether or not a public hearing and delivery of judgment were strict requirements of customary law depended on the part of Africa in question. Whilst they were strict requirements in most language groups of South Africa,³³ Igboland in Nigeria and Asante in Ghana, it was not so in the Upper Volta regions and among some of the language groups of North Africa.³⁴

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.

Concerning the right of access to courts *vis-à-vis* the right or choice to arbitrate, the legal position will depend on the courts that are used. If it is access to customary courts as against customary arbitration, the position is exactly as it was in pre-colonial times when Western-style constitutions and courts were not yet in place. If it is the right of access to Western-style courts (set up by constitutions) as against customary law arbitration, the situation is akin to that of Western-style courts against Western-style arbitration which is discussed below. With respect to the right to a public hearing and the public delivery of a finding, the position varies depending on whether or not the courts in question are customary or Western-style courts.³⁵

With respect to the principles of a fair hearing, the position has remained the same. Observance of the relevant principles ensuring a fair hearing is a *sine qua non* for the exercise of any judicial, quasi-judicial

³¹ Though non-arbitration practitioners sometimes refer to arbitration as an ADR (Alternative Dispute Resolution) method, the fact is that arbitration has since assumed a distinct character of its own. It is midway between litigation and ADR. It shares some characteristics with litigation on the one hand and with ADRs on the other, but is not the same.

³² In fact, even as with respect to courts, the customary African system or procedure is itself very similar to arbitration and ADR and a practical difference hardly exists. As a South African judge has observed: 'Dispute resolution in traditional African courts gives full recognition to the idea that a public trial is only a minor phase in the progress of a dispute. The aims and procedures in these courts revolve around mediation or arbitration and reconciliation as opposed to adjudication with a win-or-lose result as in western courts.' N Mokgoro 'The role and place of lay participation, customary and community courts in a restructured future judiciary' in M Norton (ed) *Reshaping the structures of justice for a democratic South Africa* (1993) 65 75.

³³ As above.

³⁴ See Elias (n 30 above).

³⁵ See sec 3.1 below.

or other adjudicatory power, including that of an arbitrator, under customary law. A person cannot be an arbitrator over a matter if he has a personal interest in it. He cannot be a judge in his own cause. It is equally so if his spouse, child, parent, brother, sister or other relation has an interest in the matter. If the arbitrator manifests bias against any party in the proceedings, his award is completely invalid. It seems clear that it would be of no moment that the award went in favour of the person against whom the bias was shown.³⁶

One unique principle in the observance of human rights (including the rights of access to courts and public hearing) in traditional African society of the past and present is the concept that every man is his brother's keeper. This concept has ensured an admixture of rights and duties. As a man is given rights, he acquires also certain duties and responsibilities which he owes other members of the society. He cannot claim rights except alongside the execution of his duties. The individual's rights cannot be claimed against society except as part of society's rights and cohesive system. The position is well captured by the late Professor Claude Ake:³⁷

We put less emphasis on individual and more on the collectivity, we do not allow that the individual has any claims which may override that of the society. We assume harmony, not divergence of interests, competition and conflict; we are more inclined to think of our obligations to other members of our society rather than claims against them.

Another commentator put the matter this way:³⁸

³⁶ Interviews with elders and informed members of Onicha-Agu Amagunze community, Nkanu-East local government area of Enugu State of Nigeria, and of some Zulu persons of South Africa in March 2005. This is one of the aspects which show clearly that the fine principles of law and life have never been the exclusive preserve of any particular set of communities in Europe or anywhere else. Any assertion to the effect that the indigenous legal system was primitive through and through can only be the result of unresearched armchair criticism or a colonial hangover and mentality. All other Africans spoken with on this point confirmed that the position is the same in their own custom — Ghanaians, South Africans and Beninese. A close relation of the parties or any of them can only act as a mediator, an intervener whose opinion would be a non-binding suggestion. For a person to assume the estate of a dispute resolver whose decision or opinion is binding on the parties, he must not be a relation of any of them. The only exception seems to exist in favour of a family head or traditional ruler who, by virtue of his position, has impartiality assumed in his favour. Even then, if his relationship with one of the parties is extremely close or closer than the relationship with the other party (eg if one party is the spouse, child, parent, etc), he cannot adjudicate the matter.

³⁷ 'The African context of human rights' (1987) *Africa Today* 5–12, cited by Umozurike (n 28 above) 18. The principle is likely to be in operation up to the foreseeable future, particularly since it has been adopted in the African Charter, arts 27(2), 28 and 29, which provide that the rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest. The Preamble to the African Charter also declares that 'the enjoyment of rights and freedoms also implies the performance of duties on the part of everyone'. The principle of duties alongside with rights is applicable on a much lower level in the borrowed or assimilated European or Western laws now applicable in the different African countries as their general laws.

³⁸ V Uchendu 'Traditional and social order' excerpt from inaugural lecture, University of Calabar, Nigeria, 11 January 1990, cited by Umozurike (n 28 above) 19.

The kinship principle provided the individual with a community whose moral order emphasised shared values, a sense of belonging, security and social justice. In such social order duties preceded rights. The principle was clear: to enjoy your rights you must do your duty; and duty and right have a reciprocal relationship, and structurally both were balanced. The genealogical structure, whatever its depth, solved the dialectical problem of relating the present to the past and both to the future. It is a simple transformation embedded in the lineage system. The lineage incorporates the living, the dead and the unborn. By the principle of reciprocity, the living respect the ancestors and the traditions they left; the ancestors reciprocate by maintaining the prosperity of the living community and through re-incarnation, strengthen the living lineage. When the living die, they join their ancestors.

This is a defining characteristic of the typical African traditional society. It must, however, be properly appreciated to avoid the rather sweeping and erroneous extension or interpretation which a few scholars, even African scholars, have tried to put on it. One such scholar has interpreted it as a 'mentality of assistance', indeed a 'colonial mentality' under which³⁹

the mind is but little inclined to cultivate and make use of any sense of initiative and responsibility, the colonial mentality has nonetheless found a favourite and predisposed home for itself in the organisation of the traditional life of most African societies where the fate, behaviour and gestures of each individual are under the control of norms, practices and traditions created and consecrated by the community or the group, to the exclusion of all individual or personal action or innovation. The role of individual will is reduced to a minimum, each person living according to rules or practices ensuing from his status.

With due respect, if this is actually the position anywhere in Africa, it is the exception rather than the rule and must be at the fringes of the continent. Much as African society ensures a high degree of brotherhood and collectivity, it does not destroy individuality or initiative. Uniqueness and initiative resulting in personal differences, approaches and dispositions ensure dynamism for the society. A very high degree of republicanism has always existed in such societies as the Igbos of South-eastern Nigeria and in some other parts on the continent. Nguema in the same article identified four types of traditional African societies and the proposition could never have been true of the four types. It is also worth noting that no authority for these assertions was cited, nor did he name any society where that is the position. Such scathing remarks on the kinship principle, particularly as it concerns human rights, stem from a hangover of mental colonialism and an insufficient perception of the differences between the obsessive concern of the West for the

³⁹ I Nguema 'Human rights perspective in Africa' (1990) 11 *Human Rights Law Journal* 261 264.

individual and the commendable African emphasis on the collective. This difference has been expressed very well by another writer as follows:⁴⁰

One critical difference between African and western traditions concerns the importance of the individual. In the . . . western world the ultimate repository of rights is the human person. The individual is held in a virtually sacralised position. There is a perpetual and, in our view, obsessive concern with the dignity of the individual, his worth, personal autonomy, and property.

3 Relevant constitutional provisions

3.1 Right of access to court

One of the rights that prevents or curtails political and other forms of persecution is the right of access to the courts. The right is so fundamental for any society that it is recognised as a constitutional right, even in jurisdictions with unwritten constitutions,⁴¹ unless it is expressly excluded by law.⁴² It is one of the bedrocks of a proper administration of justice that to deny a citizen access to the courts is an outright denial of justice and the rule of law and indeed a breach of his right. We can therefore safely assert that it is an existing right, even in the few African countries where the constitutions are silent on the point.⁴³ In these countries the people have a right of access to justice. In each cause or matter they are at liberty (subject to regulation by statutes and non-statutory legal principles) to choose to go to court or to choose any other mode of dispute resolution.

In fact, the right of access to a court is sometimes actually regarded as synonymous with, and the embodiment of, the right of access to justice. Such an impression or emphasis is particularly the case in countries emerging from colonialism or dictatorial and oppressive regimes. It exists because litigation has previously been the major or principal mode of dispute resolution. Framers of constitutions normally have only courts and

⁴⁰ A Legesse 'Human rights in African political culture' in KW Thompson (ed) *The moral imperatives of human rights: A world survey* (1980) 130, cited by Juma (n 25 above) 179.

⁴¹ Eg, it is entrenched even in the unwritten Constitution of England. See *Raymond v Honey* (1982) 1 All ER 756; (1983) 1 AC 1. See also *R v Secretary of State for the Home Department, EXP Leech (No 2)* (1994) QB 198, where Steyn LJ declared that it is 'a principle of our law that every citizen has a right of unimpeded access to a court'.

⁴² Dictatorial and oppressive regimes which have arisen time and again in some parts of the world sometimes make laws ousting the jurisdiction of courts over some matters. Examples are the Constitution (Suspension and Modification) Decrees of 1984 and 1994 in Nigeria. See also *Civil Liberties Organisation v Nigeria* (2000) AHRLR 188 (ACHPR 1995) of the African Commission. The regimes of Idi Amin in Uganda, Milton Obote, Jerry Rawlings in Ghana and (even now) Robert Mugabe of Zimbabwe have been guilty of this.

⁴³ Burundi, Central African Republic, Chad, Congo, Côte d'Ivoire, Gabon, Guinea-Bissau, Libya, Madagascar and Mali.

formal tribunals set up by government in mind when framing provisions for access to justice or to dispute resolution fora. It is mainly this mindset that breeds the problem or question as to whether or not arbitration and other informal or private dispute resolution mechanisms operate in breach of parties' right of access to courts or, in that sense, to justice. This is because (with only litigation in mind) the framers of constitutions routinely impose on adjudicators such requirements as the observance of a public hearing and the publication of the decision, which fly in the face of the core values and strengths of arbitration over litigation.⁴⁴ We shall now examine African constitutional provisions on the right of access to courts with a view to seeing if and how a resort to voluntary arbitration may amount to a breach of that right.

As already stated, some countries have no constitutional provisions conferring a right of access to the courts, but this does not mean that citizens have no such right. It simply means that they have an equal right of access to the courts and all other dispute resolution mechanisms. Even if unwittingly, such constitutional provisions avoid the error of giving the unintended impression that litigation is the only recognised or the preferred dispute resolution mechanism or that it is superior to other mechanisms. In such countries the question of whether or not a resort to arbitration breaches a party's right of access to court does not arise. It will at best be a mere, and indeed mute, academic point.

Other constitutions confer rights of access to the courts in a manner that purports to convey finality and rigidity on the point. For instance, article 68 of the Egyptian Constitution provides that 'the right to litigation is inalienable for all, and every citizen has the right to refer to his competent judge'. The 1994 Ethiopian Constitution provides in article 37 that every person has the right to bring 'justiciable disputes to, and obtain a decision or judgment by a court of law or, where appropriate, by another body with judicial power'.

Prima facie this right and others like it seem to be an absolute right. It must be noted, however, that what these sorts of provisions seek to achieve is simply the protection of a citizen's right to go to court if he so wishes. No constitution in Africa or anywhere else imposes upon any person a duty to go to court in a civil matter⁴⁵ if he does not want to. The provisions also do not expressly negate or exclude all other dispute

⁴⁴ Such values as confidentiality, absence of rigidity or formality and speed. For a detailed examination of these and other strengths of arbitration, particularly in the African context, see Chukwuemerie (n 17 above) and Chukwuemerie (n 18 above).

⁴⁵ The institution of criminal proceedings is mainly the responsibility of the state. It is therefore in civil proceedings that the citizen needs an assurance that this right exists. The point has not arisen for decision before an African court or the African Commission to the best of this writer's knowledge. It may well be, however, that when it arises, the courts or the African Commission will take the same view as the European Court of Human Rights, which determined in the 1970s that the right of access to courts is simply a right to institute proceedings in civil matters: the *Golder* case, judgment of 21 February 1975 Series A No 18 (1979-80) 1 EHRR 524.

resolution mechanisms such as arbitration. The question that arises 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? In other words, does the making of an arbitration agreement amount to a waiver of his constitutional right to litigation or is he, by virtue of such a constitutional provision, unable to waive the right to litigation? In these matters, no case law or judicial interpretation of the relevant provisions can be found on the continent. Neither an African court nor the African Commission seems to have encountered the point, though it would appear that in the case of *Scot v Avery* arbitration clauses, there is a clear waiver of the right of access to court.⁴⁶ With respect to cases involving other than *Scot v Avery* clauses, and outside the statutes based on the UNCITRAL Model Law, a cue can be taken from the European Commission and Court of Human Rights which have held in a number of cases that the right of access to court is by no means an absolute right, but one subject to limitation;⁴⁷ and that by its very nature the right of access to court may be waived by a party in preference to another dispute resolution mechanism such as arbitration, provided that the waiver is unequivocal.⁴⁸

In considering article 6 of the European Convention, the European Commission has held that the voluntary making of an arbitration agreement is a waiver of the right of access to court.⁴⁹ However, African courts and the African Commission can hardly find such reasoning persuasive. There is nothing in the mere making of an arbitration clause that automatically ousts the jurisdiction of the courts. The clause can

⁴⁶ A *Scot v Avery* clause (named after the old case in which its principles were first expounded, *Scot v Avery* (1856) HL 1) is one which provides that the parties shall not have any resort to a court until arbitration has been tried. In the face of such a clause there is in fact no cause of action for litigation until the parties have tried arbitration: *Khetran v New India Assurance Co Ltd* (1968) 3 ALR Comm 115 (Tanzania); *Obembe v Wema bod Estate Ltd* (1977) 5 SC 129 (Nigeria). In this writer's view, the clause is the philosophy and preferred approach of the UNCITRAL Model Law on International Commercial Arbitration in art 8. The article provides for a mandatory stay of court proceedings pending arbitration once a party applies for stay, no matter the nature of the arbitration clause involved. It is consequently the legal position in those African countries that have adopted the Model Law in their jurisdictions. See n 8 above.

⁴⁷ *Waite and Kennedy* Application No 00026083/94, judgment of 18 February 1999. On this generally, see Jaksic (n 1 above).

⁴⁸ *R v Switzerland*, Application No 10881/84, Decision of 4 March 1987; *Suovaniemi & Others v Finland*, judgment of 23 February 1999 cited by Jaksic (n 1 above) 279 n 399.

⁴⁹ *Suovaniemi* case (n 48 above).

after all be an *Atlantic Shipping* clause⁵⁰ or even a *Union of India* clause,⁵¹ either of which implicitly preserves court jurisdiction, unlike a *Scot v Avery* clause. It is therefore only with respect to *Scot v Avery* clauses⁵² that African courts and the African Commission can find an automatic waiver of the right of access to the courts.⁵³ It also needs to be pointed out that, where a resort to arbitration is not voluntary but compulsory, the parties cannot be said to have waived their right of access to court. Their choice of arbitration is not the product of the exercise of their will.⁵⁴

Therefore, a resort to arbitration can fail to act as a waiver of a party's right of access to court and, arguably, become a breach of that right if, and only if:⁵⁵

- (a) it is a compulsory/statutory arbitration not predicated on an agreement freely entered into by him;
- (b) the choice of arbitration and the consequent waiver of the right of access to court are not unequivocal;
- (c) the arbitrator compels him as a third party to join the process despite the fact that there is no arbitration agreement binding upon him;
- (d) through some artificial processes (such as the piercing of a corporate veil, the alter ego doctrine or the 'group of companies' doctrine), it (the party) is brought in as a sister organisation to one of the parties. Such a bringing in or inclusion of a third party cannot be regarded as a clear waiver of its right to go to court.

⁵⁰ A clause which prescribes that, except if arbitration is resorted to within a specific time, the right to arbitrate is thereby waived. The name is taken from the first case where its principles were elaborated, *Atlantic Shipping & Trading Co Ltd v Louis Dreyfus* (1922) 2 AC 250.

⁵¹ A clause conferring on only one party the right to demand arbitration. Just like the other clauses, this is named after the case in which the principles were clearly formulated, *Union of India v Bhorat Engineering Corp* LLR Delhi Series (1971) 2 57. See also *Pittalis & Others v Sherepettin* (1986) 1 QB 868.

⁵² See n 53 above and the text thereof.

⁵³ It is the actual start of an arbitral proceeding that in all cases constitutes a waiver of the right of access to court. It is an unequivocal intent on the part of the parties, whatever the nature of the arbitration clause amongst them, to go to arbitration and forego remedy in the courts. Remedy can only be sought in the courts in so far as they are ancillary or complimentary to the arbitral process or if the arbitral process fails irretrievably. This is in exception of such countries as South Africa, where court jurisdiction is hardly affected even when parties have gone to arbitration. See the South African Arbitration Act 1965 and such cases as *Nick's Fishmonger Holdings (Pty) Ltd v De Sousa* 2003 2 SA 278. That being the case, it would appear that the most unequivocal way of indicating a waiver of the right and of most clearly evincing an intention to arbitrate is a *Scot v Avery* clause.

⁵⁴ This is recognised even by the European Commission, despite the unsupportable opinion in *Suovaniemi* (n 48 above), eg, its report of 12 December 1983, Applications No 8588/79 and 8589/79 para 30.

⁵⁵ On (c) and (d), see Jaksic (n 1 above) 280.

It is only in these circumstances that an arbitral proceeding in those African countries can be viewed as being in breach of the constitutional right of access to court. Even then investors and business organisations operating or wanting to operate in such countries have no reason for fear or apprehension. Compulsory arbitrations (ie (a) above) are encountered only in trade disputes between employers and employees. Such arbitrations do not normally affect the investment and business potential or chances of the parties, particularly when they are expatriates or owned by expatriates.⁵⁶ Subheads (b) and (c) above cannot arise unless the parties themselves bring them about. The arbitration of investment disputes can be effectively resorted to in such places just as any other.

The third, and more difficult type of provision of the right of access to court in African constitutions is the case in which the constitution provides for dispute resolution in court and 'other tribunal established by law'. The Constitution of the Republic of Malawi, 1994, provides in section 41 that every person shall have access to any court of law or any other tribunal with the jurisdiction for the final settlement of legal issues. In section 23(2), the 1991 Constitution of Sierra Leone equally empowers 'any court or other authority' prescribed by law for the determination of the existence or extent of civil rights or obligations, to hear causes and matters. The Constitution of the Republic of Togo provides in article 19 that every person shall have the right in all affairs to have his cause heard and decided equitably by an independent and impartial jurisdiction within a reasonable time. There is nothing in the Constitution restricting the meaning of 'jurisdiction' to courts only. Rather, it seems obvious that tribunals are included.

Article 18(9) of the Zambian Constitution, 1991, is even more liberal, by granting parties a right to exclude a public hearing by agreement. Article 28(1) of the Ugandan Constitution, 1995, confers on courts or 'tribunals established by law' the jurisdiction to entertain disputes over people's civil rights and obligations. Section 36(1) of the Constitution of the Federal Republic of Nigeria, 1999, provides 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 a fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such a manner as to secure its independence and impartiality. Section 34 of the South African Constitution, 1996, provides that everyone has the right to have any dispute that can be resolved by the application of law decided in a

⁵⁶ Such compulsory arbitrations are of course conducted in a manner that ensures that the advantages of arbitration over litigation are available. Again, provision for compulsory arbitration is in effect an effort to prevent parties from taking such matters to regular courts — the very place which investors want to avoid. Such provisions are therefore in a sense simply *Scot v Avery* arbitration clauses.

fair public hearing before a 'court or, where appropriate, another independent and impartial tribunal or forum'.⁵⁷

The germane question here is whether or not arbitral tribunals fall under the term 'other tribunal established by law' or its several in these and similar provisions. If arbitral tribunals fall within the scope of 'other tribunal', it means that constitutional requirements in each such country for public hearing/trial and the publication of judgment bind arbitral tribunals and thus effectively destroy confidentiality, one of the attractive hallmarks of arbitration.⁵⁸ In such a case, any arbitration conducted in private would amount to a breach of the parties' right to a public hearing and public pronouncement of decision. Such arbitration would be unconstitutional and therefore invalid and completely null and void.⁵⁹ A resort to arbitration, properly so called, would be a breach of a party's right. Such a scenario would enable a shifty businessman to enter into an arbitration agreement, derive all possible benefits from the transaction, and after the dispute resile from arbitration and insist on litigation. He would even most probably insist on litigation in his own country's courts. Such a legal regime would hardly be consistent with the yearnings of African nations and their concerted efforts through NEPAD.⁶⁰ It would also negate their efforts, made through modern and progressive arbitration statutes, to attract direct foreign investment and to make their shores attractive venues for transnational arbitral proceedings.⁶¹ I seek to show here that arbitral tribunals are neither 'other tribunals' in those provisions, nor does a recourse to arbitration constitute a breach of any party's right to have his matter heard and determined by a court or 'other tribunal'.

⁵⁷ See also art 12(1)(a) of the Constitution of the Republic of Namibia 1990; sec 19(13) of the Constitution of Ghana 1992 — 'adjudicating authority . . . established by law'; art 9 of the Fundamental Law of the Second Republic of Guinea 1990; art 13(h) of the Fundamental Law of Equatorial Guinea 1991 — a right to present complaints and petitions 'to the authorities'; art 4 of the Constitution of Burkina Faso — 'independent and impartial jurisdiction'.

⁵⁸ The essence and bedrock of arbitration rest in extensive party autonomy, private hearing and declaration of award, and confidentiality. Without those, arbitration can hardly be preferred over and above litigation.

⁵⁹ In Africa, the supremacy of the constitution and attendant unconstitutionality and invalidity of any statute or rule of law that contradicts a constitutional provision are well established. See, eg, sec 1(3) of Nigeria's 1999 Constitution.

⁶⁰ New Partnership for Africa's Development. See <http://www.nepad.org> (accessed 31 March 2007).

⁶¹ African countries are taking steps to modernise their legal regimes for arbitration. Presently six of the countries have made statutes patterned wholly or substantially after the UNCITRAL Model Law. The francophone countries are members of the OHADA Treaty and have the Uniform Arbitration Act; 42 of the 53 African countries are already members of the ICSID (an African country, Nigeria being one of the very first countries to ratify it in 1965) and 22 countries are members of the New York Convention. These are no doubt giant strides though a lot of work still needs to be done on the continent, for which see Asouzu (n 4 above); Al Chukwuemerie *Africa and the UNCITRAL Model Law on arbitration: Winning and losing to win* (forthcoming).

Taking the latter first, that is, if arbitral tribunals are not the tribunals envisaged by the constitution, our arguments above to the effect that the right of access to court is not absolute, will hold. When a party elects to go to arbitration by voluntarily and clearly entering into an arbitration agreement, he has properly waived his right of access to court with respect to the dispute in question.⁶² It will not lie in his mouth to allege a breach of his right of access to court.

At the risk of repetition, we need to restate here that in Africa, outside of customary law, arbitration and ADRs are relatively new. In fact, until recently, many African minds conceived of dispute resolution through the legal process outside the customary law simply as litigation. Commercial arbitration, particularly international arbitration, was regarded with skepticism flowing mainly from unsavoury experiences in the past at the hands of biased international arbitrators.⁶³ Even now that awareness has been created in most countries, arbitration is still not as popular with policy and law makers as litigation. The natural consequence of this is that arbitral tribunals are not kept in mind when constitutions are drafted. The words 'other tribunal' are therefore not a reference to arbitral tribunals, but to official or public quasi-judicial tribunals, such as tribunals of inquiry set up by government.

Generally, the independence and impartiality of an arbitration tribunal and its duty to treat the parties equally are consistent with the strict principles of fair hearing and have been provided for clearly in African arbitration statutes. Examples are section 12 of Uganda's Arbitration and Conciliation Act, 2000, and section 8 of Nigeria's Arbitration and Conciliation Act.⁶⁴ Each requires an arbitrator to be impartial and independent with respect to the dispute and parties before him. This is not usually the case with the courts and official or public tribunals.⁶⁵ The provision is missing from statutes establishing those courts and

⁶² It needs to be noted that the waiver only affects his right to litigate the substantive dispute. It does not abrogate his right of recourse to the courts (by way of application) for the enforcement or setting aside (as the case may be) of any award rendered in the arbitration. Nor is he disentitled from appealing from a decision given in such an application. In African states that have enacted statutes based on the UNCITRAL Model Law, he has no right of appeal against the award.

⁶³ *Per J Paulson*, 'It may be true that in the beginning of this century, and until the 1950s, arbitrations conducted by various "international tribunals" or commissions evidenced bias against developing countries': 'Third World participation in international commercial arbitration' (1987) 2 *ICSID Review* 21. See also M Sonarajah 'Power and justice in foreign investment arbitration' (1997) 14 *Journal of International Arbitration* 103; Al Chukwuemerie 'Commercial and investment arbitration in Nigeria's oil and gas sector' (2003) 4 *Journal of World Investment* 828.

⁶⁴ Ch A18 Laws of the Federation of Nigeria 2004 (revised); sec 13 Kenya's Arbitration Act 1995.

⁶⁵ In Nigeria, the High Court laws of the Eastern, Northern and Western regions which apply in all the State High Courts in the country contain no such provision. So also the Court of Appeal Act and Supreme Court caps C36 and S15 respectively Laws of the Federation of Nigeria, 2004. Nor does the Tribunals of Enquiry Act cap T21 contain any such provision.

tribunals because constitutional provisions on fair and public hearing bind them. The provisions on a fair hearing appear in African arbitration statutes, simply because the draftsmen, knowing that the constitutional provisions do not apply to arbitral tribunals, have to make provision for arbitral tribunals. In the absence of such provisions in arbitration statutes, arbitral tribunals would infringe no statutory law if they did not observe a fair hearing.

As already stated, African countries have for some time now had deliberate policies to enact modern arbitration statutes and generally make their shores preferred venues for international commercial arbitration.⁶⁶ It is inconceivable that they would want to remove or destroy the prime characteristics and advantages of arbitration over litigation (privacy, etc) by requiring all arbitral proceedings to be held in public. For instance, since 1967 Nigeria has consistently taken steps to aid the growth of the law and the practice of arbitration within her shores and has consistently tailored her policies and legislations in that direction. She could therefore⁶⁷ hardly have in 1999 adopted a constitutional policy destroying the privacy of arbitration.

Article 7(1)(a) of the African Charter grants every individual the right of access to 'competent national organs' and article 7(1)(d) grants him 'the right to be tried within a reasonable time by an impartial court or tribunal'. It is not clear why, with respect to a criminal trial, the African Charter uses the specific words 'court or tribunal', while using 'competent national organs' in respect of civil suits. Nonetheless, it seems rather clear that 'competent national organs' include tribunals set up under the law. A community reading of articles 7(1)(a) and 7(1)(d) seems to suggest this. Other regional and global human rights instruments are clearer on the point. The jurisprudence that has been developed around those clearer provisions supports our argument that arbitral tribunals are not part of the tribunals envisaged by provisions on access to courts and tribunals. For instance, the European Convention on Human Rights provides in article 6 that, in the determination of his civil rights and obligations, everyone is entitled to a fair and public hearing 'by an independent and impartial tribunal established by law'. It has been held repeatedly that 'tribunal established by law' in that provision does not include an arbitral tribunal in a voluntary arbitration and that entry into an arbitration agreement by a party amounts to a renunciation of the right to go to court.⁶⁸ It has also been held that, for a tribunal to be a 'tribunal established by law' it needs to, amongst other things, exercise judicial functions, have independence from the executive arm of government and the parties, have a fixed term of

⁶⁶ See n 62 above.

⁶⁷ For further elaboration of the point and the instances, see Chukwuemerie (n 63 above).

⁶⁸ See *Deweever v Belgium* (1980) 2 EHRR 439; *R v Switzerland* (n 48 above).

office for officers and have guarantees afforded as to its procedure.⁶⁹ The African Commission may be persuaded by arguments in the same direction when interpreting articles 7(1)(a) and (d).

The International Covenant on Civil and Political Rights, of which most African countries are state parties, provides in article 14 that:

All persons shall be equal before the courts and tribunals. In the determination of . . . his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interest of justice; but any judgment rendered . . . in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

In its General Comment No 13, the United Nations (UN) Human Rights Committee⁷⁰ stated:

- (1) The Committee notes that article 14 of the Covenant is of a complex nature and that different aspects of its provisions will need specific comments. All of these provisions are aimed at ensuring the proper administration of justice, and to this end uphold a series of individual rights such as equality before the courts and tribunals and the right to a fair and public hearing by a competent, independent and impartial tribunal established by law.
- (2) In general, the reports of states parties fail to recognise that article 14 applies not only to procedures for the determination of criminal charges against individuals but also to procedures to determine their rights and obligations in a suit at law. . . .
- (4) The provisions of article 14 apply to all courts and tribunals within the scope of that article whether ordinary or specialised . . .

Of course, this commentary has no force of law whatsoever and can only at the very best have persuasive authority. Despite the commentary, countries have felt free to interpret the provision as excluding arbitral tribunals. In fact, the commentary itself was a reaction to the general trend of interpretation and implementation of article 14 by state parties which involved or entailed the exclusion of arbitral tribunals. For instance, the article has force of law in Hong Kong having been domesticated by the Hong Kong Bill of Rights Ordinance, 1991, but several Hong Kong courts have taken the view that not all tribunals fall under the provision. In *R v Town Planning Board ex parte Kwan Kong Co Ltd*,⁷¹ Wang J held *inter alia*:

⁶⁹ *Le Compte, Van Leuven & De Meyere v Belgium*, (1982) 4 EHRR 1.

⁷⁰ Adopted by the Committee on 12 April 1984 at its 516th meeting.

⁷¹ (1995) 3 HKC 254. See also *MA Wan Farming Ltd v Chief Executive in Council* (No 1) (1998) HKC 190.

'Suit at law' therefore means very clearly a legal proceeding in a court of law. I do not believe that when reference is made to a suit at law, any lawyer or layman will have any doubt that the words can have only one meaning, namely, a legal court proceeding . . . The usage of the words in a 'suit at law' in connection with judgment delivered in public can leave no doubt that the reference there is unmistakably to a formal judgment in legal court proceedings delivered in public, something familiar to everyone brought up under the common law system of Hong Kong. The 'suit at law' can therefore only mean a formal suit, action or proceeding brought in court by one party against another party.

It should be abundantly clear from the foregoing that a recourse to arbitration by any person in Africa is not a breach of his right of access to a court or formal tribunal, but rather a voluntary waiver of that right. Since arbitration is currently the best dispute resolution mechanism, particularly in an African/Third World setting,⁷² it is a waiver that enables the party to achieve the best for himself or itself in the resolution of the dispute at hand.

We contend that on yet another ground arbitration enforces the African's right of access to justice more than mere access to court does. The African Commission has repeatedly held that the right of access to the courts 'must naturally comprise the duty of everyone, including the state, to respect and follow these judgments'.⁷³ Despite pious and salutary provisions in most African constitutions on the rule of law and the independence of the judiciary, most African countries, as represented by their governments, have failed woefully in this area. The continent has had more than its share of military and other oppressive dictatorships run by self-centred officials.⁷⁴ Such regimes behold court judgments with deep contempt and arrogant defiance. In fact, in the imagination of most such rulers the fact that judges and the courts constitute an arm of government simply means that the judges and courts are extensions of the executive. They further imagine that judges and courts must take instructions from rulers (the executive) and should not dare 'annoy' them through adverse judgments. Even some civilian

⁷² See nn 18 & 20 above and the texts thereof.

⁷³ *Media Rights Agenda & Others v Nigeria* (2000) AHRLR 200 (ACHPR 1998). See also *Amnesty International v Zambia* (2000) AHRLR 325 (ACHPR 1999) para 44.

⁷⁴ Nigeria, eg, has been independent since 1960, but for 39 of those 47 years, oppressive military regimes with little regard for the rule of law have held sway. Of the 17 years of civilian regimes, a former military general and former military Head of State has ruled for nearly eight years with very little difference, if any, in his perception and attitudes in government, particularly towards court judgments, from when he was a military dictator. Military and other dictators have held sway for different but long periods in Cameroon, Chad, Egypt, Ethiopia, Ghana, Somalia, Uganda and Zimbabwe.

regimes disobey court orders with surprising impunity almost as a matter of course.⁷⁵

On the contrary, arbitral awards are not observed in the breach. Even oppressive governments normally obey arbitration awards, particularly when other nationals or foreign interests are involved.⁷⁶ To that extent, therefore, the question as to whether or not arbitration breaches any citizen's human right does not arise at all. The truth is rather that, while the courts are often helpless in the breach of citizens' rights which they (the courts) pronounce upon, arbitration effectively secures citizens' rights in this area.

It must be noted that a waiver of the right of access to court (ie by electing to go to arbitration) does not amount to a waiver of other fundamental procedural safeguards under the different African constitutions. Whether it is an arbitral tribunal or any other adjudicating mechanism, the party's right to a fair hearing by an impartial umpire remains intact, as we shall see in the next section.

3.2 A fair hearing within a reasonable time

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. Practically all African constitutions provide for a fair hearing. Section 19(13) of the Constitution of Ghana, 1992, demands that every civil case 'be given a fair hearing within a reasonable time'. The South African Constitution provides in section 34 for a 'fair public hearing' before a court or another independent and impartial tribunal or forum. Section 36(1) of the Nigerian Constitution, 1999, entitles every person to 'a fair hearing within a reasonable time' by a court or other tribunal established by law and constituted in such a manner as to secure its independence and impartiality. Ironically, some countries have no provisions on the right to a fair hearing in their constitutions for civil cases and matters.⁷⁷ In such countries, parties can only rely on other statutory provisions and the common law prin-

⁷⁵ Eg, in December 2004 the Nigerian Supreme Court declared as unconstitutional and invalid the holding back of funds accruable to local governments (the third tier of government in the country) in Lagos State by the Federal Government and ordered that the funds be released forthwith in *Attorney-General of Lagos State v Attorney-General of the Federation* (2005) All FWLR (pt 244) 805. The President soon after the judgment asserted on prime time national television that the funds would not be released. He and his party men ceaselessly taunted and cajoled the courts on the matter and held on to the funds until August 2005 when just about one-third was released. The rest is yet to be released about three years after the judgment.

⁷⁶ Even Libya, in the days of its ultra-radicalism, obeyed the awards in *LIAMCO v Libya* (1981) 20 *International Legal Materials* 1; *BP Exploring Co Libya Ltd v Libya* (1979) 53 *International Law Reports* 297; *TOPCO/CALASIA v Libya* (1970) 53 *International Law Reports* 389, even though it considered them objectionable.

⁷⁷ The Constitutions of Algeria, Angola and Equatorial Guinea have no such provision.

principles governing a fair hearing. Article 7(1)(d) of the African Charter provides for 'the right to be tried within a reasonable time by an impartial court or tribunal'.

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.⁷⁸

A court or tribunal has to give each party an (equal) opportunity to present his case and challenge the other party's case. This equality of opportunity is not to be evaluated solely from the point of view of the amount of time allocated. If a plaintiff in a court action elects to file his statement of claim within seven days instead of the 21 days provided for under the relevant rules of court, the defendant cannot be compelled to also file within seven days. He may decide to use the length of time (21 days) granted him by the rules. In the same way, if a party to an arbitral proceeding elects to file his points of claim within three days, nothing says that the respondent must have only three days to file his points of defence.

Since arbitral tribunals are not part of the dispute resolution fora covered by African constitutions, the principles governing a fair hearing or natural justice stated in these constitutions do not bind them. The rules that govern arbitral tribunals and arbitrators in this regard are to be found in the individual countries' arbitration statutes and common law, which in effect have the same rules for arbitration as the constitutions have for litigation. In Nigeria, for instance, under the common law any adjudicatory function performed in breach of any of the tenets of a fair hearing is absolutely null and void and of no effect whatsoever. The courts have held that such a proceeding has no consequence with respect to the rights and obligations of the parties.⁷⁹

There are arguments in some jurisdictions outside Africa, in Europe for instance, on whether or not the right to a fair hearing or equal treatment can be waived by a party.⁸⁰ In those jurisdictions, even when a tribunal or court is not independent and impartial, its judgment may still stand if the trial was 'generally fair'.⁸¹ In African countries with the same common law heritage as Nigeria, it is not so because, generally, the right to a fair hearing cannot be waived by any party involved

⁷⁸ See the different provisions already cited above. Typical examples are South Africa: 'a court or, where appropriate, another independent and impartial tribunal or forum' — sec 34; Togo: 'in all affairs have his cause heard and decided equitably by an independent and impartial' forum — sec 19; and Nigeria: 'a fair hearing . . . by a court or other tribunal . . . constituted in such a manner as to secure its independence and impartiality' — sec 36(1).

⁷⁹ *RC Okafor v Attorney-General of Anambra State* (1991) 6 NWLR (pt 200) 659 662.

⁸⁰ Jaksic (n 1 above) 233.

⁸¹ *Millar v Dickson (Procurator Fiscal, Elgin) and Other Appeals* (2002) 3 All ER 1041 Privy Council; *Brown v Stott (Procurator Fiscal, Dunfermline) & Another* (2001) 2 All ER 97.

in any proceeding. The right is not granted to him for his benefit alone, but also for the general good of society.⁸² He is incompetent to waive that which belongs to him and every other member of his society. To the best of this writer's knowledge, a case is yet to be seen in common law Africa in which the court or tribunal was obviously partial and dependent and the trial was said to have been fair overall or 'generally fair'. If such an issue arises before the courts in common law Africa, it can almost certainly be said that the courts, as alert as they are against a breach of fundamental rights, will have great difficulty in saving such a proceeding. Once a rule is allowed to stand to the effect that an unfair trial is generally fair, it will be very difficult in the majority of cases to draw the line between apparent partiality and dependence, and 'overall' or general fairness of trial. On the contrary, the African Commission has established for the continent persuasive authority in one of its decisions, to the effect that a trial must be fair as a whole, that is, wholly fair.⁸³

As shown above, six African countries have domesticated the UNCITRAL Model Law, a number which will increase with time.⁸⁴ In each country, article 18 becomes part of that country's statute on arbitration. It provides that the parties shall be treated equally and that each party shall be given the opportunity of presenting his case.⁸⁵ This ensures that the tribunal treats the parties equally and evenly without fear or favour — the principle of equality of arms. This principle is so sacrosanct that, in jurisdictions like Ghana and Nigeria, it is an abuse of office by a tribunal or an arbitrator if any one of the principles of a fair hearing is breached.⁸⁶

It has been held by the European Court of Human Rights that equality of arms in a matter involving two opposite interests —

- (a) means that each party should be afforded a reasonable opportunity to present his case, including his evidence, under conditions that do not place him at a substantial disadvantage *vis-à-vis* his opponent;⁸⁷

⁸² See eg the Nigerian case of *Jonathan Enigwe v Michael Akaigwe* (1992) 2 NWLR (pt 225) 505 and the Ghanaian case of *Hage v Talch* (1967) GLR 372.

⁸³ *Free Legal Assistance Group & Others v Zaire* (2000) AHRLR 74 (ACHPR 1995).

⁸⁴ Generally, before the advent of the Model Law, most countries of the world, not just Africa, did not have provisions on fair hearing in their arbitration statutes. The common law countries relied on the common law for the observance of the rules of natural justices in the arbitral process.

⁸⁵ Sec 14 Nigeria's Arbitration and Conciliation Act; sec 18 Uganda's Arbitration and Conciliation Act, sec 19 Kenya's Arbitration Act; art 26 Egypt's Law No 27/1994.

⁸⁶ See the Ghanaian case of *Hage v Talch* (n 82 above) 375 and sec 28 of the Ghanaian Arbitration Act 1961 — Act 38 and the Nigerian cases of *Taylor Woodrow Nig Ltd v SE GmbH* (1993) 4 NWLR (pt 286) 127 and *Lagos State Development and Property Corporation v Adold. Stamm International (Nig) Ltd* (1994) 7 NWLR (pt 358) 545 as well as sec 8 of the Nigerian Arbitration and Conciliation Act on disclosure and challenge of arbitrators.

⁸⁷ *Stran Greek Refineries and Stratis Andreadis v Greece* (1995) 19 EHRR 293.

- (b) involves an opportunity to comment on all facts of importance to the award, to canvass his legal viewpoint and oppose his opponent's, to offer relevant evidence and take part in the proceedings;⁸⁸
- (c) also entails a duty on the part of the tribunal to properly examine the submissions, arguments and evidence adduced by each party without prejudice to its assessments of whether they are relevant to its decision in the matter at hand;⁸⁹ and
- (d) proceedings are not conducted in a manner that puts a party at an advantage over and against the other party. It is of no moment that the favoured or privileged party did not actually benefit from the advantage. It suffices that he could have benefited from it.⁹⁰

African courts and the African Commission are likely to feel persuaded by this reasoning when faced with cases calling for decisions on these points. As yet there has not been such an opportunity.

The foregoing considerations show that, sometimes, there may be a theoretical equality of arms, but a practical equality tainted with misdemeanour. If, for instance, an arbitrator makes overtures 'equally' to both parties directly or through their lawyers, offering his services for any future arbitrations, his award in the matter at hand cannot stand, even if it is argued that the development did not affect his decision in the matter at hand. In *Babcock and Wilcox Co v PMAC Ltd*,⁹¹ this was what happened between an arbitrator and the parties' lawyers. One of the lawyers agreed to consider him for future work while the other told him that his conduct was improper. Though the court reasoned that 'it does not necessarily follow that the arbitrator's impartiality was compromised', it nullified the award. A contrary decision would have been very surprising because by their responses the lawyers (and therefore the parties they represented) had put themselves in unequal positions before the arbitrator. The party whose lawyer acted wrongly by making a promise of future consideration to the arbitrator had automatically been placed at an advantage over the other party whose lawyer had adopted the correct professional approach.

National statutes in the six countries that have domesticated the Model Law also ensure that each party has adequate notification of proceedings. This is because without due notice to, and/or appearance of, a respondent, it cannot be said that the parties are equal or are being treated equally or even that the tribunal has jurisdiction to entertain the matter.⁹² Article 21 of the Model Law determines that, unless

⁸⁸ *Dumbo Beheer BV v The Netherlands* ECHR (27 October 1993) Ser A 274, para 35.

⁸⁹ *Kraska v Switzerland* ECHR (19 April 1993) Ser A 254.

⁹⁰ *Borgers v Belgium* ECHR (30 October 1991) Ser A 214.

⁹¹ (1993) 863 SW 2d 225 233-234.

⁹² See eg sec 9 of the Kenyan Arbitration Act; sec 8 of the Ugandan Arbitration and Conciliation Act.

the parties agree to the contrary, arbitral proceedings over a dispute commences on the date on which the request for arbitration (a notice of arbitration) is received by the respondent.⁹³ All through the proceedings, whatever document a party forwards to the tribunal, he must forward to the other party. In the same way, whatever the tribunal sends to or does with one party, it must send to or do with the other party.⁹⁴

Article 12 requires any person approached in connection with an appointment as an arbitrator to disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. He bears this duty of disclosure throughout the proceedings.⁹⁵ Therefore, to competently sit over an arbitral proceeding, each and all of the arbitrators must be independent of the parties and also actually impartial.

Independence is decipherable on an objective basis or standard whilst partiality can hardly be detected before it manifests. Partiality rests on the personal conviction, prejudices and general mental disposition of the arbitrator in question.⁹⁶ If in any business, blood or deep social relationship exists between an arbitrator (or a presiding judge in a court) and one of the parties, he is not independent of that party.⁹⁷

It is obvious from the foregoing paragraphs that, though in Africa constitutional provisions on a fair hearing do not govern arbitration, the principles guaranteeing a fair hearing apply in arbitral proceedings on the continent. This is particularly so in countries that have enacted the Model Law into their domestic legal regimes on arbitration. It has been argued that the specific nature of arbitration as a dispute resolution mechanism 'does not allow that the elements comprising the fair administration of justice . . . be transported *mutatis mutandis* to voluntary arbitration'.⁹⁸ However, in practice, the different aspects of the right to a fair hearing are effectively secured in arbitration. It follows,

⁹³ Sec 17 Nigeria's Arbitration and Conciliation Act; sec 21 Ugandan Act.

⁹⁴ See, eg, art 15(3) of the UNCITRAL Arbitration Rules 1976, adopted also by the six African countries that have adopted the Model Law.

⁹⁵ Secs 8(1) & (2) Nigeria's Arbitration and Conciliation Act; sec 12 Ugandan Act.

⁹⁶ *Kingsley v UK* Application No 35605/97, judgment of 7 November 2000 para 47.

⁹⁷ For a detailed examination of these things, see Al Chukwuemerie 'Appointment and challenge of arbitrators under the UNCITRAL Model Law' (1999) *International Arbitration Law Review* 167. See also *Constitutional Rights Project (in respect of Lekwot & Others) v Nigeria* (2000) AHRLR 183 (ACHPR 1995); *Constitutional Rights Project (in respect of Akamu & Others) v Nigeria* (2000) AHRLR 180 (ACHPR 1995).

⁹⁸ Jaksic (n 1 above) 226. See the American case of *Commonwealth Coatings Corp v Continental Cas Co* (1968) 393 US 145, where Justice Black posited that the 'requirements of impartiality taken for granted in every judicial proceeding' were not suspended merely because the parties had agreed to arbitration. He then said that 'we should, if anything, be even more scrupulous to safeguard the impartiality of arbitrators more than judges'. In *JP Stevens & Co Inc v Rytex Corp* (1974) 312 NE 2d 466 469, the court was of the view that the 'arbitrator's quasi-judicial function . . . demands no less a duty to disclose than would be expected of a judge'.

therefore, that proper arbitral proceedings on the continent do not breach the fair hearing principle.

It needs to be pointed out here that in another major way, arbitration seeks to secure greater impartiality than the court system. Nowhere in Africa, to the best of this writer's knowledge, is a judge required by any expressly written rule to disclose to the parties appearing before him certain relationships he may have had with any of them. The law takes his impartiality for granted and does not demand of him to make disclosures — it is assumed that he will do so. If there was or is a relationship which can reasonably be expected to affect his independence or impartiality, he is expected to disqualify himself from hearing the matter and have it transferred to another judge. However, he may only disclose the reason — the relationship — if he so wishes. If, in his judgment, the relationship is not such that it will affect his judgment, he can keep quiet about it, whether or not it is known to the other party. If the other party finds out about the relationship and raises it, it would be considered, but if that party never gets to know or fails to raise it, the case will proceed as usual. This therefore means that a judge who is not very honourable⁹⁹ may well have a relationship with one of the parties in a matter before him. Knowing that it can or indeed will affect his judgment, but that the disadvantaged party does not know about the relationship, he may keep quiet on it, hear the matter and, out of bias, enter judgment for the favoured party.¹⁰⁰

That is hardly possible in arbitration. As part of the impartiality requirements, every arbitrator is required to disclose to the parties and fellow arbitrators in the matter any prior or contemporary relationship with any of the parties that may be capable of affecting his independence and/or impartiality.¹⁰¹ He bears the duty for the duration of the arbitral process.

⁹⁹ Much as the society, particularly lawyers, would wish that all judges were very honourable, events in several countries show that some are not. For more on this — corruption, sectional sentiments — see Chukwuemerie (n 18 above).

¹⁰⁰ This reality is often lost on many a lawyer, especially the non-litigators. There is an unscrutinised mental picture (which is in some way helpful to the profession) that a judge is an honourable man and will make necessary disclosures and decline from taking a case if there are impairing circumstances on his part. Perhaps it is that assumption that has caused several legal systems not to make specific rules on mandatory disclosure, and for sanctions in the event of failure to make such a disclosure. Indeed, if an impairing factor is discovered the case is transferred from the erring judge and if he has delivered a judgment it is liable to being set aside, but that is about all. This is one of the areas where the statement by a former judge is most appropriate with respect to practically every country, to wit: 'It has always seemed to me — and I cannot resist saying this even though it might not be traditional and to do so might be controversial — that we lawyers are too complacent. Do we examine our system often enough or closely enough to see how it can be improved? How often are these fundamental questions even addressed, let alone answers sought? These and many others should be.' — Justice Gerald Butlet, QC in his retirement address at the Southwark Crown Court, 8 May 1997.

¹⁰¹ See art 12 of the Model Law, sec 8 of Nigeria's Arbitration and Conciliation Act; sec 13 of the Ugandan Act; sec 13 of the Kenyan Act.

A disclosure made by an arbitrator under this rule enables others to dispassionately consider the matter and decide whether he should withdraw or continue. That way, the matter is taken away from his one-man opinion, which obviously would look upon his action or situation more favourably than a detached third party may. It is extraordinary men that are able to judge themselves or their actions with the same detachment and dispassion with which a non-involved person would.

The duty of disclosure in this way ensures that persons laden with bias or potential bias do not get to hear causes and matters in which they would, even if unconsciously, favour or victimise any one. Of course, like any other good thing, if the duty of disclosure gets overstretched, it becomes itself counter-productive and a hindrance to arbitration. That has not happened in Africa, to the best of this writer's knowledge, but there are examples in the United States, for instance, to be avoided. In *Al-Harbi v Citibank, NA*,¹⁰² A lost an award before three arbitrators, one of whom was C. A discovered that C, a lawyer, had been a partner in a firm which represented (B was the other party in the arbitral proceedings) interests affiliated with B's interests. It was found that, though C had never met B, never worked on B's matter and did not know that B or B's affiliate had been a client of that firm (which in any case he had left), he was not in a position to ask the firm for a conflict check. The court of first instance invalidated the award because of his failure to disclose these facts. The decision was only overturned upon appeal. The duty of disclosure need not be that cumbersome. Prospective arbitrators can hardly be required to embark on a voyage of discovery to unearth very far-away or reasonably inconsequential events they may very well have forgotten. An arbitrator only needs to disclose that which would cause a reasonable man to suspect bias. The standard is that of a reasonable man, not a timorous or highly litigious man determined to find excuses with which to attempt the overturning of an award, or an unnecessarily suspicious person.

If there is any relationship or circumstance that can affect the prospective arbitrator, then it is a valid ground for him to be challenged by the disadvantaged party. If he refuses to withdraw, the other arbitrators may ask him to withdraw from the proceedings and he must.¹⁰³ A failure to disclose a disclosable relationship has been held in an American case, *Richo Structure v Parkside Village Inc*,¹⁰⁴ to be a disqualifying factor. An arbitrator failed to disclose past business relationships with the party which eventually won the award. That party's lawyer had in the past represented the offending arbitrator and was, at the time the arbitral process was taking place, also representing him. The award was invalidated. The court reasoned that, if the facts had been disclosed, the

¹⁰² (1996) 85 F 3d 680.

¹⁰³ See art 12 of the Model Law; sec 8 of the Nigerian Act, sec 12 of the Ugandan Act.

¹⁰⁴ (1978) 263 NW 2d 204, 213 (Wis).

disadvantaged party would have had an opportunity to evaluate their significance. That party, it was further held, might ultimately have judged that the value of the arbitrator's 'expertise in the subject matter might outweigh the possibility of his being partial'. African courts and arbitration practitioners are likely to find this sufficiently persuasive to adopt in similar circumstances.¹⁰⁵

It must also be stated here that sometimes the high expectations had of judges and other adjudicators such as arbitrators may well be less real than is normally assumed. It is particularly so when, as often happens in arbitration, the adjudicators are not lawyers and so may not have as much detachment from the case before them as lawyers can have because of their training. It has been stated that:¹⁰⁶

Deep below consciousness are other forces, the likes and the dislikes, the predilections and the prejudices, the complex of instincts and emotions and habits and convictions which make up the man, whether he be litigant or judge.

Let it also be noted that a litigant's right to have his matter heard 'within a reasonable time', which is part of the right to a fair hearing in African constitutions, is even more likely to be satisfied or achieved by arbitration than litigation. One of the strong points of arbitration above

¹⁰⁵ It may be worthy of note that, much as I am canvassing for compulsory written rules on disclosure for judges just as arbitrators already have done, the duty of disclosure is indeed far more necessary and wider in arbitration than in litigation. This is because arbitrators, being relatively few, are always being circulated among disputes. They are much more likely to have interacted before with the parties or their lawyers. This is particularly so if they are members of the same trade or profession with the parties or their lawyers. Therefore, in considering what could be a disqualifying relationship or event in a particular case a balanced view must be taken of the circumstances. It often happens that the parties desire arbitrators who understand the nuances and peculiarities of the particular kind of business from which their dispute has arisen. No other arbitrator would be more qualified or suitable than the one who is equally a member of that trade or involved in that business, but with whom both parties or one of them may well have had numerous business or other encounters. It is also a fact, however, that in a different (even if far-fetched) sense an arbitrator may well be less patient to get to know the facts of a matter before him or that he may act in presumption. His intimate knowledge of the trade and its standards, in fact, his practical experience, may cause him 'to judge too swiftly in terms of the familiar that which is not yet fully known': L Fuller 'The forms and limits of adjudication' (1978) 92 *Harvard Law Review* 353-383. Indeed, 'The career path of an arbitrator is likely not only to bring him into personal and professional contact with the disputants and their counsel; it is also likely to instill in him a strong sense of how things work — and how they are supposed to work. Even decision-makers who think of themselves as scrupulously neutral may be hard put to avoid the predispositions and preconceptions that so often seem to accompany practical experience as well as purely technical "expertise". This is a dynamic that may operate even in routine cases and seems especially likely where one of the parties claims to have observed "trade standards" and the dispute promises to call into question longstanding practices and patterns of behaviour widespread throughout an entire industry.' AS Rau 'On integrity in private judging' (1998) 14 *Arbitration International* 115-136-137.

¹⁰⁶ B Cardozo *The nature of the judicial process* (1921) 167.

other dispute resolution mechanisms is timeous hearing.¹⁰⁷ What is more, the Model Law and national (African) statutes based on it contain provisions for even much faster disposal of cases than obtains under any other legislation. Article 25¹⁰⁸ empowers an arbitral tribunal to terminate the proceedings if the claimant fails to communicate his statement/points of claim. It equally empowers the tribunal to continue the proceedings up to an award if the respondent fails to communicate his statement/points of defence. This is, however, without treating the respondent's failure in itself as an admission of the claimant's claim. Even after the parties have exchanged pleadings, if any of them fails to appear at the hearing to give evidence in support of his case, the tribunal may proceed to make an award based on the evidence before it.

In most of Africa, the courts often fail in this area as they are congested and delay is a very serious problem. Several factors, such as a lack of equipment, non-conducive service conditions and work environment for judicial officers, account for this. Cases sometimes take decades to get decided. For instance, in the Nigerian case of *Yesufu Adedoyin and Others v Muili Okunola*,¹⁰⁹ the retired Honourable Justice Olatawura was a clerk of the court when the case was filed in the High Court of Ibadan. It lingered on in that court until he left, completed his legal training and qualified as a lawyer, practised law for several years and was appointed a judge. He again encountered the case in that court and sat over it as presiding judge — 15 years later! In *ACB and Another v Prince AO Awogboro and Another*,¹¹⁰ a suit was filed in June 1986 along with a motion on notice for injunction. Appeals to the Court of Appeal and Supreme Court on the propriety or otherwise of the grant of the injunction sought took the next nine years, at which time the substantive issue was moot.¹¹¹

¹⁰⁷ For this and related issues, see Chukwuemerie 'Commercial arbitration' (n 16 above).

¹⁰⁸ Sec 21 of the Nigerian Act; sec 26 of the Ugandan Act.

¹⁰⁹ Suit No 1/92/57 judgment of Olatawura J (as he then was), cited in C Oputa *Our temple of justice* (1993) 27.

¹¹⁰ (1996) 3 NWLR (pt 437) 383.

¹¹¹ Generally, see Al Chukwuemerie 'Delay and congestion in Nigerian courts: Some urgent tasks and viable alternatives' in UU Chukwumaeze & S Erugo (eds) *In search of legal scholarship* (2001). It must be noted, however, that even in arbitration, unless a proceeding is properly managed, delay is a possibility. In *Black Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* (1981) 2 Lloyd's Rep 446, the matter lasted 15 whole years between the arbitrators and the courts for enforcement of, and recourse against, the award. On proposals for solutions, see Al Chukwuemerie 'The parties' rights against a dilatory or unskilled arbitrator: Possible new approaches' (1998) 15 *Journal of International Arbitration* 130.

3.3 Public hearing

With respect to courts and formal tribunals, a public hearing is a must. Thus, except for the noted exceptions,¹¹² any judgment issuing from a non-public hearing or proceeding is invalid. A public hearing for them also includes the public delivery of judgment.

Confidentiality is the prime characteristic of arbitration. Confidentiality ensures that parties' trade secrets and other aspects that they are unwilling to disclose to the public remain their private information. For instance, company A may proceed against another in a dispute that requires disclosure of company A's trade secrets, such as chemical or other formula of production. If it gives such evidence at a public hearing, the evidence becomes public information and the company's competitors can use the information for any purpose. Every and any person who desires can, in the absence of any of the applicable exceptions, attend a public hearing and he cannot lawfully be excluded therefrom if he is not rowdy or otherwise unlawful. This would normally happen in litigation. On this account, parties prefer arbitration. What is more, arbitrators are under a duty not to testify in any subsequent court proceeding about facts that came to their knowledge while acting as arbitrators. In a public (court) hearing, not only the witnesses but the judge can lawfully testify later on facts that came to their knowledge in the course of those proceedings.

Arbitration is mainly a private affair that lays tremendous emphasis on party autonomy — the freedom of the parties to agree on how any aspect of the proceedings should play out. A constitutional provision requiring a public hearing by arbitrators and for awards to be delivered publicly whether or not the parties so desire would be antithetical to autonomy and it would destroy confidentiality. As already stated, confidentiality is a very important part of arbitration. There is nothing in the constitutional or legal cultures and policies of African states to suggest that in this age and time they would be taking steps to scare away parties from arbitration by decreeing the compulsory public hearing and pronouncement of awards. They would not want to convert arbitration into litigation. It would be much less so now that they are taking steps to make their states competitive in the field of international commercial arbitration. In fact, the requirement of a public hearing and public delivery of decisions is proof of the fact that arbitral tribunals are not envisaged by those constitutional provisions.

¹¹² Reasons of morality, public order or national security. Nigeria's sec 36 does not even have any exceptions. It may be argued that some tribunals such as university disciplinary panels or such other domestic panels need not sit in public, ie that not all members of the public (those outside the university, for instance) can lawfully demand to be admitted. Such an argument, however, ignores that 'the public' for such a panel is not necessarily the whole world, but is limited to the university community. It would be curious if there are no issues of security, morality or public order but such a panel proceeds to exclude the members of the university community — the public.

It is highly recommended that African constitutions exclude arbitral proceedings from tribunals that must hold public hearings and public delivery of findings. In the United Kingdom, as is the case in the rest of the world, this is not so. In these places, human rights treaties require all tribunals and courts to hold public hearings. In such places, a solution had to be found so as to preserve the prime characteristics of arbitration. The appropriate authorities have held that an arbitral proceeding and award need not strictly conform with this provision since they could after all be subject to subsequent control by courts that are, in themselves, bound to observe a public hearing and public pronouncement of decisions. That way, the desired guarantees are provided by the courts, which are then in a position to cure any defects of substance (not just form) that may have occurred in an arbitral proceeding. This is generally the position in the United Kingdom and in the jurisprudence of the European Court of Human Rights, with respect to the statutory adjudication scheme and under the UK Human Rights Act, 1998. It is equally the case under article 6 of the European Convention on Human Rights. In *Bryan v United Kingdom*,¹¹³ it was held that article 6 would not be breached if the proceedings in question were subject to 'subsequent control by a judicial body that has full jurisdiction and provides the guarantees of article 6'. This was followed in the English case of *Austin Hall Building Ltd v Buckland Securities Ltd*,¹¹⁴ where the court considered a public hearing with respect to adjudication. It held that, in answering the question whether a right to a public hearing had been observed, it was necessary to consider not only the adjudication process itself, but also the subsequent court proceedings that may become necessary in enforcing the adjudicator's decision.

Even if fair hearing provisions in African constitutions were to cover arbitral tribunals, it is possible that African courts would feel compelled to promulgate rules similar to this one. This is because, in practice, every African country's arbitral awards are enforceable only in the courts;¹¹⁵ courts which are themselves bound to observe public hearing and public delivery of judgments, as has already been shown in this work. No doubt, those courts generally lack the power to go into the merits of an award. They have jurisdiction simply to recognise and enforce an award or deny recognition and enforcement. Nonetheless, they certainly exercise 'subsequent control' of the awards and the arbitral process in the sense meant in *Bryan*. To that extent, therefore, arbitration proceedings would not be invalid in any African country that adopts the *Bryan* jurisprudence, despite being held in private.

Whichever of these options is taken as correct, an important factor is that African countries must preserve the confidentiality of arbitration.

¹¹³ (1996) 21 EHRR 342.

¹¹⁴ (2001) 25 EG 155; CILL 1734.

¹¹⁵ See, eg, secs 31 & 51 of Nigeria's Arbitration and Conciliation Act.

Otherwise they would destroy the very essence of arbitration. Such a destructive move would breed deep scepticism and dissatisfaction against arbitration amongst citizens. This would be an undesirable situation; the kind of situation which African countries, like the rest of the Third World, would not want.¹¹⁶ It would also run against the grain of the popular international position. As a further consequence, it would make African countries less attractive to parties who ordinarily might have chosen African countries as a venue for their arbitrations.

The African Charter does not provide for a public hearing even by the courts. As it concerns arbitration, this is a very commendable position. The position joins the African constitutions in freeing arbitration on the continent from any requirement for a public hearing or public delivery of judgments. Equivalent human rights treaties, such as the European Convention on Human Rights and the American Convention on Human Rights, and indeed even the Covenant on Civil and Political Rights, provide for public hearings.

The position exemplified by the African Charter lends credence to my contention that African countries do not impose public hearings and public delivery of awards on arbitrators. This is proof of the fact that, where necessary, the continent has charted its own course and need not be judged by, or prevented from taking the initiative. A necessary initiative now underway on the continent is the arbitration of human rights disputes, as discussed below.

4 Arbitration of human rights matters

Human rights causes and matters normally arise when a party's right has been abused or is about to be abused — in Africa most often by a government or its agents. Such abuses occur in the realm of torts or delict, not contract. Our interest here is not just in whether such abuses are currently arbitrable, but also whether they should become arbitrable.

It has long been the position that tortious or delictual claims are not arbitrable.¹¹⁷ This may be explained on at least two 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. This is even far less likely

¹¹⁶ For the causes of scepticism and dissatisfaction and emergence therefrom, see Chukwuemerie 'Enhancing the implementation of economic projects' (n 16 above) 240. See also Sonarajah (n 63 above).

¹¹⁷ See, eg, *Kano State Urban Development Board v Fanz Construction Company Ltd* (1990) 4 NWLR (pt 142) 1.

with respect to an agreement on how to extract a remedy from the aggressor by going to arbitration. This is particularly so if the aggressor is an oppressive government. Even if the parties were to be accommodating to each other so as to mutually agree on anything, such as a resort to arbitration, they would face a further hurdle if the breach of the right in question also constitutes a criminal offence. In that case, the breach may well not be compromisable and would therefore not be arbitrable under public policy. These difficulties, however, are not insurmountable or even as serious as they may look *prima facie*. I will show that African governments have often been parties to other forms of arbitration and that there is nothing intrinsically wrong with their being parties to human rights arbitrations.

In some African countries, the position on whether human rights are arbitrable seems to have been left open by statutes and constitutions. In Nigeria, for instance, section 46 of the 1999 Constitution provides 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'. The phrase 'may apply to' in the provision is capable of more than one interpretation. It could mean that he may or may not apply for redress, that is that he may decide to forego the pursuit of his rights: He 'may apply to court' as opposed to 'shall apply to court'. It could also mean that he may apply to court just as he may decide to apply elsewhere, for instance to an arbitral tribunal set up for the purpose. A tribunal could be set for the purpose, if the parties had agreed before or after the dispute that, rather than going to court and spending years on the adjudication of the matter, they should go to arbitration. There is really nothing in the statutes, public policy or indeed the common law stopping parties from submitting such compromisable claims to arbitration.

Another difficulty is that the chances of winning of a would-be claimant in such a proceeding are further diminished if he cannot show that the dispute over such a violation of his fundamental right is a dispute of a commercial nature. Under some African arbitration statutes that are based on the UNCITRAL Model Law, arbitration is necessarily commercial if undertaken under these statutes. The statutes, following the footnote to article 1 of the Model Law, list a number of aspects to be regarded as 'commercial'.¹¹⁸ Though the list is not exhaustive, it is

¹¹⁸ They are sec 57(1) of the Nigerian Act and art 2 of Egypt's Law Concerning Arbitration in Civil and Commercial Matters. Each provides that the term 'commercial' should 'be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not'. It further states that relationships of a commercial nature 'include, but are not limited to . . . any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering, licensing; investment; financing; banking; insurance, exploitation agreement or concession; joint venture and other forms of industrial or business co-operation; carriage of goods or passengers by air, sea, rail or road'.

obvious that these aspects are in the same general family of aspects — commercial ventures and concerns. By the application of the *eiusdem generis* principle of statutory interpretation, tortious wrongs and claims are clearly excluded. This is notwithstanding the fact that the provisions provide that relationships of a commercial nature 'include, but are not limited to' those aspects. Under these provisions, when a man is wrongly detained without trial or his property is destroyed or seized by a rampaging government official or agency or a private individual, it will be difficult to bring it under any of those subheads. The position would be the same when he has suffered one form of discrimination or the other based on race or tribe, religion, gender or any other ground.

Another hurdle is that, though an arbitration agreement can be made to cover future disputes, there can be no arbitral proceeding over a dispute that has not arisen, no matter how soon it may happen. There must be an existing dispute between the parties. Therefore, any application based on an allegation that the party's right is 'likely to be contravened' will hardly be arbitrable on this ground, since it would not be a dispute in the sense envisaged by the arbitration statutes.

These difficulties notwithstanding, in the African environment at least some disputes on human rights violations may be arbitrable. Despite the pious constitutional provisions in African countries, it is often difficult or impossible to secure redress for human rights violations through the courts, especially when a government is the defendant. This is due to the inordinate delay that attends litigation in those countries. Sometimes there are judges who are more 'executive-minded' than the executive itself, and would adopt legal interpretations and excuses to deny a citizen his redress when the government has violated his rights.¹¹⁹

Firstly, there is really nothing in legal policy or common sense that determines that a matter is absolutely unarbitrable simply because it has not arisen out of a contractual relationship. It was probably because of this realisation that the UNCITRAL Model Law stipulated what should be arbitrable under it, ie what is 'commercial' to be 'matters arising from all relationships ... *whether contractual or not*'.¹²⁰ It should be sufficient that the parties to a dispute have reached an agreement to go to arbitration whether the relationship or situation out of which the dispute arose is contractual or not.

The requirement for a relationship to be commercial for a dispute arising therefrom to be arbitrable is, all things considered, simply an

¹¹⁹ At one point or the other in their history, each country and people had some executive-minded judges. In the UK of the 1940s, some judges were in that mould concerning the extensive powers the government appropriated to itself to arrest and detain citizens. In *Liversidge v Anderson* (1942) AC 206, Lord Atkin had to sound his time-hallowed alarm; see n 19 above.

¹²⁰ Ie things to be regarded as 'commercial' (my emphasis).

extension — even if an unconscious extension — of the unnecessary old rule for the relationship to be contractual. Commercial relationships are necessarily, or at least almost always, contractual. The philosophy of the Model Law that a matter may be arbitrable whether or not it is contractual ought to be carried through. There is really no irrevocable reason why non-commercial matters should not be arbitrable. This is particularly so in today's complex world where there is — more than ever before — an intermix of issues, ideas and principles in any single legal matter in question. The division of legal causes, matters and principles into straight jacket departments of commercial law, public law, private law, property law, and so on is, particularly now, convenient and real only for study and academic enterprise/endeavour. In real life dispute-resolution processes, any strict division of issues along these lines may well be artificial and impracticable, whether it is in litigation or any other mode of dispute resolution. It is time for the law to drop the rigid classification of matters into 'commercial' and 'non-commercial' for purposes of arbitrability. It should suffice that a compromise is capable of being reached in that the parties have agreed to go to arbitration. The whittling down of party autonomy — one of the bedrocks and virtues of arbitration — in this area ought now to cease. It is instructive that the Model Law set out to end this unnecessary dichotomy by including many things into the class of 'commercial' things. It is regrettable that the effort was easily defeated on delivery by the *eiusdem generis* principle, as already explained in this work.

Even if the foregoing suggestion is considered rather radical for now, a progressive approach to the law can still achieve arbitrability for several human rights disputes. For instance, if a dispute based on a human rights violation is in any way related to those aspects presently classified as 'commercial' by the law, it should be regarded as having satisfied the requirement of being 'commercial' in nature. Thus, if a citizen's right is violated in the course of 'construction of works . . . engineering' and so on, whether or not there is a contract between him and anyone who-soever, the dispute over the violation of his rights could be termed 'commercial' since it arose out of a transaction defined by law as 'commercial'. It should not matter that the dispute itself is tortious or delictual and not 'commercial'.

Turning to the arbitrability of disputes or causes of action that have tortious and criminal elements (ie that are *prima facie* not compromisable), it is submitted that such disputes should be arbitrable. After all, the dispute the parties seek to resolve by arbitration is not the criminal aspect of the matter, but the civil. The criminal aspect — the non-compromisable aspect — would remain for the courts. Thus, if a man is slapped or beaten up by another, they should be able to have the civil wrong and the attendant question of compensation resolved by arbitration if they so wish. The criminal aspect — the assault — would remain for adjudication by the courts. This would be the same as if

the victim was suing in court over a civil aspect, it should be enough that the victim — the complainant — first duly reported the matter to the police. By reporting the matter to the police, he would have set criminal proceedings in motion before taking recourse for a civil wrong.¹²¹

It remains to remark that the fact of the government is the culprit in most cases of human rights abuses does not pose any difficulty to the arbitrability of such disputes. Governments can be parties to arbitral proceedings. This is already happening in investment disputes, particularly under the auspices of the International Centre for the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID), which operates under the ICSID Convention.¹²² African states are members of the Convention and are often parties to proceedings conducted under the auspices of the Centre.¹²³ Even outside of investment arbitrations some African governments have been regular parties, as it were, in arbitrations between them and their own nationals or subjects. In Nigeria, for instance, labour disputes between government and its workers routinely go through mandatory (statutory) arbitration, under the auspices of the Industrial Arbitration Panel, before proceeding to the National Industrial Court or ultimately to the regular courts if the arbitration is unsuccessful.¹²⁴

Since at least some African states and governments get involved in these two types of arbitration, African governments can legitimately be party to arbitrations on violations of citizen's human rights. In fact, it is only through the arbitration of such violations that the victims can be sure of an expeditious hearing and the granting of relief or remedies.

Pursuing remedies for human rights violations through the courts is a very cumbersome process because of the congestion and delay in the courts. On the other hand, arbitration is a fast and effective procedure. Victims of human rights violations by governments can be sure that arbitrators in their matters will be independent and impartial at least on two grounds. One is the compulsory duty of disclosure of impairing relationships and circumstances which arbitrators bear on the continent.¹²⁵ The second is that, although African governments sometimes

¹²¹ In at least most of the common law world, a victim of a tortious wrong that has a criminal element may now institute a civil suit once he has set the criminal proceedings in motion, eg by reporting to the police. See, eg, the Nigerian case of *Military Administrator, Akwa Ibom State v Obong* (2001) FWLR (pt 60) 1456 CA.

¹²² The International Convention for the Settlement of Investment Disputes Between States and Nationals of other States, New York, 1965.

¹²³ See eg the Libyan arbitration cases in n 76 above.

¹²⁴ These are done by virtue of secs 9 and 14 of the Trade Disputes Act cap T8 Laws of the Federation of Nigeria, 2004.

¹²⁵ See sec 3.2 of this article.

attempt to influence court judgments, they are unable to influence arbitrators. Whilst judges are appointed and paid by the state, arbitrators are highly-skilled individuals plying their trade. They cannot afford to be corrupt or pervert justice. Whilst a judge who is known to be pro-government may retain his job despite such a slur, an arbitrator so inclined will be out of business soon. The citizens may never again engage his services. Even if the government re-appoints him, such appointment will easily, vigorously and successfully be challenged by the other party or parties.¹²⁶

The fact that human rights disputes are currently not arbitrated in other parts of the world is no reason to argue that they should not be arbitrated in Africa. Circumstances on the continent necessitate the arbitration of human rights disputes. As the continent begins to have them arbitrated, it will be showing a new path to the rest of the world, just as it has done with the introduction of the concept of international customary law arbitration.¹²⁷ Dogma or colonial hangovers should not be used to dismiss the concept of human rights arbitration

5 Conclusion

This article attempted an examination of whether or not arbitration is antithetical to the human rights provisions in the various African constitutions on access to courts, fair and the public hearing of disputes and a public delivery of judgment. The article argues that arbitration does not breach these rights. It shows that a recourse to arbitration is a waiver of the parties' right of access to court. Parties who have so waived their rights of access to a court cannot allege a breach of that right. The article concludes that arbitral tribunals do not fall into the category of courts and tribunals which African legal systems require to hold public hearing and public delivery of judgments or findings.

The article shows that arbitration engenders fair hearing on the continent more than litigation. It posits the idea that disputes on the violation of human rights are arbitrable and should be arbitrable in Africa. In this regard, it argues that arbitration will ensure the greater attainment of justice for complainants or victims. It demonstrates that, dogma aside, the mere fact that a government is a party does not and cannot, without more, make human rights arbitrations wrong in law or common sense. It has shown that African governments are often parties to

¹²⁶ Under relevant provisions of law for successful challenge and removal of arbitrators by parties. See, as examples, secs 13 of the Ugandan Act, sec 14 of the Kenyan Act, sec 9 of the Nigerian Act, art 530 of the Moroccan Code of Civil Procedure. For more on why arbitration is a better mode of dispute resolution generally and particularly, see Chukwuemerie (n 18 above) and Chukwuemerie 'Commercial arbitration' (n 16 above).

¹²⁷ See n 16 above and the text thereof.

other types of arbitration (such as investment and trade dispute arbitrations) and that there is nothing intrinsically wrong in their being parties to human rights arbitrations. It contends that, even if human rights disputes are not currently arbitrated elsewhere, peculiarities on the African continent now necessitate the arbitration of such disputes in Africa. In that regard the article contends that, in arbitrating such disputes, the continent would be leading the world into a new direction as it has done in another area of arbitration through the concept of international customary law arbitration.

In summary, the inquiry shows that the human rights provisions in African constitutions do not affect arbitration in a negative way. The two legal streams of arbitration and human rights are smoothly flowing through the continent for the good of the people. Things can, in this respect, continue as they are. Things can even improve should disputes on human rights violations be arbitrated.