ALTERNATIVE DISPUTE RESOLUTION IN NIGERIA: ISSUES AND CHALLENGES

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Abstract

The nature and character of mankind made it imperative that conflict or dispute is inevitable in continued existence of humanity. It is as old as man with the eternal features to last as far as humanity exist. In fact, conflict or dispute notwithstanding its negative impact in the development of society is one the pillars upon which mankind rest. Perhaps, this was the reason behind the emergence in all legal system in the globe legal mechanism or framework not for the abolition of dispute but for the settlement of dispute or conflict which Alternative Dispute Resolution is one of them. Incidentally, in the Alternative Dispute Resolution process, challenges emerged which attempted to stultify the efforts. These impediments are lack of transparency, accountability, participation and conflicting loyalty *et cetera*. The destructive characters of these challenges called for urgent steps that would provide solutions to address them. This is all this work labored to achieve. It recommended majorly, creation of necessary platforms that will provide the needed educative awareness about Alternative Dispute Resolution.

Introduction

This paper presents a critical review of Alternative Dispute Resolution (ADR) as a mechanism for the settlement of disputes in Nigeria. ADR refers to any method of resolving disputes without litigation, and it regroups all processes and techniques of conflict resolution that occur outside of any government authority.[1] Ordinarily, disputes or conflicts are resolved through court processes. However, litigants in Nigerian courts are faced with certain impediments to the realisation of the purpose of the courts such as delays arising from congestion of cause lists, costs, long adjournments, and inadequate manpower, which makes ADR a viable alternative.[2]

ADR is not new to Nigeria but deeply rooted in culture. For instance, early traditional societies settled disputes without litigation by referring them to the elders, families, communities or other bodies set up for that purpose.[3] It can be argued that the introduction of the modern ADR process in Nigeria's administration of justice is geared towards complementing the court system, enhancing access to justice, and addressing the challenges associated with court litigations.

Back in the 1980s, ADR provided executives and experts with a supposedly cost-efficient and sensible way to keep corporations out of court and away from litigations that end up devastating parties.[4] Alongside this wide adoption of ADR by corporations and countries across the globe, litigations in institutionalised courts also increased. The use of ADR in settling disputes between individuals, individuals and companies, and between companies is gaining momentum. Today, amicable settlement of disputes is desirable to litigation; more so, when it is less formal, less expensive and more expeditious than the court processes.

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[1] Joseph Nwazi, 'Assessing the Efficacy of Alternative Dispute Resolution (ADR) in the Settlement of Environmental Disputes in the Nigeri Delta Region of Nigeria' (2017) 9(3) Journal of Law and Conflict Resolution, 26.

[2] Andrew Chukwuemerie, *Studies and Materials in International Commercial Arbitration* (Lawhouse, 2002) 26.

[3] Ali Mazrui, *The Africans: ATriple Heritage* (BBC Publications, 1986) 133.

[4] Todd Carva and Albert Vondra, 'Alternative Dispute Resolution: Why it Doesn't Work and Why It Does', 1994 Harvard Business Review, available at >https://hbr.org/1994/05/alternative-dispute-resolution-why-it-doesnt-work-and-why-it-does< accessed 6th July, 2023.

Alternative Dispute Resolution: Rationale

In contemporary dispute settlement, culture and cultural diversity have lent more credence to the opposed rise of this legal tradition; thus, making it a matter of great concern. For instance, the court's institutional mechanisms follow a positive law theory which insists on the interpretation and implementation of laws as it is. It gives less room for flexibility; hence, may be perceived as rigid by the parties. However, as a common characteristic of ADR, parties are enabled to find admissible solutions to their conflicts outside of traditional legal proceedings. For instance, whereas no third party intervenes to help the parties reach an agreement in a negotiation, the third party in mediation and conciliation promotes an amicable agreement between that parties. It is pertinent to note that whereas negotiation, mediation and conciliation are non-binding ADRs, and the parties can decide not to be bound by them, arbitration is a binding ADR. Parties are bound by the awards or decisions of the Arbitrators. However, it must be noted that public courts may have the power to review the validity of ADR methods, but will rarely overturn ADR decisions and awards if the parties have a valid contract to abide by such decisions and awards.

The importance of ADR in Nigeria is pivotal to the Nigerian legal system. For instance, legal practitioners in Nigeria are enjoined by law to inform their clients of the option of an alternative dispute resolution before resorting to or continuing litigation before the court.[5] Of course, this practice would relieve the court system of burden by reducing the volume of dispute resolutions. Furthermore, Order 19 of the Federal High Court (Civil Procedure) Rules as well as some State High Court (Civil Procedure) Rules[6] provide for supportive court intervention in arbitral proceedings and reference of cases to ADR. What it entails is that in these jurisdictions, ADR, with the support of the court, is a viable means recognised by the state laws, to promote amicable settlements of the disputes before the court.[7] The method adopted by the High Courts of both Lagos and Federal Capital Territory is only aimed at promoting the adoption of ADR towards attaining an amicable settlement of dispute, even when there is no agreement between the parties to settle disputes through ADR. What is seen in Lagos State is the court referring disputes for consideration through ADR; thereby, acknowledging that ADR plays a supplementary role in dispute settlement. Yet, it appears that these provisions are not optimally utilised.

Section 19 (d) of the 1999 Constitution of the Federal Republic of Nigeria (as amended) provides and recognises the settlement of international disputes by negotiation, mediation, conciliation, arbitration and adjudication. Although the emphasis in the 1999 Constitution is on international disputes, the federating states in Nigeria have to catch up with the pace of the evolution of law and society by embracing this means of resolving disputes. These processes of dispute resolution have always been in practice even in the pre-colonial era. For instance, in *Okpururu v Okpokam*, Oguntade JCA (as he then was) stated that 'in the pre-colonial times and before the advent of the regular courts, our people certainly had a simple and inexpensive way of adjudicating over the dispute between them. They referred to the elders or to a body set up for that purpose'.[8]

Today, ADR is perceived as a potential route to civil justice. For instance, in the United States of America (USA) and the United Kingdom, it has gained prominence in preference to litigation.[9] In this vein, an English court in *Dunnett v Railtrack* considered it imperative to penalise successful

[5] Rule 15 (3) (d) of the Rules of professional Conduct for Legal Practitioners, 2023.

[6] See, Order 19 of the High Court of the Federal Capital Territory; Order 28 of the 2019 High Court of Lagos State (Civil Procedure) Rules.

[7] Order 27 (2) (c) of the 2019 High Court of Lagos State (Civil Procedure) Rules.

[8] (1998) 4 NWLR Pt. 90, 554 at 586.

[9] Jibrin Yahaya, 'The Imparative of Alternative Dispute Resolution (ADR) in Resolving Conflicts in Nigeria' (2021) Noun International Journal of Peace and Conflict Resolution, 128.

defendants on appeal by not granting them costs because they refused mediation.[10] In this case, the claimant lost at first instance and applied for permission to appeal. The judge, however, advised the claimant to consider the possibility of alternative dispute resolution to avoid the need for an appeal, which the claimant refused. This decision, though taken in conformity with the English Civil Procedure Rules provides that the court should encourage the parties to use ADR where necessary. From the foregoing, the court emphasised that to flatly reject ADR without just cause places the parties at risk of adverse consequences in costs. This decision showcases the overriding objective and purpose of ADR, especially when it is embedded and recommended in the rules of the court.

In Nigeria, the Nigerian Institute of Chartered Arbitrators and the Institute of Chartered Mediators and Conciliators are the two key establishments engaged in the training of persons aspiring to be professional mediators, arbitrators, negotiators and conciliators across Nigeria. These institutional frameworks not only regulate and set standards for the practice of ADR in Nigeria, but they also encourage organisations and institutions to adopt ADR as mechanisms for addressing disputes. Consequently, there are Alternative Dispute Resolution Multi-Door Court Houses in Lagos,[11] Abuja,[12] and Kano States.[13] The Kano State Multi-Door Court House is established with the functions of conciliation, arbitration, mediation and other forms of dispute resolution as enshrined in the Kano State Arbitration Law and Mediation and Arbitration Rules 2008.

The merits of ADR in Nigeria are numerous. In addition, the complexity of court litigation tends towards an increase in costs. Also, there may be claims involving small sums, which may not be worth the cost of litigation. In all of these, parties may consider ADR’s flexibility, confidentiality, rapidity, cost-effectiveness, and quick dispensation of justice over litigation.

Concept of Alternative Dispute Resolution in Nigeria

On 11th June 2004, the Chief Judge of Lagos State issued Practice Direction for the functioning of the Multi-Door Courthouse and therein emphasised that the court must further its overriding objective by actively managing cases. Accordingly, active case management means encouraging the parties to use ADR procedure if the court considers that appropriate and facilitating the use of such procedures.[14] A settlement agreement entered into once reduced in writing and signed by the parties is forwarded to the referral judge whereas in the case of walk-ins, the ADR judge would endorse a settlement agreement as an enforceable consent judgement.

The effectiveness of ADR depends on the attitude of the courts to settlements reached through ADR in Nigeria. For instance, in *Folarin and another v Idowu and others*,[15] the Court of Appeal recognised the importance of the agreement to engage in mediation and other forms of out-of-court settlement in a contract as well as any settlement agreement made pursuant to such mediation proceedings. The Court further held that any settlement agreement made pursuant to contractually imposed mediation must be enforced by the courts and will be binding on the parties who have endorsed it.

The motivation for ADR is to provide access to justice through a user-friendly system. It offers disputants various doors to dispute resolution. However, one key area where the application of

[10] (2002) 2 All England Report, 850.
[11] Established on 11 June, 2002, as a public-private partnership between the High Court and the Negotiation and Conflict Management Group.
[12] This body was formed in October 2003 and now funded by the Abuja State Judiciay.
[13] Kano State Multi-Door Court House was opened on 20 January 2009.
[14] Section 1 (1) of the High Court Law of Lagos State, 2003.
[15] LPELR - 22123 (CA).

ADR still faces controversy in Nigeria is in criminal cases. There is an argument of the public/private law paradigm that ADR is not applicable in the criminal justice system with regard to serious offences.[16] On the other hand, there is another argument that ADR can apply to criminal matters including serious offences if mainstreamed into the criminal justice system on a more holistic and systematic basis rather than using a piecemeal approach.[17]

Method of Alternative Dispute Resolution

ADR helps the parties resolve conflicts early and expeditiously and was designed to resolve the problem of delayed justice. Today, the most famous ADR methods are mediation, negotiation, arbitration, and conciliation. These methods are increasingly acknowledged nationally and internationally.

Negotiation

Negotiation is the preeminent mode of dispute resolution and is always attempted first to resolve a dispute. This method allows the parties to meet to settle a dispute, and it presents the parties with the opportunity to control the process and the solution. This is a less formal method than other types of ADR and is very flexible. Negotiation is preventive because it works to keep disagreements from escalating into full-blown hostilities between the parties.[18] Negotiation takes the form of talks between two or more persons in which they voluntarily try to work out an agreement that will satisfy them. This method of ADR is extremely useful in preventing the escalation of disputes and improving relationships. For instance, the use of plea bargain in criminal cases which entails the use of 'negotiating' which is a look-alike of ADR in terms of operation is mostly used by the accused persons or their legal representatives and the prosecution on issues concerning the severity of the punishment of the offence in jurisdictions where plea bargain is legal.

Mediation

Mediation is another informal alternative to litigation which allows the bringing of parties together and attempting to work out a settlement or agreement that both parties accept or reject.[19] It is a voluntary non-binding process in which a neutral person helps the parties to reach an amicable settlement. Parties usually enter into mediation and choose the mediator who proposes a solution for the parties' consideration and acceptance. The duty of a mediator is not to determine right or wrong but to control the process leaving the outcome to the parties since he cannot impose a decision on the parties. A mediator is simply a facilitating intermediary who acts as a catalyst by helping the parties identify underlying interests and enhance communication between the parties.

Mediation is most effective and appropriate for conflicts that have multiple parties who have a long-term relationship that they wish to preserve or that require confidentiality.[20] It revolves around the help of trained professionals with resolution skills. Regrettably, the opinion expressed by the mediator only binds the parties if they accept it. Mediators understand that the process itself

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[16] Bryant Dawn, et al, Mediating Criminal Domestic Violence Cases: How Much is too much Violence' 5 International Perspectives in Victimology, 47.

[17] Chukwunweike Ogbuagbor, *et al,* 'Mainstreaming ADR in Nigeria Criminal Justice System' (2014) European Journal of Science, 32.

[18] Samuel Olugbenga, 'Alternative Dispute Resolution (ADR): A Suitable Broad Based Dispute Resolution Model in Nigeria; Challenges and Prospects' (2023) 14 International Journal of Conflict Management, 50.

[19] Joseph Nwazi, 'Assessing the Efficacy of Alternative Dispute Resolution (ADR) in the Settlement of Environmental Disputes in the Niger Delta Region of Nigeria' (2017) 9 (3) Journal of law and Conflict Resolution, 26.

[20] Ernest Uwazie, 'Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability' (2011) 16 Africa Security Brief, 1.

is as important as the outcome; hence, must allow parties to feel they have received their court in a way that trials commonly do not.[21] Mediation can be used to resolve a variety of legal issues such as contract disputes, contesting a will, divorce cases and child custody arrangements.

Mediation can be private or court-annexed. Private mediation involves the parties seeking the assistance of an independent third party who offer professional services on a commercial basis, whereas court-annexed mediation involves matters which have already been filed in court, but with a directive from the court that parties could settle the dispute through mediation, and direct such party to go to mediation. In this instance when a mediation agreement is reached by the parties, it is entered as consent judgement by the court. Court-annexed mediation takes place typically in states with multi-door courthouses.

Conciliation

Conciliation is a process in which a neutral party meets with the parties to a dispute and explores how the dispute might be resolved. As a form of ADR, this method of dispute resolution allows a third party to facilitate communication between the parties in an attempt to help them settle their differences. The conciliator is more like an interventionist who provides probable solutions to the parties by giving suggestions and advice on the issue for resolving the dispute between the parties.[22]

To successfully initiate a conciliation, the conciliator inquires first from the parties whether they are prepared to settle the dispute amicably; if the response is positive, he then arranges a joint meeting with the parties. After joint sessions, the conciliator meets the parties separately and privately with a view to further discuss in confidence and understand the crux of the dispute, after which he considers each party's submissions and evidence. A professional conciliator then draws up and proposes the terms of settlement which must represent a fair compromise of the dispute.[23]

It is important to note that the regulatory framework for conciliation in Nigeria is the Arbitration and Conciliation Act, Chapter A18, Laws of the Federation of Nigeria, 2004. This law has no provision for mediation and makes it possible for Nigeria and parties to adopt the UNCITRAL Model Law on International Commercial Arbitration, 1985.

Arbitration

Arbitration, as one of the growing methods of ADR, is more formal than mediation and relies on the consent of the parties. Parties usually enter into a binding arbitration agreement with an arbitration clause prior to the dispute occurring. Such arbitration clause allows the parties to lay out major terms for the arbitration process such as the number of arbitrators, rules of arbitration, and arbitration forum. Arbitration can be held *adhoc* or with the administrative support of any of the institutional providers such as the American Arbitration Association.

Arbitration is an expression of party autonomy which allows parties to settle their disputes amicably and peacefully. When parties agree to arbitrate their dispute, they select a particular mechanism that grants broad freedom to the parties to define the manner of dispute resolution and to minimize the role of the third parties.[24]Parties to arbitration want their dispute to be settled by a

[21] Ernest Uwazie, 'Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability' (2011) 16 Africa Security Brief, 1.

[22] Samuel Dike, 'et al', 'Transforming Mediation and Conciliation Practices for Effective Dispute Resolution in Nigeria' (2020) 12 Journal of Property Law and Contemporary Issues, 230.

[23] Gaius Ezejiofor, The Law of Arbitration in Nigeria (Longman, 1997) 7.

[24] Gary Born, 'Keynote Address: Arbitration and the Freedom to Associate' [2009] 38 Georgia Journal of International and Comparative Law, 7.

tribunal of their choice and they do not want to take the risk of delay by the courts.[25]Furthermore, depending on the agreement of the parties, arbitration is headed by an arbitral panel or a single arbitrator. In setting up an arbitration panel, either both sides agree on one arbitrator, or each side selects one arbitrator and the two selected arbitrators elect the third. Arbitration also allows the parties to choose as arbitrators' persons they consider more suitable to resolve their disputes, and these arbitrators do not necessarily have to be legal practitioners.

Domestic arbitrations are statutorily governed by the Arbitration and Conciliation Act, Chapter A18, Laws of the Federation of Nigeria, 2004, which is modelled on the UNCITRAL Model Law on International Commercial Arbitration. For instance, chapter 19 of the Arbitration and Conciliation Act provides for the recognition and enforcement of arbitral awards; it implements the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and adopts the Model Law's internationally accepted provisions for the conduct and regulation of arbitration.[26]The advantage of arbitration over litigation is canvassed in many sources.[27]For instance, there are likely fewer cases/matters in ADR, therefore, it moves through more quickly than in litigation, where other matters compete on the court list. In addition, arbitration is more relaxed than a courtroom and has fewer regulations and procedures that must be followed by legal practitioners and parties. Also, arbitration help protect the privacy of all involved parties.[28]

Contemporary challenges of ADR in Nigeria

ADR, just as the traditional process of dispute settlement through the courts is not without challenges. Below are some of the challenges hindering ADR in Nigeria:

Accountability: In contrast with public adjudication, one can argue that there is relatively little accountability in arbitration. This is normatively desirable because it permits arbitrators to make decisions based on standards other than legal standards. While this may make a strong case to choose binding arbitration over trial in public adjudication in some disputes, arbitration awards not being subject to substantive review for accuracy that is available for court decisions is perceived as a challenge.[29] Simply put, if arbitration is not a desirable process or a particular arbitrator is undesirable, parties will not choose these services.

Participation: According to Richard Reuben[30], two major ways in which participation is not promoted in arbitration are the lack of a place for public participation and the arbitration selection process. Noting that arbitral justice is the most private of law and the diminishment of the public realm in dispute resolution, the process presents no publicly evolved legal standards to guide decision-making.[31] Today, one can argue that the arbitration selection process which permits parties to accept or exclude arbitrators based on preference or bias diminishes participation when compared to litigation through the court institutions. In the public adjudication system, parties are somewhat stuck with the assigned judges except in situations where parties may move to rescue a

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[25] Lord Hoffman in *Premium Nafta Producs Ltd v Fili Shipping Co.Ltd* (2008) 1 Lloyd's Rep. 254 (6) (HL) as cited by Campbell Machlan, 'Lis Pendens in International Litigation' [2009] Hague Academy of International Law 341

[26] Note that Nigerian government is host to Regional Center for the International Commercial Arbitration-Lagos (RCICAL).

[27] Randy A Pepper, 'Why Arbitrate? Ontario's Recent Experience with Commercial Arbitration' [1998] Osgoodehall Law journal Vol 36 No 4, 815

[28] Samuel Olugbenga, 'Alternative Dispute Resolution (ADR): A Suitable Broad Based Dispute Resolution Model in Nigeria; Challenges and Prospects' (2023) 14 International Journal of Conflict Management, 50.

[29] Richard Reuben, 'Law and Contemporary Problems' (2004) 67 Mandatory Arbitration, 279.

[30] 'Law and Contemporary Problems' (2004) 67 Mandatory Arbitration, 279.

[31] *Ibid*.

judge on the basis of perceived bias. For instance, in *Abo v State*,[32] the Court of Appeal observed that a judicial officer should disqualify himself in a proceeding in which his impartiality may genuinely and reasonably be questioned.

Transparency: Ordinarily, arbitrators are generally not required to articulate the reason for their decisions in the form of written opinion as with the case with public adjudication through court institutions. In contemporary institution-based arbitration, the rules of arbitration-provider institutions vary as to whether proceedings and awards are confidential. The confidentiality attribute of ADR may be misunderstood by laypersons who misinterpret it as inefficiency unlike litigation in court which is made public and monitored by all concerned persons.

Conflicting loyalty: There may be instances of conflicting loyalties by the person appointed to either of the party that appointed them. For instance, in arbitration where each party select their arbitrator, with the third arbitrator selected by the arbitration service or the two arbitrators, there are high chances that the arbitrators selected by the parties will side with the appointee.

Non-binding Nature of ADR:
The non-binding nature of ADR such as mediation, negotiation and conciliation sometimes renders the efforts in settling outside the court pointless. Hence, unless the parties adopt a binding method, negotiation and mediation leading to a settlement are non-binding. Where parties desire a binding decision, it is purposeless for the court to refer them to ADR as the same will not be result oriented. Where a party refuses or breaks the agreement, there is no guarantee of a resolution.

Lack of adequate awareness and negative perception of parties and legal practitioners: In Nigeria, not all states have accepted ADR as a legal culture for the promotion of dispute settlement. The acceptability of ADR in Nigeria cannot be compared to countries such as the United Kingdom and the United States of America despite the informal acceptance of ADR in the various cultures and traditions of Nigerian societies. Lack of awareness is fuelled further by legal practitioners who see litigation as a source of generating surplus income from filing fees, appearance fees, and other charges accruable from legal representation in court. Although it is trite that settlement through ADR such as negotiation and mediation is not financially beneficial to legal practitioners, it can be argued that the benefits derivable from ADR is not been publicised enough in Nigeria.

Recommendation

The court may be considered to take second place in dispute resolution. That is, it must not be the place where dispute resolution begins; rather, where disputes are determined after attempts to resolve using ADR methods.

Federating States in Nigeria should borrow a leaf from Lagos State by adopting practice direction and necessary legislation that makes ADR compulsory, if necessary, or enact provisions that enable judges to refer parties in a matter before it to ADR.

Nigerian government and other relevant institutions should vigorously enlighten the public on the benefits of ADR as an alternative to litigation.

It has become imperative to recommend that all ADR methods voluntarily entered into by parties be made binding on the parties. This, of course, will impact its effectiveness in Nigeria. Hence, just as it is obtained in Lagos State, a settlement agreement duly signed by the parties shall be enforced as a judgement of the court.

[32] (2018) LPELR-46068 (CA)

Conclusion

ADR, just like the courts, proffer settlement to parties in dispute by supplementing the role of the courts in dispute settlement, and not in the administration of justice. Though one may not completely avoid the courts, it is always profitable to the parties to try settlement through other non-rigid means to save the relationship. Just like the courts, ADR addresses substantive issues and strengthens the relationship of trust and respect between the parties. ADR methods of dispute resolution are widely adopted and applied in various areas of conflict.

ADR has been effectively used to enhance public confidence that seems lacking in some litigants towards achieving durable settlements and solutions to conflicts. Given the acceptance of these methods of dispute resolution as reflected in some federating states of Nigeria, there is no doubt that Nigeria is gradually equipping itself to grapple with the increasing individual transactions and societal disputes. All methods of ADR are effective mechanisms for the administration of justice and amicable dispute resolution to make social life peaceful.