

ALTERNATIVE DISPUTE RESOLUTION MECHANISMS, PLEA BARGAIN AND CRIMINAL JUSTICE SYSTEM IN NIGERIA *

Abstract

Conflicts, disputes, disagreements, problems and issues are inevitable in human affairs. Most of these disputes and problems in some circumstances give rise to offences for which a criminal prosecution becomes necessary. One can say that Alternative Dispute Resolution (ADR) is used all round the world to resolve disputes even before formal procedures for resolving disputes came to be. It is noteworthy to say that all through human history, disputes have always arisen and most were resolved without resort to court. The way our criminal justice system is designed, criminal trials do last long. This will of necessity be compared with the saying that justice delayed is justice denied. In some cases, after spending many years in detention while undergoing trial, the defendant is eventually discharged and he gets no compensation from the authorities for such wastage. This study examines these issues by first and foremost discussing the nature of ADR. The paper sees plea bargain as an instance of ADR and appraises its adoption into Nigerian criminal justice system in order to curb delay.

Key words: ADR, Criminal Justice System, Litigation, Disputes, Resolution, Trial

1. Introduction

Litigation, criminal or civil, which has been the most common method of dispute resolution, has proved with time to be fraught with so many irregularities including time wastage. Most matters on litigation last beyond the absolute minimum. This delay is most times occasioned by the number of matters pending before the Court and the inability of the Court to sit regularly. Delay in dealing with disputes especially criminally occasioning disputes often generates a kind of lack of trust on the Court and the desire albeit illegal on the part of the parties to engage in self-help. This paper will therefore seek a clear meaning of ADR and its advantages and then make a case for adopting ADR in the disposition of criminal cases if the circumstances permit.

2. Meaning and Some Types of ADR Mechanisms

ADR mechanisms as means of resolving dispute are an alternative to litigation. It is a non-adversarial way of resolving disputes. It also refers to a set of practices and techniques aimed at permitting the resolution of legal disputes outside the courts. According to Akinbuwa, ADR refers to a range of mechanisms designed to assist disputing parties in resolving their disputes without the need for formal judicial proceedings. They are those mechanisms that are used to resolve disputes faster, fairer, and without destroying on-going relationships.¹ Black's Law Dictionary² defines ADR as a procedure for settling a dispute by means other than litigation, such as arbitration or mediation. Equally, Oxford Dictionary of Law³ describes it as various methods of resolving civil disputes otherwise than through the normal trial process. ADR is often regarded as a better option than the more conventional mechanisms for the settlement of disputes because of lower cost and greater speed involved. It normally requires the consent and commitment of parties involved with a potential of presenting a more successful and sustainable solution to disputes. It is usually less formal, less expensive, and less time-consuming than a trial. It can give people more opportunity to determine when and how their disputes will be resolved with more flexibility in choosing what rules will be applied to their dispute. Parties can also have the option of choosing an expert in the relevant field. ADR enables flexible settlement that takes account of factors other than money or land, focusing on interests and needs and enabling disputants to build relationship. Since ADR is a set of practices allowing the settlement of disputes outside the rules of litigations, it has far more advantages than litigation. In most cases ADR produces

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¹ A. A. Akinbuwa, "Citizens Mediation Center and Multi-door Courthouse in Lagos State", in *Law, Politics and Development*, NBA Ikeja Branch, 2010, p. 327.

² B. A. Garner, *Black's Law Dictionary*, 9th Edition, West Publishing Co., St. Paul, Minn, 2004, p. 91.

³ E. A. Martin and J. Law, *op cit*, p. 28.

a more acceptable judgment for both parties as the judgment reflects their involvement in the search for a peaceful resolution. Apart from this, the resolution of the dispute may come faster than the resolution from the Courts. At the same time, the cost implication of a court based resolution may be unnecessarily higher than the ADR cost implication. It is pertinent to assert too that ADR may be used to settle matters that may be costly or difficult and as well it may be valuable in settling multi-party and multi faced disputes that do not easily fit into the two-sides traditionally existing in our adversarial system. The alternatives in dispute resolution have gained considerable grounds in recent times. The most common known forms of ADR in Nigeria are Arbitration, Mediation, Conciliation and Negotiation. Rules of procedure regulating these forms of ADR are enshrined in the rules of various courts. We will look into the above mentioned forms.

Arbitration

Black's Law Dictionary⁴ defines arbitration as a method of dispute resolution involving one or more neutral third parties who are usually agreed to by the disputing parties and whose decision is binding. It also defines an arbitrator as a neutral person who resolves disputes between parties, especially by means of formal arbitration. The principal Act regulating arbitration in Nigeria is the Arbitration and Conciliation Act. This Act in section 57 which is the interpretation section defines arbitration as commercial arbitration whether or not administered by a permanent arbitral institution. Arbitration is a process in which a third party neutral, after listening to parties in a relatively informal hearing makes a binding decision resolving the dispute.⁵ It is the simple version of a trial consisting of simplified rules of evidence. It arises where a third party neutral is appointed by the parties or an appointing authority to determine the dispute. Some of its advantages are that the parties will choose who the arbitrator would be, the arbitrator is some form of expert in the relevant field, a party can be represented in the dispute, its more flexible, less formal, less expensive, less time consuming than a trial, proceedings are open to the public. Arbitration has so many similarities with litigation, because of these similarities, many scholars and jurists have argued that arbitration is not an alternative to litigation. Arbitration itself is becoming more formal with the same procedures as litigation; lawyers apply delay skills of complex legal arguments and procedures into the arbitral process. In essence, arbitration is really a court process since once it is over, an award has to be filed in court, however, the advantage it has over litigation is that it saves time, resources, and is not fraught with unnecessary delays. Arbitration can only commence if there is a valid arbitration agreement between the parties before the dispute which agreement must be in writing as provided under Arbitration and Conciliation Act in its section 1. Arbitration is a binding form of ADR as against mediation, conciliation and negotiation. The arbitrator can be regarded as a private judge who determines issues between two or more disputing parties. Arbitration is no doubt the most widely used ADR both nationally and internationally.

Mediation

According to Black's Law Dictionary,⁶ mediation is a method of non-binding dispute resolution involving a neutral third party who tries to help the disputing parties reach a mutually agreeable solution. Mediation as defined in Oxford Dictionary of Law⁷ means a form of alternative dispute resolution in which an independent third party (mediator) assists the parties involved in a dispute or negotiation to achieve a mutually acceptable resolution of the points of conflict. The mediator, who may be a lawyer or a specially trained non-lawyer, has no decision-making powers and cannot force the parties to accept a settlement. According to Haynes, 'Mediation is a process in which a third person helps the participant in a dispute to resolve it. The agreement resolves the problem with a naturally acceptable solution and is structured in a way that helps maintain the continuing relationship of the people involved'. Simply put, mediation is negotiation assisted by a third party. It is voluntary, informal, consensual, confidential and not binding on the parties. The mediator's sole function is not to decide the issues or determine right or wrong, but to help the disputants resolve their conflict consensually. Mediation has existed

⁴ B. A. Garner, *op cit*, 119.

⁵ K. Aina, "Alternative Dispute Resolution", Nigerian Law and Practice Journal, Council of Legal Education, Nigerian Law School, vol. 2, No. 1, March 1988, p. 171.

⁶ B. A. Garner, *op cit*, 1070.

⁷ E. A. Martin and J. Law, *op cit*, 338.

before other alternatives to litigation were invented. In the case of *Okpwuru v Okpokam*,⁸ Justice Oguntade observed thus, ‘in the pre-colonial times and before the advent of the regular court, our people certainly had a simple and inexpensive way of adjudicating over disputes between them. They preferred them to elders or a body set up for that purpose. The practice has over the years become strongly embedded in the system that they survive today as custom’. Just like other alternatives, it focuses on the interests and welfare of the parties involved. The underlying point in the mediation process is that it arises where the parties to a conflict have attempted negotiations, but have reached a deadlock, they therefore invites a third party to assist them continue with the negotiations. The whole notion of agreeing on a third party to assist in the negotiations shows that mediation is a voluntary process since both parties to the conflict have to agree to the mediation process and the mediator.⁹ Mediation is faster, probably the fastest amongst the alternatives as the timing is within the control of the parties, it is informal, flexible, efficient, economical, preserves existing relationship, it is confidential, saves time. If one of the parties enters the mediation process without the intent to willfully abide by the outcome, the mediation is likely to fail. The power mediation has over litigation is that mediation resolves many problems associated with litigation such as high costs, formal and complex processes involved in litigation.

Conciliation

This according to Black’s Law Dictionary¹⁰ is a settlement of dispute in an agreeable manner or a process in which a neutral person meets with the parties to a dispute and explores how the dispute might be resolved. It is a process in which a third party, known as the conciliator tries to bring two disputing parties together in a bid to restore their relationship before the problem arose. Conciliation is a process used to restore parties to the position they were, where it fails, other forms of dispute resolution techniques may then be applied. It does not require that any form of agreement must be in existence. The Arbitration and Conciliation Act provides for a right to settle disputes by conciliation, sections 37-55 detailed the provision for conciliation. The right to settle dispute by conciliation is provided in section 37. Where more than one conciliator is appointed, they may act jointly. Each party may submit statements to the conciliator informing him of the issues to be resolved; the parties may further clarify the conciliator orally or through writing. After considering the issues and a possible settlement in view, the conciliator can prepare a settlement with its terms and send to the parties, after which the parties may accept, if they accept it and executes same, it becomes binding on them. The conciliator is an impartial person who drives the parties towards reaching an agreement. There is great similarity between mediation and conciliation, however the difference lies in fact that the conciliator possess expert knowledge in the said area, however, a mediator seeks to help parties develop a shared understanding of the conflict and to work towards trying to establish a lasting resolution.

Negotiation

Black’s Law Dictionary¹¹ defines negotiation as a consensual bargaining process in which the parties attempt to reach agreement on a disputed or potentially disputed matter. Negotiation usually involves complete autonomy for the parties involved, without the intervention of third parties. It is an informal process which offers the parties total control over the process, the aim being not to have a winning and losing side, but both parties winning. Negotiation leads to mediation in the sense that the need for mediation arises after the conflicting parties have attempted negotiation, but have reached a deadlock.¹²

3. Some Nigerian Legal Framework Encouraging ADR

The laws and rules regulating the establishment of courts and their procedures made provisions for ADR. There is no known law prohibiting ADR, rather, we have some of them making certain provisions. Some rules of court demand that the presiding judge is to encourage the parties involved to

⁸ (1998) 4 NWLR (pt. 90) 554 @ 586.

⁹ Makumi Mwangiri, “Conflict in Africa; Theory, Processes and Institutions of Management”, (Centre for Conflict Research, Nairobi, 2006), p. 53-54.

¹⁰ B. A. Garner, *op cit*, 329.

¹¹ B. A. Garner, *op cit*, 1136.

¹² M. Mwangiri, “Conflict in Africa, Theory, Processes and Institutions of Management”, (Centre for Conflict Research, Nairobi, 2006), p. 115.

consider ADR. Some of these statutory provisions and rules of courts are as follows- Constitution of the Federal Republic of Nigeria, 1999, section 19 (d) provides that the foreign policy objectives shall be (d) respect for international law and treaty objectives as well as the seeking of settlement of international disputes by negotiation, mediation, arbitration and adjudication. Section 254(3) of the Constitution of the Federal Republic of Nigeria (Third Alteration) Act, 2010 permits the National Industrial Court of Nigeria to establish within its premises an ADR centre to aid in the speedy disposition of cases that come to the court. Arbitration and Conciliation Act,¹³ is the domestic regulatory framework in Nigeria, modeled after the UNCITRAL Model Law on International Commercial Arbitration. Section 17 of The Federal High Court Act¹⁴ provides for reconciliation in civil and criminal cases – In any proceedings in the Court, the Court may promote reconciliation among the parties thereto and encourage and facilitate the amicable settlement thereof. Section 11 of the Matrimonial Causes Act,¹⁵ in its sub 1 provides that it shall be the duty of the court in which a matrimonial cause has been instituted to give consideration, from time to time, to the possibility of a reconciliation of the parties to the marriage (unless the proceedings are of such a nature that it would not be appropriate to do so), and if at any time it appears to the judge constituting the court, either from the nature of the case, the evidence in the proceedings to the attitude of the parties, or of either of them, or of counsel, that there is a reasonable possibility of such a reconciliation, the judge can adjourn the proceedings to afford the parties an opportunity of being reconciled or interviewing them in chambers with a view to effecting reconciliation or nominate a person with experience or training in marriage conciliation to effect reconciliation. Various State High Court Rules such as High Court Rules of Lagos State, High Court Rules of Rivers State, Anambra State High Court Rules etc encourage ADR. Section 33 of Environmental Impact Assessment Act¹⁶ makes provisions to the effect that the council can refer a matter to a mediator for mediation. Section 26 of National Health Insurance Scheme Act,¹⁷ provides that the arbitration board shall be charged with the responsibility of considering complaints made by any aggrieved party. Section 11 of Petroleum Act,¹⁸ provides for settlement of disputes by arbitration. Section 76 of Minerals and Mining Act,¹⁹ provides for arbitration and conciliation. Section 3 of Administration of Justice Commission Act,²⁰ provides that the commission shall ensure that congestion of cases in courts is drastically reduced. Rules of Professional Conduct for Legal Practitioners, 2007 in its Rule 15 provides that a lawyer shall not fail or neglect to inform his client of the option of ADR. From the above provisions, its left no doubt in our hearts that these numerous provisions were created and put in place to enhance alternatives to litigation, litigation is not always encouraged as it doesn't all the time bring the desired result sought for. ADR is being advocated for through the above provisions to be first sought for where possible before litigation is to be considered, litigation is meant to be the last resort where all other alternatives will fail.

4. The Concept of Justice and the Nigerian Judicial System

Justice is best described than defined. The word justice is an abstract term that stems from natural law and whatever definition is given to justice must necessarily picture integrity, moral rightness, fairness, impartiality, giving to everyone according to his due, upholding rights. Justice cuts across all spheres of human endeavors. Oxford Dictionary of Law²¹ defined justice as a moral ideal that the law seeks to uphold in the protection of rights and punishment of wrongs. We see from this definition that the object of law is to protect the rights and punish the wrongs of its subjects for justice to be achieved, and any law that will not punish any wrong or uphold any right cannot rear its head as a just law. The oft quoted aphorism by Lord Chief Justice Hewart that not only must justice be done; it must also be seen to be done came from the case of *R v Sussex Justices, Ex parte McCarthy*²² where a conviction was quashed

¹³ Cap A18, Laws of the Federation of Nigeria (LFN), 2004.

¹⁴ Cap F12, LFN, 2004.

¹⁵ Cap M7, LFN, 2004.

¹⁶ Cap E12, LFN, 2004.

¹⁷ Cap N42, LFN, 2004.

¹⁸ Cap P10, LFN, 2004.

¹⁹ Cap M12, LFN, 2004.

²⁰ Cap A3, LFN, 2004.

²¹ E. A. Martin and J. Law, Oxford Dictionary of Law, 6th Edition, Oxford University Press, New York, 2006, p. 301.

²² [1924] 1 KB 156.

because there was evidence before the English trial court that justices of the court of first instance were biased in giving their decision in favour of the respondent. Judges reputation for fairness and justice would be shattered when any party go away thinking that the judge had been influenced by the other party whether or not he did it in fact. Has this been the situation in Nigeria? We think this is not so as most persons outside the law profession view lawyers as liars, even amongst lawyers themselves, what then is the fate of the judge who sits to listen to liars and must tilt his scale to one side? The effect is that the judge is seen as a person who upholds lies and injustice; a person who gives credence to the side with the better lawyer. This has resulted in the loss of confidence in the legal process. Some persons especially the poor ones prefer not to have anything to do with the legal process at all because they believe that nothing good would come out of it.

Another oft quoted phrase is that justice delayed is justice denied. This is a legal maxim meaning that if legal redress is available for a party that has suffered some injury, but is not forthcoming timely, it's the same as having no redress at all. This phrase is being used to cry out to courts in their too complex and overburdened system which certainly slows down the act of giving justice. There are so many Nigerian cases that took too many years to be resolved, sometimes when the decision is finally given, the parties might have lost interest in the judicial process and moved on with their lives. Delay of cases is routine in Nigerian courts, there are too many reasons for this, and one of them is that our courts are burdened with too many cases on their dockets. On a daily bases, a court is likely to hear at least 30 cases at a sitting and one will not blame the court for spending as little time as possible with any of the cases so as to be able to touch all cases before him, at the end, many would be adjourned. Another reason is that legal practitioners/prosecutors ask for adjournments all the time especially when they are unprepared or where the lawyer knows very well that there is no merit in his client's case. Such lawyers employ all possible tactics of delay to ensure that the case suffers a still birth. This is further assisted by the fact that the Nigerian legal system especially the criminal justice system places so much emphasis on procedural law rather than substantive law which allows lawyers to dwell on technical arguments leaving the substance of the matter. It is not unheard of that a matter that has spent so many years getting heard at the Appellate Court may be returned to the High Court for trial *de novo*.

In the celebrated case of *Ariori v Elemo*,²³ proceedings were commenced in the trial court in 1960 and was concluded at the Supreme Court in 1983, the case took a total of 23 years from the trial court to the Supreme Court. The trial court delivered judgment fifteen months after the conclusion of the case and the case lasted in the Supreme Court from 1972 - 1983. In *Union Bank Nigeria Plc v Ayodare and Sons (Nig.) Limited*²⁴, the matter was instituted at the State High Court in 1989 but was not finally disposed of by the Supreme Court until 2007 – a period of 18 years. In *Adisa v Oyinwola*,²⁵ the trial court gave judgment while the appeal was not determined by the Supreme Court until the year 2000 – the appeal lasted for 15 years from the Court of Appeal to the Supreme Court. In the case of *Amadi v NNPC*,²⁶ a preliminary issue of jurisdiction took the Court 13 years to decide as the case went up to Supreme Court. In *Justice Akpor & Ors v Ighorigo*,²⁷ there was a delay of two years and nine months between conclusion of trial and judgment, and at the end, the Supreme Court set aside the whole proceeding because of the delay, what a waste of time, energy and resources! Also in *Ekiri v Kemiside*,²⁸ the Supreme Court set aside a judgment which was about 16 months late.

The list is endless, it could go and on, statistics have held that the average time a case stays in the Nigerian Court is about 6 years, this is just the average. How then can justice be achieved if it takes this long for litigants to have it, surely, this can be termed some other thing but never justice. The courts have proved not to be the last resort to the aggrieved, the down-trodden, and the poor man.

²³ 1983 1 SC NLR 1.

²⁴ [2007] 13 NWLR (Pt. 1052) 567.

²⁵ [2000] 10 NWLR (Pt.674) 116 in 185.

²⁶ (2000) 10 NWLR (Pt. 675) 76 @ 80.

²⁷ 2SC, 115, (1972).

²⁸ (1976) NWLR 145.

5. Plea Bargain in Nigerian Criminal Justice System

Criminal justice system is a system of practices and institutions of governments directed at upholding social control, deterring and mitigating crime, or sanctioning those who violate laws with criminal penalties and rehabilitation efforts.²⁹ Black's Law Dictionary³⁰ defines criminal justice system as the collective institutions through which an accused offender passes until the accusations have been disposed of or the assessed punishment concluded. The system typically has three components: Law enforcement (police, sheriffs, marshals), the judicial process (judges, prosecutors, defense lawyers), and Corrections (prison officials, probation officers, and parole officers). These three agencies operate together both under the rule of law and as the principal means of maintaining the rule of law within society. Most write-ups on ADR contain few or no allusions to crimes. This is because ADR is primarily described as a means of settling disputes between parties without resort to litigation; it does not welcome the idea of settling disputes between the state and an offender. The Criminal Justice System emphasizes the important role the state has to play to maintain order and peace in the society and to protect its citizens and their properties, the state has refused to withdraw from this duty. Is there really a better alternative to an accused being taken to court? Plea bargaining is an agreement in a criminal case between the prosecution and the defence, whereby the accused pleads 'guilty' as against 'not guilty' in return for an offer by the judge that he will minimize the sentence if the accused pleads guilty or an entirely different offer by the prosecution, for instance, dismissal of other charges. However, it must be pointed out that this concept is not yet developed in Nigeria as it is now in developed western countries, it is hoped that in no distant time, this will come to help minimize the workload on the courts in the criminal justice system with its other numerous benefits. Plea bargaining is therefore advocated for to be introduced in Nigeria as an alternative to litigation. In doing this therefore, one has to state that it offers more advantages than disadvantages in that ADR reduces delay, offers greater satisfaction to aggrieved parties and at a reduced cost. It offers a reduction in the workload of the court and simplifies most of the procedures. It provides a less confrontational means of resolving dispute, increases access to justice while restoring relationship among disputants. It is opined that ADR is not without its disadvantages but obviously the advantages it offers far outweigh its disadvantages.

6. Conclusion

From the above, there is no doubt that ADR is here to stay. Its growth has been enhanced as the fact that time, money, and energy input to litigation is often not worth the efforts at the end. Considering the advantages of ADR, it's obvious that the only way to decongest the courts and allow for settlement of disputes especially those bothering on criminal matters amicably is through the various ADR methods. We are therefore of the opinion that even in criminal justice system, the future of ADR in Nigeria is bright and promising in bringing about a society where disputes are disposed of more expeditiously and at lower costs, without having to resort to judicial settlements.

²⁹ Criminal Justice from Wikipedia, the free encyclopaedia. Accessed on 5th September, 2016.

³⁰ B. A. Garner, *op cit*, 431.