LEGAL SYSTEM

Application of the Rules of Natural Justice in Arbitral Proceedings in Nigeria

Abdulrazaq Adelodun Daibu*

Introduction

The basis for arbitration as an alternative dispute resolution mechanism is dependent on the parties' preference for a simple, faster and more informal way to resolve their dispute without any publicity, technicalities and rigidity associated with litigation.[1] Arbitration, like other dispute resolution mechanisms is regulated by law; hence the task of arbitrator(s) as umpire is to ensure that justice is done in any reference without infringing the civil rights of parties thereto.[2] Apart from the ethical obligation of arbitrator(s) to use skill, diligence and care in the performance of his duties, the rules of natural justice also imposes a legal duty on arbitrator to ensure that parties to the arbitral proceedings are accorded a fair hearing and equal treatment in line with the rules of natural justice.[3] The rules of natural justice ensure procedural fairness, which ensures parties in judicial or quasi-judicial proceedings have equal opportunities of presenting their cases and dealing with the claims of the other party. The rules are basically twofold: *audi alteram partem* (hear the other side) and *nemo judex in causa sua* (no one shall be a judge in his own case), and are to a greater extent applicable to both statutory and customary arbitration. This article analyses the evolution and significance of arbitration as a dispute resolution mechanism, and the rationale for the application of the rules of natural justice in judicial and quasi-judicial proceedings. This article further considers the application and operation of the rules of natural justice in both statutory and customary arbitral proceedings in Nigeria and concludes by making suggestions and recommendations for its efficient application to ensure procedural fairness in arbitral hearings.

The historical evolution and significance of arbitration

Arbitration is a dispute resolution mechanism that involves amicable resolution of disputes between parties with a binding decision in a judicial manner by person(s) other than a court.[4] The practice of arbitration as a method of resolving disputes has been with mankind in one form or the other from time immemorial, and has grown to be one of the most potent and efficient alternative dispute resolution mechanism in many legal system in recent time; largely because it ensures confidentiality between or among the parties, it saves time, is less cumbersome, is economical and more friendly.[5] It is difficult for any society to lay claim to the evolution of the practice of arbitration. Although countries like China, India, Italy, Nigeria and a host of others claim to be the first countries to introduce the system,[6] evidence of settlement of private, commercial and international disputes through arbitration found in the

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* Lecturer, Department of Private and Property Law, Faculty of Law, University of Ilorin, Ilorin. Nigeria. E-mail: abdulrazaqdaibu@yahoo.com.

[1] Abdulrazaq Adelodun Daibu and Ibrahim Kayode Adam, 'Competence-Competence and Separability under the Nigerian Arbitral Law: a Curse or Blessing?' (2017) Yonsei Law Journal 8 (1 & 2) 31; Muhammed Mustapha Akanbi, 'Contending without being Contentious: Arbitrators, Arbitration and Arbitrability' (University of Ilorin Press, Ilorin, 2014) 3.

[2] Rom Chung, "The Rules of Natural Justice in Arbitration" (2011) 77(2) Arbitration 167.

[3] See s.36(1) of the Constitution of the Federal Republic of Nigeria 1999 (as amended), herein after referred to as the Nigerian Constitution, and s.14 Arbitration and Conciliation Act LFN 2004, herein after referred to as ACA.

[4] Akanbi, n. 1.

[5] Abdulrazaq Adelodun Daibu, "The Lagos State Arbitration Law and the Doctrine of Covering the Field: A Review" (2014) *University of Maiduguri Law Journal* 11, 35.

[6] Muhammed Mustapha Akanbi, *Domestic Commercial Arbitration in Nigeria: Problems and Challenges* (Lambert Academic Publishing, Germany, 2012) 56.

Sumerian inscriptions dating back to 400 BC has debunked the claims.[7] Arbitration has always been an informal and effective method of resolving disputes by which businesspersons would call in a third party to hear the parties to a dispute and give a binding decision in the form of an award.[8] The third party - arbitrator - is usually someone familiar with the parties' trade or business from which the dispute arose or someone with a good knowledge of the domestic rules and nuances of their trade and business practice.[9]

In Nigeria, in the early period arbitrators are usually non-lawyers, but are businesspersons and professionals with a keen understanding and practice of commercial transactions.[10] Arbitrators were usually chosen from business associations and/or professional bodies such as those knowledgeable in insurance, maritime and construction sectors, because the arbitration clauses in most contracts involving these professional groups and business association often provided for the appointment of arbitrators by the respective presidents of these bodies.[11] As a result, these, arbitrators were usually professionals in diverse areas of businesses and relevant fields, e.g. quantity surveyors, architects, insurance professionals, maritime experts and engineers.[12] However in recent years, serving and retired judges, and practicing lawyers are also being appointed as arbitrators, a development scholars have argued is leading to gradual legalisation of the arbitral process.[13] The commercial and contractual origin of arbitration account for the fact that despite advances in knowledge, sophistication and complexities in business relationships parties still prefer arbitration because of its consensual nature as well as confidentiality and flexibility of its proceedings.[14]

Arbitration has been in Nigeria and other parts of Africa long before the advent of the colonialist.[15] In Nigeria for example, various communities have their peculiar systems of disputes resolution known as customary arbitration.[16] Customary arbitration is a traditional system where community heads, traditional chiefs, family heads, and elders are actively involved in dispute resolution to ensure social justice and harmony within and among the various communities.[17] Customary arbitration is still recognised as part of Nigerian jurisprudence practiced among the Igbo, Yoruba and Hausa communities in the south-east, south-west and northern part of the country respectively.[18] The existence and validity of customary arbitration was affirmed by the Nigerian Supreme Court in the case of *Agu v. Ikweibe*[19] thus:

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[7] Ibid 56-57.
[8] Andrew Chukwuemerie, 'A Synergy of Opposite: Effective Commercial Justice, Rights and Liberties in African Jurisprudence' in Andrew Chukwemerie (ed.) Growing The law, Nurturing Justice (Law House Books, Port Harcourt, 2005) 193.
[9] Ibid.
[10] Ibid.
[11] Muhammed Mustapha Akanbi, 'Challenges of Arbitration Practices under the Nigerian Arbitration and Conciliation Act of 1988: Some Practical Considerations' (2012) 78(4) Arbitration 329.
[12] Ibid.
[13] Ibid.
[14] Abdulrazaq Adelodun Daibu Ibrahim Kayode Adam 'Alternative Dispute Resolution and the Dwindling Fortunes of Arbitration in Nigeria: Is Fast Track Arbitration the Solution? (2019) 3 (2) Obafemi Awolowo University Law Journal 466; Sunday Fagbemi, 'The Doctrine of Party Autonomy in International Commercial Arbitration: Myth or Reality?' (2015) 6(1) Journal of Sustainable Development Law and Policy 224.
[15] Virtus Chitoo Igbokwe, 'Law and Practice of Customary Arbitration in Nigeria: Agu V. Ikewibe and Applicable Law issues Revisited" (1997) *Journal of African Law* 41(2) 200.
[16] Muhammed Mustapha Akanbi, Lukman Adebisi Abdulrauf and Abdulrazaq Adelodun Daibu. 'Customary Arbitration in Nigeria: A Review of the Extant Judicial Parameters and the Need for Paradigm Shift' (2015) 6 (1) *Journal of Sustainable Development Law and Policy* 205,207.
[17] Abdulmumin Adebayo Oba, 'Juju Oath in Customary Arbitration and Their Legal Validity in Nigerian Courts' (2008) 52 (1) Journal of African Law 140.
[18] These are the three dominant ethnic groups in Nigeria. See Abdulmumin Adebayo Oba, "Religious Rights and the Corporate World in Nigeria- Products and Personnel Perspective" (2004) Recht in Afrika, 196.
[19] (1991) 3 NWLR (Pt. 180) 385.

> It is well accepted that one of the many African customary modes of settling dispute is to refer the dispute to the family head or an elder or elders of the community for a compromise solution based upon the subsequent acceptance by both parties of the suggested award, which either party is free to resile at any stage of the proceedings up to that point. This is a common method of settling disputes in all indigenous Nigerian societies. [20]

The above decision does not only shows that customary arbitration is recognized under the Nigerian legal system, but also emphasizes the final and binding nature of its award. Apart from these judicial pronouncements, customary arbitration also have statutory and constitutional basis under the Nigerian law. For example, s.35 (b) ACA recognizes the fact that certain disputes may be submitted in accordance with such other laws which scholars have argued to include arbitration and in accordance with customary law otherwise known as customary arbitration.[21] Similarly, s.315(3) and 4(b) of the Nigerian Constitution also recognizes the continued operation of some existing laws before the enactment of the Constitution. Hence, there are arguments that customary law, upon which customary arbitration is based, is part of existing laws.[22] The advent of the statutory/commercial arbitration came with the colonization of Nigeria.[23] Arbitration has developed with time and still a progressive field because parties to dispute are always desirous of settling their disputes with less formality and expense than is involved in recourse to the courts. [24]

An appraisal of the rules of natural justice

The rule of natural justice is of primordial origin and also has scriptural history.[25] The Bible in the book of Genesis[26] narrated how God created Adam and Eve and put them in the Garden of Eden with instructions on what to do and what not to do, particularly an injunction to them not to eat the forbidden fruit. In spite of God's injunction, Eve having been tricked by Satan ate the forbidden fruit and thereafter, convinced her husband Adam to take same. Despite the fact that God saw them and knew what they did, He still gave them a fair hearing by asking them why they were hiding and what they have done. He allowed both of them to state their own side before passing judgment on them.[27]

Similarly, the biblical story of Cain is also relevant.[28] God asked Cain, after Cain had killed his brother, "where is Abel thy brother?" Cain's retort was rather direct, "I don't know: am I my brother's keeper"? Clearly, the opportunity of hearing Cain had been availed him prior to "sentencing". The above scriptural references demonstrate the early application of the principle of natural justice and that the creator of human kind also values fair hearing (which is a basic pillar of natural justice) as God himself did not pass sentence upon Adam and Eve before they were called upon to make their defence.[29]

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[20] See also the cases of *Odonigi* v. *Oyeleke* (2001) 6 NWLR (Pt. 708) 12; *Ohiaeri v. Akabeze* (1992) NWLR (Pt. 221) 1, at 7.
[21] Igbokwe, n. 15, 205-206; Akanbi, n. 6, 143.
[22]Abdulrazaq Adelodun Daibu and Lukman Adebisi Abdulrauf 'Challenges of the Practice of Customary Arbitration in Nigeria' (2014) *The Nigerian Juridical Review,* 12,104; Igbokwe, note 15, 206.
[23] Nigeria was a British colony until 1960 when it got its independence. For a detailed history of the Nigerian historical link with common law. See John Asein, *Introduction to Nigeria legal System* (2nd Edition, Ababa Press Ltd. Lagos 2005) 98; Akintunde Olusegun Obilade, *The Nigerian Legal System* (Spectrum Books Ltd, Ibadan 1979) 17.
[24] Paul Obo Idornigie, "Overview of A D R in Nigeria" (2007) 73(1) Arbitration 73.
[25] See Generally Lukman Ayinla 'Fair Hearing: Is it a Magic Wand to Cure all Ills in all Mellius?' (2006) 2University of Ilorin Law Journal*,* 49*;* Muhtar Etudaiye 'The Doctrine of Natural Justice as an arm of the rule of law' (2006) 2(1) Ilorin Bar Journal 103.
[26] See Genesis chapters 1 and 2.
[27] The Supreme Court of Nigeria made reference to this scenario in the case of *LDPC v Gani Fawehimi* (1985) 2 NWLR (Pt.7) 300, 347.
[28] Genesis 4:8-12.
[29] Abdulrazaq Adelodun Daibu, 'The Significance of Rules of Natural Justice in Administration of Justice" (2015) 1(1) *Al-Hikmah University Law Journal* 193.

The rules of natural justice (which connotes "fair hearing" or "fair trial") emerged on the basis that parties must have equal and reasonable opportunity to have a fair trial before any decision is reached.[30] The rules have over the time become an international standard for determining the validity or otherwise of judicial and non-judicial or quasi-judicial proceedings in modern time.[31] The rules were developed to ensure that decision-making by a judicial or quasi-judicial body is fair and reasonable. It concerns procedural fairness that ensures a fair decision is reached by an objective and impartial decision maker.[32] It is submitted that an arbitral tribunal being a quasi-judicial body is expected to observe the rules of natural justice by affording the parties equal and reasonable opportunity of presenting their case and dealing with that of the other party. Natural justice involves the decision-maker informing parties of the case against them or their interests, giving them a right to be heard, not having a personal interest in the outcome and acting only on the basis of logically probative evidence.[33]

The rules of natural justice have been domesticated in several laws, enshrined in many constitutions, international conventions and arbitral institutional rules.[34] Therefore, an arbitral tribunal been a quasi-judicial body is expected to apply the rules of natural justice in its proceedings by protecting the fundamental right to fair hearing of parties and accord them equal treatment in order to have a legally binding and enforceable award. The rules encompass two fundamental pillars viz:

i. *nemo judex in casa sua* (no man can be a judge in his own case); and
ii. *audi alteram partem* (hear the other side)

The first fundamental rule of natural justice states that no person can be a judge in a case in which he or she is a party. This has been extended to mean that he or she should have no personal interest in the outcome of the case and should not be biased.[35] The second principle prohibits a judicial decision which affects the civil or individual rights of parties in a dispute without been heard.[36] Habeas corpus was an early expression of the principle and in recent years, it has extended to include a right to receive notice of a hearing and a right to be represented.[37]

The rules of natural justice are embodied in the United Nations Universal Declaration on Human Rights,[38] the Europe Convention on Human Rights,[39] the American Convention on Human Rights,[40] as well as the African Charter on Human and People's Right.[41] Although the notion of natural justice does

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[30] Ibid, David Altaras, 'Arbitration in England and Wales and the European Convention on Human Rights: Should Arbitrators be frightened?' (2007) 73 (3) Arbitration 264.
[31] Chung, n. 2, 167.
[32] Principle of Natural Justice http://www.cricketeurope2.net/docs/ECC/TSOP2010/ANNEXURES/C110.pdf 203 accessed 19 April 2020; Natural Justice/Procedural Fairness http://www.ombo.nsw.gov.au accessed 21June, 2020.
[33] Natural Justice/procedural fairness in http://www.ombo.nsw.gov.au accessed 14th December, 2020.
[34] See generally Article 10 of the Universal Declaration of Human Rights; Article 6 European Convention on Human Rights; Section 36(1) of the Nigerian Constitution; Article 7 of the African charter on Human and peoples' (Ratification Enforcement) Act cap. A9 Laws of Federation of Nigeria (2004); Article 9 United Nations Commission on International Trade Law Arbitration Rules (UNCITRAL); Article 7 American Arbitration Association International Arbitration Rules (AAA); Article 22 World Intellectual Property Organisation Arbitration Rules (WIPO); Article 12 Arbitration Rules of the Regional Centre for International Commercial Arbitration Lagos (RCICA).
[35] Chung, n. 2, 167.
[36] Thomas Klotzel, 'The Right to be Heard and Right to Hear: Cultural Dimensions of International Commercial Arbitration' (2006) 72(1) Arbitration 27.
[37] Fabian Ajogwu, *Commercial Arbitration in Nigeria: Law and Practice* (Mbeyi & Associates Nig. Ltd. Lagos 2009) 120.
[38] Article 10 United Nations Universal Declaration of Human Rights.
[39] Article 6 (1) European Convention on Human Rights. The UK Human Rights Act 1998 gives effect to this Convention.
[40] Article 8 American Convention on Human Rights.
[41] Article 7 (1) (d) of the African Charter.

not require any statutory basis, because it is an in alienable right, practically all countries of the world provides for fair hearing in judicial and quasi-judicial proceedings.[42]

Application of the rules of natural justice in statutory and commercial arbitration in Nigeria

The rules of natural justice are provided in the Nigerian Constitution and applicable to any judicial or quasi-judicial proceedings. The Constitution states that in the determination of the civil rights and obligations of a person in any question or determination by or against any government or authority, a person shall be entitled to fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such manner as to secure its independence and impartiality.[43] The obligation to act fairly binds all persons performing judicial and quasi-judicial functions. Therefore, an arbitral tribunal being a quasi-judicial body, must be fair, unbiased and impartial in its proceedings. Parties must be given a fair hearing and a full or equal opportunity to present their respective cases.[44] Fair hearing is a fundamental issue in arbitral proceedings and this can only be achieved by giving the parties a reasonable opportunity to present their cases in person with such legal advisers and witnesses as the parties may wish to bring with them in the course of arbitration.[45] In arbitration the arbitrators assumes the role of a judge or umpire and must therefore ensure that parties are accorded their constitutional right of fair hearing in accordance with the rules of natural justice. As an unbiased arbiter an arbitrator is expected to give a fair hearing to both parties and give an award based on evidence presented by the parties at the trial.[46] Section 14 ACA encapsulates the *audi alteram partem* rule, which is fundamental to all adjudicatory process and a basic pillar of natural justice. The section provides that:

> In any arbitral proceedings, the arbitral tribunal shall ensure that the parties are accorded equal treatment and that each party is given full opportunity of presenting his case.

Similarly, Article 15(1) of the UNCITRAL Arbitration Rules also applicable to arbitration under the Arbitration and Conciliation Act[47] provides thus:

> Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner, as it considers appropriate, *provided that the parties are treated with equality and that at any stage of the proceedings, each party is given a full opportunity of presenting his case*. (italics for emphasis)

The above provisions clearly shows that the rules of natural justice and fair hearing are fundamental to arbitration like any other adjudicatory process, therefore, in achieving the objectives of the rules of natural justice, the tribunal may apply and observe the following general principles critical to granting the parties a fair hearing:

a. Each party must be aware of his opponent's case and must be given reasonable opportunity to test and rebut the same.
b. Each party must have a full opportunity to present his own case to the tribunal.

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[42] See for example Section 19 (3) of the Ghana Constitution 1992, section 36 of the Nigerian Constitution and section 34 of the South African Constitution.
[43] Section 36 (1) of the Nigerian Constitution.
[44] Daniel Brawn, 'Commercial Arbitration in Dubai' (2014) Arbitration 80 (2) 161.
[45] Ajogwu, n. 37, 123.
[46] Ibid.
[47] Section 53 ACA provides for the application of Arbitration Rules set out in the First Schedule to the ACA. It provides that: "Notwithstanding the provisions of this Act, the parties to an international commercial an agreement may agree in writing that disputes in relation to the agreement shall be referred to arbitration in accordance with the rules set out in the first schedule to this Act, or the UNCITRAL Arbitration Rules or any other international arbitration rules acceptable to the parties (emphasis mine).

c. The parties must be treated alike: equality of parties to put forward their respective case and to test that of their opponent.[48]

An arbitrator must be neutral and act fairly and impartial to both parties, He must also not receive a bribe or benefit one way or the other from his or her decision.[49] An arbitrator should not be seen to favour one party at the expense of the other as justice must not only be done, but be seen to be done in arbitral process.[50] The implication of violation of the rules of fair hearing in arbitration is that the award will not be enforceable and liable to be set aside by the courts on appeal.[51] A tribunal does not have to follow the strict procedures of a court of law in so far the procedure adopted is not repugnant to natural justice, inconsistent with the practice of a particular trade or business the parties, and does not lead to any unfairness between the parties in the dispute.[52] In *Phipps v Ingram,*[53] the dispute involved the recovery of the price of a wheeled carriage that had been built under a written contract. The arbitrator viewed the carriage and took evidence from the defendant's witnesses, but refused to examine the witnesses produced by the plaintiffs because it was considered unnecessary. The award made in favour of the defendant was subsequently set aside.[54]

The duty to accord equal treatment to the parties includes, among other things, that the tribunal must not hear one party or his witness in the absence of the other party or his representatives. Where evidence is received behind a party, and he objects to it, the fact that he continues to attend the proceedings will not amount to waiver if the irregularity in receiving evidence behind him amounts to a denial of natural justice.[55] In the case of *Umar v Onwudiwe,*[56] it was held that the arbitrator has a legal obligation and duty to conduct the arbitral proceedings fairly, and this includes among other things to hear the parties by giving them equal treatment, and considering all materials issues submitted before delivering its award.

It must be noted however that there are a few exceptions,[57] apart from which both parties must be heard in the presence of the other. A party that chooses not to utilize the opportunity accorded him to present his case and contradict or test his opponent case without any cogent reasons, cannot afterwards complain that his right to fair hearing has been is denied or breached.[58] It is pertinent to note that the right to attend the hearing need not be exercised in person: it may in certain circumstances be exercised through agent, counsel, or any other person acting as advocate, representative or such other professional as may be suitable for that purpose.[59]

The rules of natural justice in customary arbitration

A typical customary arbitral process in most Nigeria societies starts with a complaint by an aggrieved party to the appropriate judicial authority under the custom of the parties after which the other party is

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[48]Ajogwu, n. 37, 119.
[49] Chung, n. 2, 175.
[50] See *Flatamontos Maritimos SA v EFF John International* (1997) 63 2(5) JCI Arb.)18, 20.
[51] Patrick Tailor, 'Adjudicators' Fees Where the Decision Is Unenforceable (2013) 79 (1) Arbitration 105.
[52] Ephraim Akpata, 'The Nigerian Arbitration' Law in Focus, 47; Olakunle Orojo and Ayodele Ajomo, Law and Practice of Arbitration and Conciliation in Nigeria (Lagos: Mbeyi and Associates Nig. Ltd, 1999)171.
[53] (1853) 3 DOWL 669
[54] Note however, that if the arbitrator refuses to accept the evidence of either parties and they raise no protest at the proceedings, they will be deemed to have waived their rights: *Riddle v Sutton* (1828) 6 Bing 200. See also s.33(a) and (b) ACA.
[55] Akpata, n. 52, 47.
[56] (2002)10 NWLR (Pt. 744) 150
[57] For instance if any of the parties fail to appear at the hearing or produce documentary evidence, the arbitral tribunal may continue the proceedings and make an award. See section 21(b) and (c) ACA.
[58] *Bill Construction Co. Ltd. v Imani & Sons* Ltd (2006) 19 NWLR (Pt. 1013) 1, 14; *Stabilini Visiononi Ltd. v. Mallinsion & Partners Ltd.* (2014) 12 NWLR (Pt. 1420) 134, 205.
[59] Gaus Ezejiofor, *The Law of Arbitration in Nigeria* (Longman Nig Plc 1997) 75.

summoned or invited.[60] Upon a complaint of an aggrieved party, the elders would have a gist of the case before them before inviting the other party, and thus the question arises whether they are not biased already. It seems that this is not so, as the tribunal are usually respected elders of impeccable character and unblemished integrity that have the sacred responsibility of listening to the other party before a decision can be reached. Hence, as an independent umpire, they will invite and listen to the other party before any decision in the form of an award can be made.

It has been argued that the early African societies like other incipient societies around the world did not have the equivalent of Bill of Rights.[61] Indeed such things evolved with time in each society even in developed societies like the United Kingdom and the United States, that are advanced in protection of human rights and observance of the rules of natural justice.[62] The diversity in culture and traditional practices of the various Nigerian communities makes it difficult to generalize human rights in which the right to fair hearing is a basic component in the very early periods. However, the observance of human rights and natural justice did not attract as much importance and care as it now commands.[63] The observance of the rules of natural justice generally depend on the social status of the person in question: a slave for instance, in pre-colonial period was for all intents and purposes a subject of ownership of his master and therefore not entitled to some of the rights guaranteed by law.[64] He had a right to life quite generally as against third parties, not strictly or fully against his owner or the empire /kingdom.[65] He certainly had no enforceable right to a fair hearing or equality with a free born (a non-slave) before the law. If he is ever allowed to have a matter adjudicated between him and a freeborn he could not demand any fair hearing or equal treatment from the adjudicated body, whether it was a court or an arbitral tribunal.[66] In fact, it will be a privilege for a slave to appear before any such body in a contest with a freeborn. A slave is not entitled to appoint any arbitrator.[67] The normal thing was that he would only be able to complain in any matter to any person outside the owner's house and state his case in any dispute with an outsider through his owner. Any complaint or case against him would also be made to or against his owner. His owner would therefore pursue a claim or defend him (the slave) in the owner's own name in any arbitral or court proceeding between the slave and a freeborn.[68] The slave owner in such proceedings occupied a higher estate than a next friend would do today in proceedings involving an infant.[69]

In some communities in the southwest Nigeria, the king was conceived as capable of doing no wrong. A citizen no matter his social status could not maintain a civil claim of any kind against the king. The question of an arbitral proceeding between a citizen and the king, whether or not a tribunal sitting over same, had to observe the rules of natural justice and a fair hearing could not therefore arise. As between other free-born however there was equality of rights with little exceptions.[70]

Generally, amongst free-born outside the monarchy there was equality of persons before the law. Arbitral tribunals therefore simply owed the parties the duty of equal treatment and a fair hearing.[71] The rules of natural justice have been in existence among the free-born in African communities from time immemorial, and the indigenous communities in pre-colonial era believed in the spirit of fair hearing.

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[60] Akintude Emiola, *The Principles of African Customary Law* (2nd edition, Emiola publishers Ltd Nigeria, Ogbomoso, 2005) 37, 38.
[61] Chukwuemerie, n. 8, 213
[62] *Ibid*.
[63]Andrew Chukwuemeire, 'Arbitration and Human Rights in Africa' 110.
[64] Ibid.
[65] Ibid.
[66] Chukuemerie, n. 8, 214.
[67] *Ibid*.
[68] Chukwuemeire, n. 63, 110.
[69] *Ibid*.
[70] For instance, in Yoruba land in Western part if Nigeria and Benin Republic, the *Aare Ona Kankafo*, the overall warlord of the race seem to have a social status above those of the other free born, and have some rights above those of other people but far less than the 'Oba' (King). See Chukwuemeire, n. 63, 110-111.
[71] Ibid.

[72] The Yoruba people of western Nigeria would say: *"Agbo ejotenikanda agbaosikani"* (He is wicked who ever pass judgment on the basis of one-sided evidence).[73] The Effik of the southern Nigeria will say *"moguniidikutisu ye edem"* (I wish to see face [or front] and back i.e. to hear both sides of dispute).[74]

One can therefore safely conclude that the rules of natural justice are applicable under customary arbitration.[75] Thus, the foregoing expressed the acknowledgment of the rules of natural justice in African communities. It is submitted that where an arbitral tribunal or single arbitrator rendered an award out of a proceeding in breach of the sacred principles of equal treatment of the parties and fair hearing in any material way, the dissatisfied party could complain to that very tribunal or arbitrator (or any other higher tribunal recognised by the custom of that particular communities) and such an award is liable to be set aside. From the foregoing, it is clear that the observation of the rules of natural justice is a *sine qua non* to the exercise of any judicial or quasi-judicial power, even under customary law.

The application of the rules of natural justice in arbitration: approaches in various jurisdictions

The right of a party to be given a full and reasonable opportunity to present his case is a basic element of the constitutional right to fair hearing.[76] In the UK, the European Convention on Human Right (ECHR) has been incorporated into the English law with the enactment of Human Rights Act 1998 (HRA), which is applicable to arbitral proceedings in England.[77] Section 3(1) of the Act is to the effect that primary legislation which includes the Arbitration Act 1996, other subordinate legislations (which include rules made pursuant thereto), must be read and given effect in a way in which is compatible with convention rights.[78] Courts and tribunals will thus have regard to the ECHR in considering any application or appeal concerning arbitration because arbitral proceedings affect the civil rights and obligations of the parties involved.[79] Article 6(1) of the ECHR provides that:

> In the determination of his civil rights and obligations… everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law…[80]

It is submitted that "Public hearing" as contained in the above provision is in respect of courts and formal tribunals. Public hearing of such judicial or quasi-judicial proceedings is mandatory although there are certain exceptions.[81]

As regard arbitration, however, it is contended that parties thereto have by implication waived their right to public hearing by their voluntary submission to arbitrator(s) in order to settle their dispute by private judges recognised by the state.[82] Arbitration is a private arrangement of parties with much

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[72] Ibid.
[73] See Ayinla, n. 25, 52; Oseni U.A. 'The inextricability of law and morality; An Appraisal of the Nigerian Legal System' 126.
[74] Ibid.
[75] Ayinla, n. 25, 52-53.
[76] Klotzel, n. 36, 29.
[77] Sutton D.S. et al, Russel on Arbitration 23rd ed. (Sweet and Maxwell London 2007) 17; Altaras, note 30, 262.
[78] Section 3 HRA.
[79] Altaras, n. 30, 264.
[80] See also Article 103(1) of the German Constitution and Article 14 of the International Convention on Civil and Political Rights Adopted and opened for signature, ratification and accession by the General Assembly resolution 2200A (xxi) of 16 December 1966 for similar provisions.
[81] In most jurisdictions the exceptions to the observance of public hearing in rear circumstance includes; National Security, public order and or reason of morality in some African counties. Thus, except for these limited exceptions, any verdict coming out of a non-public hearing proceeding is invalid and public hearing includes the pronouncement of judgment in the public. See Article 6 ECHR; ss.36 (3) and 1(3) of the Nigerian Constitution.
[82] Altaras, n. 30, 265.

emphasis on party autonomy and minimal control from the state. Businesspersons prefer to settle their disputes through arbitration because of privacy and confidentiality that is available in the arbitral process, and therefore waive their rights to a public hearing in arbitration proceedings, which by its very nature is consensual, private and devoid of unnecessary publicity.[83] The confidentiality and privacy ensures that parties' trade secrets and other privilege information that are so confidential remain their private information.[84] Thus, parties are at liberty to exclude any person from the hearing,[85] and arbitrators are under a duty of confidentiality of facts that came to their knowledge in the course of the proceedings. However, where resort to arbitration is not voluntary, as under the Trade Dispute Act,[86] the parties cannot be said to have voluntarily waived their right of access to court because such arbitration is statutory and mandatory in nature; thus the choice of arbitration therein is not a product of the exercise of the parties' will.[87] Nevertheless, it is contended that any statutory or constitutional provision requiring a public hearing of arbitration will not only negate and destroy confidentiality, which is a hallmark of arbitration, but will also be antithetical to the freedom of the parties and party autonomy.

The rules of natural justice are also enshrined in Chinese Arbitration Law.[88] The Honk Kong Arbitration Ordinance,[89] which applies to both the domestic and international commercial arbitration, provides that:

> When conducting arbitration proceedings or exercising any of the powers conferred on it by this ordinance or by the parties to any proceedings, an arbitral tribunal is required – (a) to act fairly and impartially as between the parties, giving them a reasonable opportunity to present their cases and to deal with the cases of their opponents[90]

The above can be contrasted with the position under the U K Arbitration Act 1996, which sets out the general duties of arbitrators/ tribunals to act *fairly* and *impartially* between the parties, giving both parties *reasonable* opportunity of putting forward their respective cases and challenging that of the other party.[91] The provision of s.33 (1) of the English Arbitration Act is however subject to s.34(2)(h) of the same Act, which empowers the tribunal to adopt flexible procedure in deciding "whether and to what extent there should be oral or written evidence or submission."[92]

The effects of a breach of the rules of natural justice

The observance of the rules of natural justice is necessary for the validity or otherwise of arbitral award s, which is the end product of arbitral proceedings. An arbitrator who knows any circumstance(s) likely

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[83] *Hankanson v Sweden* (A/171) (1991) 13 E.H.R.R. 1; *H v Belgium* (No. 1/1986/99/147); *Suovaniemi v Finland* (Case No. 31737/96)
[84] Chukwuemerie, n. 8, 253 – 254.
[85] Altaras, n. 30, 265.
[86] See s.9 Trade Dispute Act CAP. T8 Laws of Federation of Nigeria 2004
[87] ibid
[88] Chung, n. 2, 168.
[89] Cap 341 Section 2GA (1)
[90] Section 2G A (1) Honk Kong Arbitration Ordinance. The provision translates the common law rules of natural justice i.e. *nemo judex in causa sua* and *audi alteram partem* into statutory form. The provision is also in tandem with Article 12 and 18 of the Model Law of the United Nations Commission on International Trade law (UNCITRAL model law that is applicable to International arbitrations by virtue of Section 34 C of the Ordinance to treat the parties with equality). However, there are two notable differences: While Article 12 provides *"independence"* as distinct from impartially, as an actionable factor to challenge the Arbitrator; Article 18 requires that a *full* opportunity be given to the Parties.
[91] See s.33 (1) (a) of the 1996 Act
[92] It should, however, be noted that there are two significant difference between the 1996 Act of UK and the UNCITRAL Model Law on which it is partially based. *First, the Act omits the requirement of "independence".* Secondly, it does not require Arbitrators to make a disclosure *of interest.* The departmental Advisory Committee on Arbitration Law (DAC) saw no good reasons for including such a requirement, on the grounds that arbitration is consensual and lack of independence, unless it gives rise to justifiable doubts about the impartiality of the Arbitrator(s) is of no significance. See Chung, n. 2, 168-169.

to give rise to justifiable doubt as to his/her impartiality should disclose such circumstance to the parties before his appointment.[93] The duty to so disclose continues after appointment and throughout the proceedings.[94] An arbitrator who refuses to disclose may be challenged if circumstance exist that give rise to justifiable doubts as to his impartiality.[95] It is submitted that persons approached in connection with an appointment as arbitrator should not accept the same if they knows circumstance that might lead to suspicion of bias or doubt as to its impartiality and independence. Where however, such circumstance arises after he/she as already been appointed, s/he should honourably resign in order to protect his or her integrity and avoid eventual challenge to the arbitral award.

In the United Kingdom, the court may by an order remove an arbitrator if circumstance exist that give rise to justifiable doubts as to his impartiality or failure to conduct arbitral proceedings properly, thereby causing substantial injustice to a party.[96] There is no similar provision for removal of an arbitrator on the ground of impartiality and independence under the Nigerian Arbitration and Conciliation Act, the Act merely provides that an arbitrator can be challenged on the ground of impartiality and independence. However, by s.30(2) of the Nigerian Arbitration and Conciliation Act, an arbitrator can be removed on the ground of misconduct.[97] It is submitted that misconduct cover a wide range of irregular behavior, such as conflict of interest, bribery, bias, a breach of natural justice, improper conduct during and at the pendency of the submission, severe wrongful acts and technical error among other things.[98] In Hong Kong under the Arbitration Ordinance,[99] a court has power to remit any matter to the arbitrator for reconsideration and an appeal there from on any question of law is to the court.[100] The court may by order confirm, vary, set aside the award and or remit the award for reconsideration by the arbitrator.[101] Fairness and impartiality are two essential requirements an arbitrator must possess and exhibit in course of proceedings so that its award will not be set aside on the grounds of misconduct or breach of fair hearing.[102]

In Nigeria, the effect of breach of the rules of natural justice is provided for under the Arbitration and Conciliation Act. A party may challenge an arbitrator as to its impartiality and independence,[103] apply to the court for removal of an arbitrator on the ground of misconduct which include bias or breach of fair hearing,[104] apply to set aside the award on the ground that it was improperly procured (the rules of natural justice having been breached),[105] and or make a request to the court for refusal of recognition and or enforcement of an arbitral award for breach of fair hearing and natural justice.[106] A person cannot be an arbitrator in a matter if he has a personal interest in the matter. He cannot be a judge in his own cause. It is equally so if his spouse or relation has an interest in the matter. If the arbitrator manifests bias against any party in the proceedings, his award is liable to set aside for breach of the rules of natural justice even if the award went in favour of the person against whom the bias was shown.

Conclusion

The article has examined the historical evolution and importance of arbitration, and the application of the rules of natural justice in both statutory and customary arbitration in Nigeria. It reveals that an arbitrator would be automatically disqualified from hearing and determining a reference to which he or

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[93] Brawn, n. 44, 163. See also ss. 8(1) and 45(1) ACA.
[94] See ss. 8(2) and 45(2) ACA.
[95] Ibid. See also Section 26(1) Hong Kong Arbitration Ordinance Cap.341
[96] Section 24(1) UK Arbitration Act 1996.
[97] See also section 25 of the Hong Kong Arbitration Ordinance
[98] Chung, n. 2, 170.
[99] Sections 24 and 23(2)
[100] Chung, n. 2,170.
[101] Ibid
[102] Tailor, n. 51, 105.
[103] Sections 8 and 5 ACA; Brawn, n. 44, 163.
[104] Section 30(2) ACA.
[105] Section 30(1) ACA.
[106] Section 32 ACA.

she has a financial or non-pecuniary interest. An arbitrator may be challenged or removed by a court if he or she has misconducted him or herself, or circumstances exist that given rise to justifiable doubts as to an arbitrator's impartiality or independence. A court has power, and has in fact exercised that power, discreetly to set aside, remit, vary or declare unenforceable an arbitral award resulting from a breach of the rules of natural justice. The article however shows that it is difficult to maintain absolute impartiality, given that arbitrators may have views based on experience and knowledge, i.e. 'antecedent bias', and consequently it is difficult for them to come to proceedings with a fresh mind. Therefore, the real danger of bias or circumstances that may result in justifiable doubt as to an arbitrator's impartiality has been incorporated into the various statues and rules in different jurisdictions, which the courts have interpreted liberally, having regards to the fact and circumstances of each case.

The article observes that fairness and natural justice are legitimate expectation of parties and contends that the application of the rules of natural justice in arbitration, apart from been a fundamental right of parties, should also be a matter of statutory and regulatory sanction as well as including ethical personal values of the desire to observe the rules. In this respect, therefore, professional institutional bodies and the community at large should assist in promoting ethical values among arbitrators in order to cultivate a common desire to safeguard the rules of natural justice in arbitration.

As regards customary arbitration, the hitherto discrimination between slave and freeborn has been curtailed by the right to freedom from discrimination as guarantee by the constitution.[107] Thus, citizens of Nigeria of a particular community, ethnic group, place of origin, sex, religion or political opinion, shall not by any reason be subjected either expressly or by implication to any disabilities or restrictions. However, although a fair hearing and equality of parties are sacrosanct in customary arbitral proceedings, the major challenge is that in reality customary arbitrators do have prior knowledge of facts and their decisions may not totally be free from personal interest and *sub judice* of the arbitrators.[108] It is, therefore, recommended that members of native tribunals (customary arbitrators) should be encouraged to acquire skills and education on the importance of observing the rules of natural justice and equal treatment of parties in customary arbitration.

On the whole, an arbitral tribunal, like any other adjudicatory body, should do all things necessary and possible to ensure that its independence and impartiality is fully protected in order to enjoy to the full the undoubted confidence of the parties. This is because justice is rooted in the confidence of the adjudicator.

[107] See section 42 Nigerian Constitution.

[108] Afe Babalola 'Arbitration and ADR process in Traditional African System: Developments, success and Failures' Amasike C.J. (ed.) Arbitration and Alternative Dispute Resolution in Africa Abuja (The Regent Printing and Publishing S Ltd, Abuja, 2005) 58-59.