

Law And Dispute Resolution In Africa: Problems And Prospects

Adebambo Adewopo^{*1}

'The courts [of this country] should not be the places where resolution of disputes begins. They should be the places where the disputes end after alternative methods of resolving disputes have been considered and tried.' Sandra Day O'Connor (US Supreme Court)

Introduction

Granted that the instructive statement of Justice Sandra O'Connor was given within the confines of the United States' legal environment, it reflects global best practices, and certainly the emergent dispute resolution dynamics in Nigeria. While the dispute resolution mechanisms sit eminently at the heart of current developments in the Nigerian legal industry, it has called for the need to expand existing architecture for dispute resolution in order to meet the exigencies of access to justice and the protection of citizens' rights. Clearly, dispute resolution speaks eloquently to the imperatives of access to justice and the challenges in the modern legal era, in particular the judicial system as the primary institution for the administration of justice. Increasing attention in recent literature and advocacy on access to justice has been focused on a range of dispute-resolution frameworks as the cornerstone of the administration of justice. For this reason, the theme of the Lead City University Law Conference on dispute resolution is both apposite and timely. The theme raises important questions bordering on dispute resolution as a function of the law and more importantly the relationship, adequacy, or otherwise of the various dispute resolution mechanisms that are available through which disputes can be resolved in a manner that would promote the rule of law, human rights and justice in the society. It is even more significant when understood in the context of the complexity and diversity of mechanisms in which today's disputes or conflicts are rapidly arising and on which they rely for prompt, efficient, and effective resolution.

The connection between the law and dispute resolution is a natural one that is strongly rooted both in legal history and modern legal theory. In the original context, it is difficult and incomplete to think of the concept of law without dispute resolution, or dispute for that matter. This has given rise to the popular impression that lawyers are known to function and thrive best in an atmosphere of disputes and dispute resolution. The idea of law and dispute resolution on the one hand, and legal education and legal practice on the other hand are intricately

¹* Professor of Law and Senior Advocate of Nigeria, Nigerian Institute of Advanced Legal Studies. Of Counsel, L & A Legal Consultants.

** Text of a Keynote Address delivered at the Opening Session of the Law and Dispute Resolution Conference held at Lead City University, Ibadan, 14th -16th June 2022.

connected, particularly in the context of the training we offer our law students who will eventually become lawyers and in turn, will engage in different forms of dispute resolution as part of providing legal services in our community. This Keynote briefly defines the concept of ‘law’ and ‘dispute resolution’ and the connection between the two. It surveys the landscape of dispute resolution expressed mainly in the two forms of dispute resolution mechanism, namely: Litigation and Alternative Dispute Resolution (ADR), and customary dispute settlement system, among other identified mechanisms. From that discussion, the paper highlights some of the challenges and future prospects of the existing legal environment for dispute resolution.

The Connection between Law and Dispute Resolution

In this Keynote, two main concepts, namely the terms ‘law’ and ‘dispute resolution’ are implicated. It also brings with it the relevance and importance of the role of systems of dispute resolution that characterizes the African customary or traditional practices. Dispute resolution is rooted in the idea of law.² A host of philosophers and legal theorists, from Plato, Aristotle, Hume, and Bentham to Kant, Holmes, and others after them have explored the universe of jurisprudence in the inquiry into the meaning of the law. This has given rise to different schools of thought and a systematic body of knowledge concerning the purpose of law, which is beyond the current purview. To put it in simple perspective, ‘The concept of law lies at the heart of our social and political life. Legal philosophy or jurisprudence explores the notion of law and its role in society, illuminating its meaning and its relation to the universal questions of justice, rights and morality.’³ That engagement can take us almost everywhere to find the law. Suffice to say that the origin of law as a written code or ‘body of rules’ or in Kelsen’s term the ‘basic norm’ prescribed by an authority and having a binding legal force is as old as human civilization with different postulates which have trodden the entire landscape of the meaning and essence of the law. The function of the law is an all-important subject not just for the purpose of explaining the nature and principles of law but also in its role as a dynamic instrument of social engineering, a function that has been credited to Roscoe Pound and has remained so in our ever-evolving society. From the First to the current Fourth Industrial Revolution or the Internet age, human society has transformed inexorably. Yet different legal theories have developed throughout societies to capture the functions of the law. Law is always at the epicenter of that revolution or evolution as the case may be. Law has always been established as primarily serving the purpose of orderly organization and regulation of society,

² See generally, R W Dias, *Jurisprudence*, 5th Edition, LexisNexis, 2013.

³ See Raymond Wacks, *Philosophy of Law: A Very Short Introduction*, 2nd edn., Oxford University Press, 2014.

and its normative order – a function at the ethical and social foundations of law and society. Significantly, existing jurisprudence has recognized the four-fold purpose of the law as establishing standards of behaviour; maintaining order; protecting rights and liberties; and resolving or settling disputes.⁴ In other words, laws provide a framework to assist in resolving disputes between individuals and organizations. Laws create a dispute resolution system where individuals can bring their disputes before an impartial arbiter, such as a judge or jury. Ultimately, dispute or conflict resolution is one of the fundamental purposes of the law. To that extent, the main schools of thought, whether natural law, positivist, legal realism, and others, are unanimous in the understanding of dispute resolution as firmly embedded in the foundations and functions of law. Different legal traditions have developed over the centuries and across geographical and political spaces in the governance of society. In today's Africa, for example, different legal systems subsist that underpin the historical, cultural, political, and jurisprudential roots of the different countries that make up the Continent. One of the remarkable strengths of African legal history is that it is home to or better still, represents some of the great legal traditions known today, which include Common law, Civil law, Islamic law, traditional or customary legal system, and others. This has provided a robust legal foundation or pluralism as it were, for the existing jurisprudence and legal mechanisms for the resolution of disputes in those countries. Consequently, those legal traditions or systems have shaped the development of their respective laws in the process of dispute resolution. For example, in Nigeria as in other Common law jurisdictions in Africa, part of that development, is the tension or conflict between common law and customary law with the accompanying jurisprudence, such as found in the 'repugnancy doctrine,' an important feature of the Nigerian legal system. The term 'dispute resolution' or 'dispute settlement' or such similar terms⁵ refers to or has been adopted to describe the act of or the legal mechanism for resolving or settling disputes between two or more parties. Dispute resolution has to do with how disputes are managed and the legal conditions for their conduct. Disputes are inevitable and often arise in everyday life, such as in the family, workplace, communities, commerce, between governments, governments and individuals, and among nations. Disputes are often the results of conflicts that are an integral part of life, thus a social problem.⁶ In broad terms, 'dispute' may be private or public. Law, being a tool for fostering orderliness in the society and ensuring disputes are resolved or settled

⁴ Joseph Raz, *The Authority of Law: Essays on law and morality*, Oxford University, 1979.

⁵ The term 'conflict resolution' is common in management science.

⁶ C N Oguonu and C C Ezeibe, "African Union and Conflict Resolution in Africa," (2014) 5 (27) *Mediterranean Journal of Social Sciences MCSER Publishing*, Rome-Italy.

plays a significant role in dispute resolution in order to arrest the social problem. This is often achievable through the Court or other forms of resolution established by law. The connection between the law and dispute resolution is a natural one. Dispute resolution is at the heart of maintaining law and order in any organization or society. As earlier indicated, this is the primary function of law through various mechanisms or systems established to achieve the purpose of resolving disputes. As earlier indicated, law and dispute resolution are naturally connected. Dispute resolution is essentially a matter of law. Having regard to the cardinal principles of rule of law, due process and administration of justice, dispute resolution involves how rights, duties and obligations are determined which is governed by the law including the Constitution, the supreme law of the land which constitutes the organic law. Any law that is inconsistent with the provision of the Constitution, the Constitution shall prevail and the other law to the extent of its inconsistency is void.⁷ It sets out the body of fundamental human rights that must be observed at all times. It is the law that provides the overarching framework or enabling environment for dispute resolution; starting with the different laws, customs and rules, and the Constitution as the grundnorm and the final barometer in which the validity of any law relating to dispute resolution is measured. Like all other laws, dispute resolution-related laws including the modern ADR system must pass this test of constitutional validity.

In the African system of dispute resolution, there were no formal laws in place to ensure disputes are resolved, but there were informal rules of engagement such as the role of family heads, chiefs, age grades, priests and priestesses in ensuring disputes are resolved amicably. Those informal rules are adhered to for justice delivery. However, formal dispute resolution mechanisms such as Litigation, Arbitration, and Conciliation, are expressly provided for in the Constitution and have statutory flavour by an enactment of the National Assembly⁸ and by international law. Section 19 (d) of the Constitution requires that the Nigerian State adopts the settlement of international disputes by negotiation, mediation, conciliation, arbitration, and adjudication. The conventional role of the court in the interpretation of the law and its constitutional powers to hear and determine all forms of disputes including the enforcement of constitutional rights have shaped the subsistence of the court system as the primary institution for dispute resolution, affording access to justice and right of appeal for aggrieved persons up to the Supreme Court. Given all the available forms of dispute resolution, this means that the

⁷ Constitution of the Federal Republic of Nigeria, 1999 (as amended) (CFRN), Section 1(3).

⁸ Arbitration and Conciliation Act, 1988.

law seeks to ensure that disputes are resolved by providing the appropriate forum for settlement of disputes and in certain instances, gives parties the opportunity to choose a forum.

As a result of the gaps in the traditional court system, parties began to adopt other forms of dispute resolution such as Arbitration, Mediation, Negotiation and Conciliation. The Arbitration and Conciliation Act (ACA) was enacted with the aim of ensuring that commercial disputes are resolved through arbitration and conciliation in line with the rules in the schedules of the ACA,⁹ giving legal impetus to the use of Arbitration and Conciliation in the settlement of disputes and in investor-state dispute between the State and a foreign investor. This means that the court and ADR systems for the most part play complementary roles in dispute resolution, especially now that some courts have now incorporated ADR provisions into their rules of court as part of their Civil Procedure Rules and the establishment of multi-door court houses which gives parties the opportunity to choose from the varied range of settlement of disputes.¹⁰ One of the areas where there is no law promoting ADR is in the matters relating to crimes, as the court system is the only method of settling criminal matters which are not even seen as disputes as such, as it is a matter that involves the defendant and the State. With the enactment of the Administration of Criminal Justice Act (ACJA) in 2015, which seeks to promote speedy dispensation of justice and most importantly promoting restorative justice (one of the tenets of the African system of dispute resolution), reintegrating convicted defendants into the society, and plea bargain, arguably there is an element of ADR, leaving one to wonder if ADR can be extended to criminal matters. This will help decongest the court. Until there is a statutory flavour to this, ADR does not operate in criminal matters. From the above, the paper posits that customary or traditional system of arbitration is not an exercise of the judicial power of the Constitution,¹¹ not being a function *strictu sensu*, undertaken by the formal courts.¹² Rather, they are accommodated under the Constitution, including in certain judicial powers,¹³ only to the extent of their consistency with enhancing human dignity and fundamental objectives of the State.¹⁴ The paper further establishes that there is a strong connection between

⁹ See ACA, 1st to 3rd Schedules.

¹⁰ These include; Lagos State High Court (Order 25, High Court of Lagos State (Civil Procedure) Rules 2012), the Federal Capital Territory Abuja High Court and Rivers State High Court, Delta State Multi-Door Court house law 2012 which have made it a mandatory requirement for settlement of non-contentious commercial disputes while establishing Multi-Door Court houses for parties to settle disputes.

¹¹ CFRN, section 6.

¹² *Agu v. Ikewibe*, 1991, LPELR 253 SC.

¹³ This includes the establishment of Customary and Sharia Courts for hearing and determining matters relating to customary and Sharia law.

¹⁴ CFRN, Section 21 a.

law and dispute settlement, whatever mechanism one chooses including the traditional system of dispute settlement. If there are no laws, dispute settlement will be problematic.

Dispute Resolution Mechanisms

There are two main forms of dispute resolution mechanisms. These are Litigation (or adjudication) and Alternative Dispute Resolution (ADR)¹⁵ such as Arbitration, Mediation, Conciliation, Negotiation, reconciliation, Customary Arbitration and other forms of customary or traditional systems of settling disputes and more recently Online Dispute Resolution (ODR).

Litigation

Litigation involves trials or settlement of disputes by the formal judicial organ of state, that is, the court system enshrined in the Constitutions of States.¹⁶ This usually takes place in the courtrooms and is governed by rules of courts and rules of professional conduct for lawyers. In litigation, parties are represented by lawyers / counsels of choice, however, parties or litigants hardly have a say in the conduct of proceedings unless they are called upon to testify or give evidence. Litigation adopts the adjudicatory system of settlement of disputes, which may be adversarial or inquisitorial in nature depending on the legal system. Litigation is the procedure widely utilized for resolving a diverse range of disputes and is more popular and readily acceptable across local and international jurisdictions especially on issues of enforcement of fundamental human rights, interpretation of constitutional provisions, and criminal matters. However, the determination of disputes in the regular courts of law, particularly in Nigeria and across Africa has several challenges strangulating the courts, including not being time-efficient, and instructively such systemic delays provide ample opportunities for the distortion of justice delivery.¹⁷ Therefore, the efficacy of relying on courts for justice delivery for disputes has been in question for some time, giving rise to Alternative Dispute Resolution (ADR). An example relates to disputes that are commercial in nature. If that is subjected to protracted litigation process or procedure, it may affect the cost benefits of the transaction, and negatively impact the commercial transaction and overall business environment, and in such circumstances, may lead to appreciable pecuniary and other losses.¹⁸

¹⁵ Alternative Dispute Resolution (ADR) encompasses a series of mediation mechanisms for resolving conflicts that are linked to but function outside formal court litigation processes.

¹⁶ CFRN 1999, Section 6.

¹⁷ Olusola Joshua Olujobi, Adenike A Adeniji, Olabode A Oyewunmi and Adebukola E Oyewunmi, "Commercial Dispute Resolution: Has Arbitration Transformed Nigeria's Legal Landscape?" (2018) 9 *J Advanced Res L & Econ* 204.

¹⁸ *Ibid* 204-205.

Alternative Dispute Resolution (ADR) Mechanisms

Alternative Dispute Resolution (ADR) refers to any method(s) of resolving disputes outside the traditional legal forum, which is the court. The globalized commercial and investment environment coupled with other concerns such as cost and time effectiveness have compelled more flexible alternatives to court-based or adjudicatory process of resolving disputes governed by the law and procedure of a particular country. This is generally known as ADR as a term to describe other forms of settlement of disputes without litigation or the court. Although the origins of ADR have been traced to ancient Greeks, Plato and Aristotle, modern dispute resolution systems have formulated and fine-tuned the process and principles largely pioneered by litigation lawyers through experimental ADR mechanisms.¹⁹ In one of the first ADR mechanisms, the entire procedure took only two days presentation time outside the judicial system and without coercive features for parties to reach a ‘settlement in principle of what had been a long and bitterly fought lawsuit.’²⁰ Since the term ADR was first used by American litigation lawyers; Green, Marks, and Olson in their seminal article,²¹ ADR is now arguably a preferred mechanism for settling disputes, especially commercial disputes in many jurisdictions. This is a result of the fact that they are more efficient, predictable, confidential, and shorter time in resolving disputes and amenable to preserving cordial relationships among the disputing parties, providing the parties with a mutually binding decision, providing a win-win situation, and to a greater extent less cumbersome.²² Although, ADR mechanisms such as negotiation, mediation, and conciliation are less expensive, this cannot be said of arbitration as it is equally seen as expensive and has some colouration of delays, especially where parties still have to revert to the court where arbitration fails. Africa has embraced ADR mechanism as the notion sits comfortably with the African traditional system of justice geared towards reconciliation, thus suitable for Africa. However, formal court litigation is usually reserved for cases of constitutional or legal interpretation, where there is a need to set precedence, in cases with major public policy implications, or as a last resort after ADR has been tried. According to Uwazie²³ ADR in Ghana is used as a viable tool to decongest cases in the traditional court

¹⁹ Edward A Dauer, *ADR: Law and Practice*, Juris Publishing, 2003.

²⁰ Eric Green, “Jonathan Marks & Ronald Olson, Settling Large Case Litigation: An Alternative Approach,” (1978) 11 *Loy L A Law Review* 493.

²¹ *Ibid.* at 501.

²² *Ibid.*

²³ Ernest E. Uwazie, “Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability,” *African Security Brief, Publication of Africa Centre for Strategic Studies*, No. 16, November 2011, (Uwazie ADR in Africa) as part of the judicial reform project which surveys the use of mediation over a period of 2003 – 2011 (noting a record of 90% success by the expression of satisfaction by disputants). For example, the author noted with respect the first mediation week at the ADR Center in Ghana in 2003 with about 300 cases pending in select

room, consequently, more than 40 district courts in Ghana have since initiated court-connected ADR programs. Presently, Ghana has an ADR legislation in 2010 where Section 82 of the law provides that mediation agreements are recognized as binding and enforceable as court judgments. In Ethiopia, the case is almost the same as ADR has shown to be a veritable tool in settling of family disputes. In August 2008, 31 cases from the civil and family court dockets from the Ethiopian Women Lawyers Association (EWLA) in Addis Ababa were referred for mediation. During the 3 days of the pilot, all cases or complaints were handled by newly trained mediators, 17 of them resulting in full settlements, 6 in partial agreement or adjournment, and 8 returned to court or the EWLA.²⁴ In Nigeria, particularly in Lagos State since the creation of Multi Door Court Houses (MDCH) in 2002, people now have options to choose from and resolve their disputes. In the month of September 2020 alone, the Lagos State Citizens Mediation Centre, established with the goal of providing qualitative mediation and timely management of disputes by skilled mediators,²⁵ successfully resolved 801 cases ranging from landlord/tenancy, monetary claims, land disputes, among other matters.²⁶ Across Africa, ADR is widely used for dispute settlement from land dispute, natural resources, Niger Delta crises, youth restiveness, communal clashes and settlement of family disputes among others.

Negotiation

This type of ADR mechanism involves a direct communication or discussion between two or more parties to find a common ground or reach a joint decision on their own for their own concerns. It is usually the first step to dispute resolution.²⁷ When negotiation fails, parties can then make recourse to other forms of resolving disputes including litigation. It must be noted that negotiation may either be face to face, through telephone or by written communication usually between parties to a dispute between themselves before involving a neutral or third party. It is seen to be one of the first steps to ADR, if negotiation fails, parties can then resort to other formal methods of dispute settlement. However, it must be noted that negotiation as a type of dispute resolution mechanism, is not exclusive to ADR. For example, in adjudicatory

courts in Accra, that by 2013, all the district, circuit, and high courts is expected to have functioning mediation programs, with a projection of 10,000 case mediations annually—significantly reducing the pressure on Ghana's court system.

²⁴ Ibid.

²⁵ See Lagos State Ministry of Justice, Citizens Mediation Center available at <http://lagosministryofjustice.org/citizens-mediation-centre/> accessed May 31st 2022.

²⁶ Available at <https://lagosstate.gov.ng/blog/2020/10/13/lagos-mediation-centre-resolves-801-cases-recover-n5-39million/>.

²⁷ Francis Oleghe, "The process of Negotiating Settlement and a peep into Lagos Multi-Door Courthouse' Chartered Institute of Arbitrators," (2014) 9 (1) *Nigeria Journal of Arbitration*.

proceedings, the courts often allow parties to negotiate and voluntarily ‘settle’ the outcome which constitutes the final judgment of the court. Negotiation, whether supervised by a private third party or the court or unsupervised, is, therefore, an important part of dispute resolution

Mediation

This form of ADR involves third-party neutrals (mediator), with the consent of the parties, to facilitate negotiations between disputing parties. It is designed to provide an opportunity for claimants to have their views heard and undertake a process that satisfies all sides in a way that court proceedings cannot.²⁸ Mediation is often employed in a dispute that has multiple parties, such as communal clashes especially in traditional African society or where they have on-going or long-term relationships that the parties wish to preserve, require confidentiality, or are driven by underlying issues rather than the immediate facts or events being disputed.²⁹ In Mediation, parties request a third person or persons to assist them in their attempt to reach an amicable settlement of their dispute arising out of or relating to a contractual or other legal relationship. The mediator does not have the authority to impose a resolution or decision on the parties to the dispute. The mediator assists parties in having an amicable settlement and ensures that the parties understand what the process entails, that it is voluntary and resolution-seeking and that the parties agree to participate.

Mediation assumes that the parties are willing, rational, able, and motivated to settle. The motivation of the parties to settle is weighed against the consequences of an imposed judgment, stalemate, or “self-help” (that is, parties taking matters into their own hands).³⁰ Three main types of mediation have been recognized, namely, evaluative, facilitative and transformative.³¹ This involves five main stages, namely Convening the mediation, Opening the session, Communication, The negotiation and Closure.³² Mediation has helped courts around the world reduce delays and costs to litigants, deliver justice faster and fairly, and allow parties to exercise control over their case resolution without feeling alienated from the process.³³ The mediator facilitates settlement between parties to arrive at a negotiated agreement leading to a win-win

²⁸ See Uwazie, “ADR in Africa,” supra.

²⁹ Ibid.

³⁰ Ibid.

³¹ Available at <https://ormediation.org/find-a-mediator/choosing-the-right-mediator/mediator-styles/> accessed 22 May 2022.

³² Ibid.

³³ Ibid.

solution to their dispute. Mediation differs from arbitration because it is non-binding and in Nigeria, it is not regulated by any law.

Conciliation

This is an out of court dispute resolution mechanism recognized under the Arbitration and Conciliation Act (ACA)³⁴ which provides that ‘parties to any agreement may seek amicable settlement of any dispute in relation to the agreement by conciliation.’³⁵ Conciliation is also used in settlement of investor state disputes. It is often flexible and relatively informal, designed to assist parties in reaching an agreed settlement.³⁶ It involves the settlement of dispute following a request to conciliate³⁷ in accordance with the conciliation rules of the ACA.³⁸ There are usually one to three conciliators appointed by a conciliator, jointly or one conciliator by each party either jointly by the parties, or in the case of three conciliators – one conciliator by each party and the third conciliator jointly by the parties.³⁹ When parties agree to a settlement, the conciliation body shall draw up and sign a record of settlement. If parties do not agree to the terms of the settlement, they may submit to arbitration or approach the court.⁴⁰ Conciliation takes place before a Conciliation Commission that examines the facts and prepares a report that suggests a solution; however, it is not binding on the parties.⁴¹ In an investor-state dispute, the International Centre for Settlement of Investment Dispute (ICSID) Convention treats conciliation and arbitration as equivalent alternatives, however, arbitration is more popular, and this is because conciliation leaves final word with the disputing parties, a conciliation procedure is necessarily a prerequisite for arbitration.⁴² From the above, this paper observes that the court system is still popular as each ADR mechanism always goes back to the court if there is a failure to settle the dispute.

Arbitration

Arbitration is a process that is initiated by mutual referral to an Arbitral Tribunal for determination and is subsequently tabled for final resolution by professional arbitrators other than the court of competent jurisdiction. Simply put, it is a dispute resolution mechanism that

³⁴ Arbitration and Conciliation Act, 1988, (ACA).

³⁵ Section 32, ACA.

³⁶ Ibid.

³⁷ Section 38, ACA.

³⁸ Section 55, ACA.

³⁹ Section 40 (a-b) ACA.

⁴⁰ Section 42 ACA.

⁴¹ Dolzer and Schreuer, *Principles of International Investment Law* (2nd Edition Oxford 2012) 237.

⁴² Ibid.

does not involve the traditional court system. It is usually an adopted mechanism for commercial disputes in the context of international commercial transactions and settlement of investor-state disputes. It is a more formal and adversarial ADR mechanism which leads to a binding decision based on law, thus more preferable to other forms of ADR.⁴³ Arbitration has the following features namely confidentiality and privacy, enforceability of arbitral awards, expert and expedition of proceedings. Arbitration is anchored on the fundamental principles of party autonomy;⁴⁴ separability;⁴⁵ arbitrability;⁴⁶ competence of the arbitral tribunal to rule on its jurisdiction;⁴⁷ and minimal court intervention.⁴⁸ Those essential features and fundamental principles combine to make arbitration a truly remarkable and preferable alternative dispute resolution system.⁴⁹ There are various types of arbitration; namely, domestic, international, multi-party and other standard arbitration types such as maritime, investment, or construction arbitrations depending on the subject matter. In Nigeria, Arbitration is governed by the ACA.⁵⁰ Due largely to the non -predictability of the time frame for commercial disputes in regular courts through litigation, parties to commercial contracts began relying on arbitration clauses in a valid agreement where such agreements or clauses trigger parties to file a contractual

⁴³ It has been argued by some scholars that arbitration should not be classified as ADR. For this argument see Paul Idornigie, *Commercial Arbitration: Law and Practice*, Law Lords Publications, 2015, Chapter One. See also Muhammed Mustapha Akanbi, "Examining the effect of section 34 of the Arbitration and Conciliation Act of 1988 on the Jurisdiction of Courts in Nigeria," (2009) 2 *NJPL* 298.

⁴⁴ This principle reflects the fact that arbitration pursuant to an arbitration agreement is a consensual process. At the outset, the parties can decide how the proceedings should be conducted, under what law, pursuant to which rules, and so on.

⁴⁵ This principle states that where a contract contains an arbitration clause, that clause is separate and independent of the underlying contract – an agreement inside an agreement. The consequence is that even if the main agreement is null and void, the arbitration clause survives: section 12(2) of the Arbitration and Conciliation Act, Cap A18, Laws of the Federation of Nigeria, 2004 (hereinafter referred to as "the ACA").

⁴⁶ The 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Award seems to draw a line between subjective arbitrability and objective arbitrability: Arts 11(3) and V(2)(a). Subjective arbitrability deals with the parties and the arbitration agreement – whether the arbitration agreement is null, void and incapable of being performed while objective arbitrability deals with whether the subject matter is capable of resolution by arbitration. See also sections 48(b)(i) and 52(2)(b)(i) of the ACA.

⁴⁷ Section 12(1) of the ACA provides that an arbitral tribunal shall be competent to rule on questions pertaining to its own jurisdiction and on any objections with respect to the existence or validity of an arbitration agreement. This fundamental principle is often referred to as *competenz-competenz*.

⁴⁸ Section 34 of the ACA provides that a court shall not intervene in any matter governed by the ACA except where so provided in the ACA. The ACA then lists areas where the courts can intervene, for instance, sections 2, 4, 5, 7, 23, 29, 30, and 31. See also Paul Obo Idornigie, "Anchoring Commercial Arbitration on Fundamental Principles," (2004) 23 (1) *The Arbitrator & Mediator, The Journal of The Institute of Arbitrators & Mediators, Australia* 65, David St Sutton, Judith Gill and Matthew Gearing, *Russell on Arbitration* (24th edn, Sweet & Maxwell 2015) 5 and 27, and Nigel Blackaby and Constantine Partasides (with Alan Redfern and Martin Hunter), *Redfern and Hunter on International Commercial Arbitration* (6th edn, Oxford University Press 2015) 104 187.

⁴⁹ See Paul Obo Idornigie, "Anchoring Commercial Arbitration on Fundamental Principles" (2004) 23 (1) *The Arbitrator & Mediator, The Journal of The Institute of Arbitrators & Mediators, Australia* 65.

⁵⁰ An Act to provide a unified framework for the fair and efficient settlement of commercial disputes by arbitration and conciliation.

dispute with an arbitration tribunal.⁵¹ Arbitration can be voluntary or mandatory. Mandatory arbitration is usually triggered by a provision of law⁵² or the insertion of the arbitration clause in a commercial contract voluntarily entered by the parties to submit disputes that may occur to arbitration. An arbitral process is based on the written agreement between the parties which provides expressly that; where a dispute arises between the parties it shall be decided by a competent Arbitral tribunal. If this provision is lacking in a commercial agreement, parties are unable to proceed to arbitration to settle their disputes. In arbitration, the parties usually agree on the number of arbitrators that would be involved in the process. However, in situations where no such provision is captured in the requisite agreement, the number of arbitrators shall be deemed to be three.⁵³ Thus parties have control over the choice of the arbitration panel. Where parties are subject to arbitration, and in any legal proceedings in any court, any of the parties may at any time after appearance, but before filing of pleadings request the court to stay proceedings. The presiding court would make such an order when it is convinced that there is no satisfactory rationale why the issue should not be submitted to an arbitration tribunal pursuant to the subsisting arbitration agreement.⁵⁴ Considering that the court is still involved, some jurisdictions in Nigeria have now adopted specific ADR provisions as part of their Civil Procedures Rules.⁵⁵

In the ACA, arbitration means a commercial arbitration, which includes domestic and international arbitration, while commercial means all relationships of a commercial nature, including any trade or transaction for the supply and exchange of goods and services.⁵⁶ The implication is that arbitration is only applicable to commercial transactions and not on issues of human rights or criminal matters or employment and tax. Arbitration rules are guided by the UNCITRAL Arbitration Rules of the United Nations. It incorporates the New York Convention of 1958, which is accepted globally for the settlement of disputes arising from commercial relationships or contracts. The rules are amenable; they can be designed to meet the needs of arbitral tribunal for commercial disputing parties. An arbitration agreement is irrevocable except by the agreement of the parties or by leave of court.⁵⁷ The court has a

⁵¹ ACA, Section 1.

⁵² Ibid.

⁵³ Section 6, ACA, See Section 7 on the appointment of arbitrators.

⁵⁴ Section 5 ACA.

⁵⁵ These include; Lagos State High Court (Order 25, High Court of Lagos State (Civil Procedure) Rules 2012), the Federal Capital Territory Abuja High Court and Rivers State High Court, which have made it a mandatory requirement for settlement of non-contentious commercial disputes.

⁵⁶ Section 57 (1).

⁵⁷ ACA, section 2.

significant role to play in an arbitration agreement; a characteristic of judicial intervention that has attended the debate on the relationship between arbitration as ADR mechanism and the court system. From the provisions of the ACA, arbitration in Nigeria applies mainly to commercial disputes and it's not bound by the formal rules of the Evidence Act. Arbitration proceedings are confidential, thus often valued by parties in matters having a major impact on economic development, and awards are not made public except where both parties expressly consented.⁵⁸ Confidentiality has also come under attack leading to calls for more transparency.⁵⁹ However, it is one of the best forums for the settlement of commercial disputes, investor-state disputes, and international commercial disputes. Other forms of ADR mechanism include Med-Arb, Ombudsman, Mini-tribunal, Dispute Adjudication Board, etc all these have their own techniques and principles.

Traditional/Customary System of Dispute Resolution

While the traditional or customary justice or dispute resolution system has been generally classified under ADR, however, in terms of form and substance, the traditional or customary justice system is distinct and should be set apart from the ADR, historically, the conflation of the two is only because in most colonized African countries, the introduction of the received English law (comprising the Common law, Equity, and Statutes of General Application in the hierarchy of sources of law (with the Constitution of most countries at the top) has effectively consigned the customary or indigenous legal traditions to a residual or alternate legal system. For good reason, the traditional system deserves a separate consideration as a dispute resolution system properly so called. Africa is made up of different ethnic groups, with diverse cultural, social and legal traditions which are reflected in the nature of dispute resolution mechanisms available for settlement of disputes. Considering the peculiarity of its legal system made up of Customary Law,⁶⁰ Received English Law, and Islamic Law,⁶¹ there is always the issue of lack of satisfaction by disputants, who still believe that the customary methods of dispute resolution

⁵⁸ Olusola Joshua Olujobi, Adenike A Adeniji, Olabode A Oyewunmi and Adebukola E Oyewunmi, "Commercial Dispute Resolution: Has Arbitration Transformed Nigeria's Legal Landscape?" (2018) 9 *J Advanced Res L & Econ.*, 207.

⁵⁹ Dolzer and Schreuer, *Principles of International Investment Law* (2nd Edition Oxford 2012) 236.

⁶⁰ Customary Law has been described by Bairaman, F.J, in *Owonyin v. Omotosho* (1961) 1 All NLR. 304; (1961) 2 SCNLR 57 as "a mirror of accepted usage". It is existing native law and custom and not ancient custom with which present generation cannot be linked. Customary arbitration referred to is the prevailing practice of arbitral process or arbitration governed by rules of customary law, thus customary arbitration is recognised as part of our law and jurisprudence. In *Assampong v. Amuaku & Ors*, the West African Court of Appeal had no doubt that a decision given by a non-judicial body can constitute estoppel, where the constituent elements of an *estoppel rem judicatam* have been established.

⁶¹ Islamic arbitration is a variant of customary arbitration where there is reliance on Islamic injunctions in settling disputes among Islamic faithfuls. This is common in northern Nigeria.

are the long-standing tradition of people and in good measure, more effective. There are indications that they would want to adopt such methods of dispute resolution on a variety of matters including the enforcement of fundamental human rights as the clash in the culture involving moral vis-à-vis legal rights by the judgment of a court can exacerbate the issues. An example could be, under the Nigerian customary/traditional system where a man has been ostracized/banished by his kinsmen or members of his community for acts against the community, and will only be reintegrated if he pays a fine by undertaking a ritual.⁶² This is a clear issue of breach of human rights under the general law. He thus approaches the court for enforcement of his Fundamental human rights particularly freedom of Association guaranteed under the Constitution and African Charter of Human and Peoples' Rights, where the court rules that ostracism or banishment from his kinsmen is a breach of fundamental right. However, after the judgment of the court, he may still not be allowed to associate with his people. What more can he do? Can the court proceed on committal proceedings against the whole community for failing to abide by the decision of the court? Will this solve the dispute? What this shows is that the traditional justice system is alive among the people and but that other forms of dispute resolution resonate with the people. Therefore, there is the need to explore the legal dynamics and framework of dispute resolution mechanisms, such as Litigation, Arbitration, Negotiation, Conciliation, Mediation, Reconciliation, including the traditional system of settlement of disputes, which framework best offers the attributes of neutrality, transparency, easily enforceable and can bring justice to the people.⁶³ In Nigeria, the legal framework for the different dispute resolution mechanisms is derived from customary law, common law, the statute, including the Constitution, the grundnorm.⁶⁴ Clearly, in the pre-colonial African societies, there existed dispute settlement system where disputes were customarily resolved through four main hierarchical order,⁶⁵ which can be situated within the classical or modern mechanisms for dispute resolution. First, the disputants attempted to resolve the disputes by or among themselves (negotiation). If that proved futile, they called on the

⁶² Usually in forms of kola nuts, goats, drinks etc.

⁶³ See Paul Obo Idornigie, "Anchoring Commercial Arbitration on Fundamental Principles" in *The Arbitrator & Mediator, The Journal of The Institute of Arbitrators & Mediators, Australia* (2004) 23 (1), p 65. See also Paul Idornigie and Adebambo Adewopo, "Arbitrating Intellectual Property Disputes: Issues and Perspectives," (2016) 7 (1) *The Gravitas Review of Bus. & Prop Law* 1 at 7. The writers highlight the various forms of dispute resolution mechanisms (noting that '[E]very legal system has devised means of resolving such disputes through litigation, mediation, conciliation, arbitration and other Alternative Dispute Resolution (ADR) processes, which may be regarded as traditional, customary, conventional, statutory, consensual, adjudicatory or otherwise').

⁶⁴ *Ibid.* at page 6.

⁶⁵ K. Aina, *Commercial Mediation: Enhancing Economic Growth and the Courts in Africa*, NCMG International and Aina Blankson LP, 2012, p. 11.

support or assistance of kinsmen (mediation). If this also proved futile, the dispute was referred to the Head of the defendant's clan or neighbourhood (neutral evaluation). Where this also failed, the matter was then taken to the High Chief or King for a binding decision, in what is today's arbitration. Among the three pre-dominant tribes of Nigeria, namely Yoruba, Igbo and Hausa, including other tribes, this structured or hierarchical approach was a common practice or pattern. With the colonialization came the formal court system which relegated the traditional system to the background on the ground of being 'repugnant to natural justice, equity and good conscience.' However, owing to the distrust or growing lack of trust in the court system, customary or traditional methods of settlement of dispute is still applied today as an average Nigerian or 'Ghanaian disputant would prefer the indigenous chief's arbitration, just as an Ethiopian would prefer to turn to the traditional Shimangele (elder) for conciliation of most civil or family matters.'⁶⁶ Among the Yorubas of Southern Nigeria, dispute settlement is rooted in their unwritten customary practices where disputes are settled, for example, in palaces by the resident chiefs or *Baales*, chief in council, town halls; or in the family, by family heads usually headed by elders of the family, or in markets by market heads, or in the various community associations responsible for maintaining peace and harmony in different areas or sections of the society. Cases of fighting among young people were in the past accorded an impromptu settlement by passers-by who normally ensured restoration of peace and harmony.⁶⁷ If the dispute is among extended family members, the head of the family leads in the settlement, if it is in a nuclear family, the father usually settles the dispute. Dispute resolution by the Chief-in-council (*Igbimo Ilu*) in Yoruba land was the highest traditional institution for conflict resolution. In the pre-colonial era, the council had the power to pass a death sentence on any offender brought before it while the king's court was the highest court. It was also the last court to which appeals could be made, but, among *Egba* and *Ijebu* people, the *Ogboni* court seemed to be the last court of appeal.⁶⁸ Fines, damages in forms of kola nuts, drinks, goats may be awarded as a form of restitution in civil cases not as forms of punishment, but as deterrence and most importantly amicable dispute settlement where everyone involved gets justice and live amicably.⁶⁹

⁶⁶ Uwazie, "ADR in Africa," (supra) (noting that 'despite numerous attempts at modernization, many African countries are still struggling to establish functional, timely, and trusted judicial systems').

⁶⁷ Ibid 143.

⁶⁸ Ibid 144.

⁶⁹ Ibid.

A similar pattern or practice is recorded among the Igbos of the Eastern region who are generally regarded as autonomous or republican in nature. In the pre-colonial period, disputes were settled through the instrumentality of the family head system (*Okpara*, council of elders), women group (*Umuada*), age grades, deities, shrines, *Ohanaeze* (assembly of the people and the king), oath taking, swearing before a god/ shrine among others.⁷⁰ Settlement is usually in the form of restitution and fines in form of yams, goats, drinks, kola nuts or sweeping the village or market square and in extreme cases, banishment from the village as punishment to appease the gods. In the classic novel, “*Things Fall Apart*,” the legendary author, Chinua Achebe records the retributive justice of ostracization meted out to the tragic character Okonkwo who was banished from his native village of Umuofi for seven years by the village head. Nevertheless, the essence of these forms of punishment is deterrence, to encourage harmony and promote restorative justice.

Again, a similar structure of traditional justice reflects in other African countries. In Ethiopia, for example, informal or non-state systems and practices of conflict/dispute resolution have now become popular, as a result, scholars have given these systems different names such as unofficial law, the traditional institution of conflict resolution, traditional justice systems, non-state laws, customary dispute resolution mechanisms, restorative justice, and alternative dispute resolution. For the sake of consistency and contextualization of the concept with the Ethiopian situation, the term “popular dispute resolution mechanisms” (PDRMs) is adopted.⁷¹ In modernizing the laws in Ethiopia in the 60s and 50s, PDRMs were incorporated into the laws, as long as they do not contradict the earlier codes; were conciliatory in nature designed to be used under the supervision of the courts, and most popular in settling family disputes and contractual obligations.⁷² PDRMs resonate with the belief system of the people, therefore, the people willingly submit to them.⁷³

Clearly, across Africa, the traditional justice systems are still in use and judicially upheld. Customary arbitration as a form of dispute resolution has been recognized by the African courts. The judicial recognition of the traditional justice systems including customary arbitration has clothed the system with the attribute of legal enforcement under the formal or

⁷⁰ Ibid 145-146.

⁷¹ Gebreyesus Teklu Bahta, “Popular dispute resolution mechanisms in Ethiopia: Trends, opportunities, challenges and prospects,” (2014) [https://www.ajol.info African Journals Online](https://www.ajol.info/African%20Journals/Online100-102)100-102.

⁷² Ibid.

⁷³ Ibid. As part of the commitment to promote ADR in Ethiopia, the government has supported the establishment of the Institute for Peace and Security Studies (IPSS) at Addis Ababa University and the Ethiopian Arbitration and Conciliation Centre (EACC). Both these institutions promote the significance of PDRMs in Ethiopia.

general law. In Nigeria, the court in *Agu v Ikewibe*⁷⁴ defines customary arbitration as an ‘arbitration in dispute founded on the voluntary submission of the parties to the decision of the arbitrators who are either the chiefs or elders of their community and the agreement to be bound by such decision or freedom to resile where unfavourable.’ Customary arbitration is usually conducted under the law and custom of the people, its proceedings and awards are not in writing, and the agreement to enter into arbitration is oral in nature, thus not within the purview of the ACA.⁷⁵ For the courts to recognise customary arbitration certain essential ingredients must be met, these conditions are listed in the *Agu v Ikweibe* case.⁷⁶

In Ghana, in the case of *Assampong v Amuaku*,⁷⁷ the court held that “where matters in dispute between parties are, by mutual consent, investigated by arbitrators at a meeting held in accordance with native law and custom, and a decision given, it is binding on the parties and the Supreme court will enforce such decisions.” The court has also held that a customary arbitration decision has the same authority as the judgment of a judicial tribunal and will be binding on parties, thus creating estoppel.⁷⁸ Islamic arbitration also qualifies as customary arbitration for Islamic faithful as arbitral mechanisms were adopted to facilitate trade in the pre-seventh century Arabia when there was no organized system of judicial structure.⁷⁹ Islamic arbitration is practiced in Northern Nigeria where there are predominantly Muslims, and parties are bound by the decisions. Suffice to state that under the African traditional system of dispute resolution, mediation, conciliation, reconciliation, negotiation, customary arbitration and adjudication are often the adopted system but in a more informal way and applicable to all aspects of human interaction- from family to contract, crime, communal clashes, employment etc.

On the whole, ADR mechanism seems to fit into the African method of justice particularly its core value of reconciliation. Those who want their disputes settled must have confidence in the system, such as in cases before the elders, chiefs, priests, priestesses, family heads, age grades, and shrine, and must be ready to submit themselves to these authorities.⁸⁰ To elicit the truth

⁷⁴ 1991 LPELR 253 SC.

⁷⁵ Section 1(1) AC.

⁷⁶ It is shown that both parties submitted to arbitration, ii parties accepted the terms of arbitration, iii that they agree to be bound by the decision, such decision has the same authority as the judgment of a judicial body.

⁷⁷ 1932 1 WACA 192.

⁷⁸ *Awonsi v Awonsi*, (2007) All FWLR PT 391, 1642.

⁷⁹ Favour O. Ebbah, *The Delta State Multi-Door Courthouse, Law and Practice*, 2020, 47-48.

⁸⁰ Adeyinka Theresa Ajayi and Oluwafemi Buhari, “Methods of Conflict Resolution in African Traditional Society,” (2014) 8 (2) *An International Multidisciplinary Journal, Ethiopia*, Serial No. 33, April, 2014:138-157, ISSN 1994-9057 (Print) ISSN 2070--0083, 141-142.

and ensure there is justice, the arbitrator, judge, mediator or conciliator must also be truthful, as the presence of the ancestral forces is a factor; some may collapse or forced to say the truth because of the ancestral forces at play.⁸¹ The reconciliation function is practiced by an authority figure that mediates between conflicting parties (an arbiter or mediator) empowered to make binding judgments. The purpose is not to render a judgment in law but to reconcile the conflicting parties and their norms.⁸² It is an all-encompassing mechanism to ensure people live in harmony. Consequently, this paper affirms that modern ADR mechanisms can be traced to the traditional system of dispute resolution, albeit now codified into written laws to ensure uniformity, predictability, acceptance and in many essential respects, shares the attributes of reconciliation. cost and time effectiveness, transparency which are the cardinal objectives and features, that meets the global best practices for a dispute resolution system.

Remote Court Proceedings in The Context of Dispute Resolution

In a globalized and liberalized world of rapid advances in information and communication technology, another form of a dispute settlement system that has come into play is Online Dispute Resolution (ODR). ODR deserves more than a mention within the generalized format or structure of law and dispute resolution. ODR is not a form of dispute resolution mechanism separate from or limited to the ADR or the court. It is a technology-enabled online service that operates securely through different platforms available for dispute resolution-related processes in private or public domain, such as video hearing, teleconferencing, and other facilities or tools. It delivers different stages in the adjudicatory or decision-making processes such as settlement agreement, e-filing, orders or judgments of the court, trials, and others. In that respect, there are two aspects to ODR. The first relates to the subject matter of the disputes sought to be settled under the online. That may involve a broad range of issues, such as e-commerce transactions, data protection, IPRs protection, cybersecurity and cybercrime, choice of law and jurisdiction, among others. The other aspect relates to the forum for dispute settlement itself, where for example, the existing physical fora for dispute settlement may prove impracticable or ineffective to resolve the different disputes except by alternative means, which is virtual.

⁸¹ Ibid.

⁸² Adeyinka Theresa Ajayi and Oluwafemi Buhari, "Methods of Conflict Resolution in African Traditional Society," (2014) 8 (2) *An International Multidisciplinary Journal, Ethiopia*, Serial No. 33, April, 2014:138-157 ISSN 1994-9057 (Print) ISSN 2070--0083, 141-142.

For the purpose of relevance, it is necessary to briefly revisit the controversy over the remote court for good reasons: firstly, because of its constitutional significance to dispute resolution and impact on access to justice, and secondly, the issue constitutes a major controversy as the practice has not been settled either by judicial pronouncement at the highest court of the land or by a constitutional amendment that has been expected for that purpose. As the following discussion will indicate, if the lesson of the COVID-19 pandemic is anything to go by, it has shown the indispensable role of digital technology through the ODR as the new normal as it has equally engendered the attendant controversy in its application or as a *fait accompli* to the increasingly technology-driven justice sector. More recently, various online platforms are now increasingly available and used to conduct conferences, meetings including ADR, arbitral and court proceedings. Within the judicial framework, for example, remote court or remote justice means the adoption of remote or technology-assisted process across the three main stages of court proceedings which include filing, service of process, and conduct of court proceedings including judgment. It must be pointed out that what is regarded as remote court system, albeit in a limited fashion is not new in our legal or judicial system. Indeed, e-filing and e-service of court processes as integral components of remote practice by the courts have received judicial backing.⁸³ Before the pandemic, lawyers and litigants have filed and served court processes, hearing notices, and settled pleadings via emails, WhatsApp and similar means pursuant to the rules of procedure and practice directions issued by heads of courts so even in the virtual world, dispute settlement mechanisms are firmly in place and an important infrastructure or mechanism of the justice system.

In recent times, one of the important constitutional and legal questions that have arisen in the context of dispute resolution, in reference to ODR is the controversy on the remote court model, which is ODR itself. This was brought about directly as a result of the lockdown and other measures imposed to contain the impact of the covid-19 pandemic on different sectors

⁸³ C.M. & E.S Ltd v. Pazan Services Nig Ltd. LTD (2020) 1 NWLR (Pt 1704) 70, at 95 The Supreme Court accepted *ipse dixit* e-filing and e-service of court processes. (Noting that ‘In the instant appeal, there is evidence that a text message was sent by the registry of the Court to the GSM numbers provided by counsel to both parties informing them that the matter had been adjourned to 15th March, 2016. I hold the view that at this age of prevalence of information technology, the service of hearing notice through text message by the registrar of Court is good and sufficient.’ Per Okoro JSC). In providing for certain instances where certain criminal trials may not be conducted in open court, The Administration of Criminal Justice Act 2015, (ACJA), permits the court to take measures that include receiving evidence by video link. Section 232 (c), is a clear indication of a remote trial system, albeit in a limited manner.

including the justice sector.⁸⁴ The suspension of court sittings has exacerbated the problem of delays in courts and extended to enforcement and execution of court orders and judgment, all of which have seriously encroached on the already persistent problem of access to justice and justice delivery. Though the controversy may have been muted by the trend now across various courts in Nigeria, the questions it raises remain alive. The application of digital technology to the legal mechanism of dispute resolution is the issue of virtual or remote court. If e-filing and e-service as components of court processes appear settled in the debate over the validity of remote hearing, it means that the real issue of contention is the actual trial itself, which if found short of a mandatory constitutional requirement of ‘a public hearing’ may go to the validity of the whole process or remote hearing as the case may be, since proper filing and service including proof of service is part and parcel of court proceedings.

For the purpose of relevance, it is necessary to briefly revisit the controversy over the remote court for good reasons: firstly, because of its constitutional significance to dispute resolution and impact on access to justice, and secondly, the issue constitutes a major controversy as the practice has not been settled either by judicial pronouncement at the highest court of the land or by a constitutional amendment that has been expected for that purpose. As the following discussion will indicate, if the lesson of the COVID-19 pandemic is anything to go by, it has shown the indispensable role of digital technology through the ODR as the new normal as it has equally engendered the attendant controversy in its application or as a *fait accompli* to the increasingly technology-driven justice sector. At the core of the legal and policy responses is the question of the constitutionality of remote hearing in the light of section 36 (1), (3) & (4) of the 1999 Constitution. The essence of the constitutional provisions is to the effect that every person shall be entitled to a fair hearing within a reasonable time for the determination of the rights and obligations accruing to such person and such hearing must be held in public.⁸⁵ The

⁸⁴ The response through various legal and policy instruments, including practice directions, guidelines, and decisions, to leverage technology and recognize remote hearings or proceedings to provide access to justice and speedy administration of justice has raised questions in the adequacy or otherwise of the existing dispute resolution process or mechanisms.

⁸⁵ See Constitution 1999, section 36 (3) ‘The proceedings of a court or the proceedings of any tribunal relating to the matters mentioned in subsection (1) of this section (including the announcement of the decisions of the court or tribunal) **shall be held in public**’(4) ‘Whenever any person is charged with a criminal offence, he shall, unless the charge is withdrawn, be entitled to a fair hearing in public within a reasonable time by a court or tribunal: Provided that - (a) a court or such a tribunal may exclude from its proceedings persons other than the parties thereto or their legal practitioners in the interest of defence, public safety, public order, public morality, the welfare of persons who have not attained the age of eighteen years, the protection of the private lives of the parties or to such extent as it may consider necessary by reason of special circumstances in which publicity would be contrary to the interests of justice (b) if in any proceedings before a court or such a tribunal, a Minister of the Government of the Federation or a commissioner of the government of a State satisfies the court or tribunal that it would not

courts have upheld as a foundation of fair hearing that one of the principles of fair hearing is that court proceedings be held in public and parties be informed or notified of the dates and have free access to the venue of the hearing.⁸⁶ In the last two years, the question of the constitutionality of remote hearings has remained a major issue of interrogation among law scholars, legal practitioners, policymakers, the whole range of the justice sector players, the public including the court which is required to settle the issue.⁸⁷ In many respects, this question goes to the root of the sustained discussion on law and dispute resolution and the attendant questions of access to justice in the digital age. As a preliminary point to note, the Constitution empowers the heads of court to validly make practice directions for the creation and regulation of court proceedings.⁸⁸ To that, there is no question. However, the question of validity or constitutionality of the practice direction, regulations or policy statements mandating remote hearings is an issue of contention. This has turned on the correct interpretation and application of the relevant constitutional provisions as it concerns remote hearing. The legal profession has been polarized on this issue; on the one side are those who hold the view that remote court hearing has satisfied the constitutional requirement ‘to be held in public,’ thus the operative instruments are valid; and on the other side are those who vehemently hold the position that the instruments mandating remote court hearing are inconsistent with constitutional requirement of the public hearing and as such the proceedings in question are null and void to the extent of their inconsistency. It is important to recognize from the onset that while there is no constitutional provision expressly providing for remote court proceedings, there is equally no provision in the same constitution prohibiting virtual or remote court hearing,⁸⁹ raising the question whether the practice directions or relevant instruments can fill that gap, if any. This ultimately leaves the question to the purposive construction of the constitutional provision, a

be in the public interest for any matter to be publicly disclosed, the court or tribunal shall make arrangements for evidence relating to that matter to be heard in private and shall take such other action as may be necessary or expedient to prevent the disclosure of the matter.’

⁸⁶ *Gitto Construction General Nig. Ltd. & Anor. V. Etuk & Anor* (2013) LPELR 20817 (CA).

⁸⁷ See also Nigerian Institute of Advanced Legal Studies Report on COVID-19 Impact on Justice Sector, May 2020.

⁸⁸ See *Onwudinjo v. State* (2014) LPELR – 24061.

⁸⁹ See *Anyaeobosi v. RT Briscoe Ltd.* (1987) 2 NWLR (PT. 59) 108 (The Supreme Court held that what is not prohibited is permitted): *Theophilus v. FRN* (2012) LPELR-9846 (noting that ‘the basic canon of interpretation or construction of statutory provisions remains that what is not expressly prohibited by a statute is impliedly permitted...it is not within the court's interpretative jurisdiction or powers to construe a statute to mean what it does not mean, nor to construe it not to mean what it means...’). See also *Alhaji Ibrahim Hassan Dankwambo & Anor v Jafar Abubakar & Ors* LER (2015) SC.732/2015, per Okoro, JSC that; “there is nowhere in the legal practitioners act which says that the names enrolled in the roll of legal practitioners cannot be abbreviated or initialed. *It is a cardinal principle of law that what is not expressly forbidden, is permitted.* [emphasis supplied].

position with abundant judicial authority.⁹⁰ The Constitution provides that hearings shall be held in public. There is no reference to a place, room or building designated as court. To the preliminary question of what is the court, there is authority for the position that the ‘court is the judge or judges who are in charge of the way a legal case happens and sometimes make decisions about it. It is also a place where trials and other legal cases happen.’⁹¹ With the idea of the court not limited to a physical place or building settled, it clears the way to the meaning of ‘public’ in that context. The interpretation of public in the context of section 36 (3) by Mohammad JCA provides clear guidance on how ‘public’ should be construed in the context of section 36(3).⁹² According to the learned Justice of Appeal:

A place qualifies under section 36(3) of 1999 Constitution to be called ‘public’...if it is outrightly accessible and not so accessible on the basis of the permission or consent of the judge.

One of the earliest hints of judicial inclination towards virtual court hearing is the FCT High Court decision in the mock trial proceedings in *Ogunwunmiju SAN v. Okutepa SAN*⁹³ where Honorable Justice Peter Affen held that Clause 9 of the FCT High Court COVID-19 Practice Direction which provides for remote hearing is neither unconstitutional nor offends section 268 of ACJA. At the time, a High Court Judge in Borno State had blazed the trail by delivering a judgement by virtual means. While the issue is far from being settled, two developments have provided the unique opportunity to lay the question to rest. The first concerns the two cases at the Supreme Court filed by the Attorney General of Lagos State⁹⁴ and Attorney General of Ekiti State,⁹⁵ respectively against the Attorney General of the Federation, challenging the constitutionality of virtual hearing. The cases were considered speculative and preemptive on the basis of the pending bill for the constitutional amendment of section 36) (3). Although, the Supreme Court hinted that ‘as of today, virtual sitting was not unconstitutional,’⁹⁶ the matters were not decided on the merit. The second was the prospect of constitutional amendment at the National Assembly by the introduction of the bill to allow for remote hearing, the very reason the apex court could not decide on the cases. The bill has now been finally rejected only last

⁹⁰ Notably the Supreme Court in the case of Attorney-General of Bendel State V. Attorney-General of the Federation (1981) 10 SC. 1, Obaseki JSC emphasised that ‘words of the constitution are therefore not to be read with stultifying narrowness.’

⁹¹ See Cambridge Law Dictionary.

⁹² *Kosebinu v. Alimi* (2005) LPELR – 11442 (CA).

⁹³ Suit No FCT/HC/CV/001/2020.

⁹⁴ Attorney General of Lagos State v. Attorney General of the Federation & Anor, Suit No. SC/CV/260/2020.

⁹⁵ Attorney General of Ekiti State v Attorney General of the Federation, Suit No SC/CV/261/2020.

⁹⁶ Felix Omohomhion, ‘Supreme Court dismisses suits against virtual hearing’ (Business Day Weekender, 14 July 2020), see <https://businessday.ng/news/Article/supreme-court-dismisses-suits-against-virtual-hearing/>, accessed 12 May 2022.

April, thus denying the opportunity to settle the issue from the purview of the constitutional amendment. As it stands today, the issue has not been resolved or settled. Clearly, both the judiciary at the highest level, (Supreme Court) and the legislature (the Upper Chamber of the National Assembly), the two organs of government responsible for interpreting and making the law respectively have not provided the authority for the practice of remote court hearing in the judicial system. The constitutionality of the practice which primarily derived its force and tenor by virtue of the various practice directions remains an open question. The practice before various courts depending on the judge has remained largely divided; some judges have wholesomely adopted it, some have done so with caution and some states are awaiting judicial pronouncement by the Supreme Court to prevent their decision from being challenged and rendered nugatory, as constitutional amendment of the provision has been ruled out. As mentioned earlier, virtual court proceedings are neither new nor peculiar to Nigeria. It has become a global practice. As an integral part of the holistic dispute resolution process with the catalytic effect on efficient and transparent administration of justice and access to justice, it would be too late in the day for the courts and lawyers to recount or reject it. That fact by itself would appear to lay the debate to rest with the preponderance of acceptance of the trend by the legal community. Perhaps, the greater challenge and the impact on an efficient and transparent process of dispute resolution is the provision of enabling environment and infrastructure for remote court hearing which includes strong internet connectivity and capable ICT manpower to support the smooth operation of the service. Indeed, the fact that remote hearing has become a *fait accompli* and an integral component of a 21st century dispute resolution mechanism in any legal system has made the debate over it a moot point.

The Challenges of Dispute Resolution System

The challenges associated with the different forms of dispute resolution mechanisms highlighted in this paper manifest in different ways and account for the reason why some are preferred over others. While the adjudicatory process of the court system remains the dominant form of dispute resolution, it is still faced with challenges or limitations giving rise to other dispute resolution mechanisms established by law or convention as forming integral parts of the justice system. Access to justice, for example, has been one of the main concerns in the justice system. These challenges include issues of access to justice; cost; delay; technology; the overall administration of the justice system, low level of awareness, perception of inferior status of ADR, especially concerning mediation and lack of mediation law, among others. This has been discussed mostly in the context of the overall administration of justice within the

formal court system. Generally, litigation has been regarded as time-consuming, characterised by undue delays such as incessant adjournments, industrial actions, congestion, lack of diligence on the part of counsels and court, transfer and elevation of judges, long times for appeals, and the fact that litigants are unable to predict the time frame within which disputes or cases brought before regular courts will last, and lack of trust in the judiciary. To preclude negative outcomes, parties began to shop for alternative methods to the settlement of disputes to preserve the *res* and to ensure that disputes have a determined time frame for settlement. This gave way to ADR mechanisms. One of the policies adopted by some states in Nigeria in addressing the underlying problems with litigation is the establishment of Multi-door Court Houses⁹⁷ with the goal of promoting ADR and supporting the development and expansion of the administration of system through the adoption of ADR mechanisms. For example, this is to have the overall effect of assisting to decongest the cases in the courts through the three doors or options, namely early neutral evaluation, mediation and arbitration, by which disputing parties are able to resolve their disputes at the Lagos Multi-Door Courthouse.

There are also challenges in the African traditional system where disputes differ. What could, for example, constitute a dispute in Nigeria may not be in Ghana. However, disputes such as family, land, communal clashes, market brawls spread across Africa as disputes. Nonetheless, there is still a considerable level of affinity to the traditional system by the local population across the continent. The court system has experienced criticisms in dispute resolution, as citizens have lost faith in the ability of their courts to provide timely or just closure to their grievances.⁹⁸ Owing to conflicts which are common across Africa, national courts are sometimes unable to seat. A significant example was the endSARS protest in Nigeria, leading to destruction of court facilities in Lagos state, where some of the courts were unable to sit for long periods. Even when courts are involved, while they may address the legal question, they are not exactly focused on mitigation or other underlying cultural and moral sensibilities or questions, especially in communal clashes or cases that involve host communities and natural resource governance, as they may miss the underlying catalyst. At times, court judgments can escalate disputes. As once noted by a Nigerian lawyer, “when the judge proclaims a winner,

⁹⁷ This refers to a courthouse that has multiple dispute resolution doors. The multi door court house system was first established in Lagos in 2002, Abuja in 2003, kano in 2009, Delta state in 2012.

⁹⁸ Uwazie, “ADR in Africa,” *supra* (noting that ‘A 2009 survey in Liberia found that only 3 percent of criminal and civil disputes were taken to a formal court. Over 40 percent sought resolution through informal mechanisms. The remaining 55 percent went to no forum at all. This includes cases where claimants felt the need to take justice into their own hands, often with violent consequences’).

that is the beginning of the real conflict.”⁹⁹ Formal litigation, grounded in an adjudicatory process, is limited in ensuring fairness and satisfaction for disputants.

Another area where the traditional court system seems to have failed is in the area of Investor-State dispute. This is a dispute between a country/state and an investor who is a foreign national. The reason is obvious: Foreign Nationals find it unattractive to settle disputes through the court system as the conflict of rules may arise. Investors may fear impartiality from the courts of the state, or there may be executive interventions in court proceedings likely to influence the outcome of the case in court.¹⁰⁰ The gaps left by the court system have led to the idea of offering investors direct access to international procedures especially arbitration, which gives investors an effective international remedy and improves the investment climate of the host state or country and likely to attract foreign direct investment.¹⁰¹

In Nigeria, litigation seems to be more popular than other ADR Mechanisms, because litigation covers all aspects of disputes while ADR covers only certain aspects of dispute. For instance, by virtue of the ACA, Arbitration and Conciliation cannot be applied to cases on human rights, criminal offences, interpretation of constitutional provisions, employment, traffic offences, taxation¹⁰² and some domestic issues that can be resolved through ADR, given their relatively minor nature, cost-effectiveness and the relatively little red-tape involved in ADR.

Another challenge with ADR across Africa is that the laws on ADR principles are underdeveloped to accommodate other forms of ADR such as negotiation and mediation. There is presently no law guiding mediation and negotiation,¹⁰³ which is seen as veritable tools in dispute resolution which has been very efficient in customary methods of dispute settlement. For example, in Zambia, the lack of this legal framework has consequently hindered the development of negotiation as an ADR mechanism.¹⁰⁴The implication is that parties will not be adopting these mechanisms; rather they will adopt more of arbitration and conciliation, thereby making them becoming difficult to access. Generally, in Africa, problems with ADR can largely be attributed to the poorly or under-documented forms and practices of conflict/

⁹⁹ Ibid.

¹⁰⁰ Dolzer and Schreuer, *Principles of International Investment Law* (2nd Edition Oxford 2012) 235.

¹⁰¹ Ibid 234.

¹⁰² Cases that fall into these categories make up a high percentage of cases in court often facing delays, leading to court congestion and congestion of detention centres.

¹⁰³ *Alternative Dispute Resolution and Peace Studies in Africa Lessons, prospects and challenges*, A report on the proceedings of the Fourth International Africa Peace and Conflict Resolution Conference held in Johannesburg, South Africa, on 25 and 26 July 2014.

¹⁰⁴ Ibid.

dispute resolution as they developed historically across the continent.¹⁰⁵ Also, there is a dearth of trained facilitators to guide the ADR processes, thereby making ADR unpopular as people do not understand or are versed in the processes. People do not easily identify with ADR practitioners the way they do with law firms. The number of qualified ADR practitioners is few and cannot adequately service the legal industry, although there is an increasing level of interest and enrolment at the two Arbitration institutes in Nigeria. As a result, some lawyers who are not qualified arbitrators, mediators, or negotiators, do not advise clients to pursue ADR as advising them to pursue ADR will affect their income or practice as the case may be. Lack of awareness makes ADR unpopular, making parties approach the court system, except for those in the commercial practice who are aware of arbitration; however, some of them are still not disposed to adopting arbitration because it is expensive. ADR particularly arbitration is often seen as a mechanism adopted by the rich or upper class in settling disputes owing to the fact that the more popular ADR mechanisms are focused on commercial transactions ruling out the everyday infringements suffered by the common man.

Another challenge is the institutionalization of arbitration which appears to be creating problems similar to that of litigation, making arbitration expensive, experiencing delay, and arbitration seats are often not within localities of the commercial transactions. Arbitrators often sit in New York, Paris, London, Dubai, Stockholm, among major arbitration seats and parties pay for their appointed arbitrators to fly to these countries to seat. This is expensive compared to litigation; thus, it appears the advantageous attributes of ADR are lost or retained as a result of institutionalizing them. Also, the lack of powers for enforcement of arbitral awards, especially where an aggrieved party against whom an award was made fails to comply with the award is a challenge to arbitration practice. This may compel the successful party to further apply to the court for execution of the award. This alters their alternatives and may diminish their effectiveness.¹⁰⁶ While one of the pillars of a legal system is the availability of dispute resolution mechanism, one of the pillars of dispute resolution is the enforceability of rights to the effect that lack of enforcement can frustrate any dispute resolution system. Without enforcement, dispute resolution is neither complete or effective. This is the context in which the enforcement of arbitral awards has been debated. Lastly, ADR also faces the challenge of lack of funding or sustainable financing.

¹⁰⁵ Ibid.

¹⁰⁶ Ibid.

Future of Dispute Resolution: Beyond The Courts?

After examining the different dispute resolution frameworks established by the existing legal or justice system as the case may be, the question of the future of dispute resolution systems is apposite. First of all, the legal system provides the overarching and enabling environment for the administration of justice in the current discussion on dispute resolution is significant. That role essentially consists of the subsistence of different dispute resolution mechanisms for ensuring justice delivery. When examined from the broader context of access to justice, the stakes for the dispute resolution mechanisms to provide the utmost condition for the enforcement of rights and remedies for citizens are high. From a pragmatic standpoint, this condition is not the exclusive preserve of any dispute resolution institution but one that is associated with the inherent nature and character of such institution available or as defined under a legal system. The marked shift in the understanding of the concept of justice itself as ‘one of the core principles of every legal system’¹⁰⁷ has effectively expanded justice, as one which is not located solely in the court system,¹⁰⁸ rather within the social milieu where justice is served. The main challenge remains in the domain of administration of justice as much as the concept itself. As a complex legal and social construct, the notion of justice, though has always meant ‘different things to different people,’¹⁰⁹ has been universally understood as conveying the quality of fairness, equality, freedom from oppression or suppression, and a sense of being just to all and the condition of trust and public confidence under which that quality is administered. The words of Oputa JSC (as he then was) describing justice as a ‘three-way traffic,’¹¹⁰ that is, for the accused, the victim, and the society, sheds further light on the concept and context of administration of justice as the primary objective of dispute resolution afforded under the existing legal system. With the existing dispute resolution mechanisms standing on the tripod of litigation, arbitration, or broadly ADR, and customary system, the real test of the justice system, whether before or outside the court is the ability to deliver in a transparent manner an efficient and effective resolution or settlement and one which meets the highest standards of justice as the reasonable expectation of citizens.

¹⁰⁷ See Michael Kirby, “Attaining Universal Justice: Realities Beyond Dreams,” (2011) 1 (7) *VICTORIA L. SCH. J.* 7.

¹⁰⁸ *Ibid.*

¹⁰⁹ Tania Sourdin, “The Role of the Courts in the New Justice System,” (2015) 7 *Arbitration Law Rev. Yearbook on Arbitration and Mediation.*

¹¹⁰ See *Josiah v. State* (1985) 1 NWLR (PT. 1) 125.

Granted the fact that the development of the Nigerian justice system or sector¹¹¹ has reflected a combination of the three forms of dispute resolution mechanisms that have derived their life from the relevant Statute, customary law, common law or the Constitution, the important question is how those mechanisms have fared under the enabling legal and political environment. What does the future hold for dispute resolution for a continent with prevalent political and economic instability, serious security challenges and social upheavals? It is clearly in the subsistence of a body of effective dispute resolution mechanisms to serve a pivotal role in the development and concerns about access to justice. While policymakers and legal philosophers have explored the wider view that disputes can be resolved outside the courtroom or court system, it is evident that the courts are the dominant institution of the justice system, notwithstanding the well-known fact of the slow judicial process. However, the attempt at eliminating the persistent delays and congestion can be seen as part of the effort to surmount some of the challenges and improve the court process as a pre-eminent dispute resolution mechanism. In Lagos State, for example, the introduction of two practice directions for the purpose of eliminating persistent congestion and delays, expeditious disposal of civil cases and improving the litigation process in the implementation of the High Court of Lagos State (Civil Procedure) Rules 2019 by the Lagos State Judiciary is a case in point.¹¹² With particular reference to the Lagos State civil procedure rules, the written memorandum of claim and options for settlement requirement or the pre-action protocol which provides a mandatory filing of necessary or accompanying documents to show an unsuccessful attempt or amicable settlement before litigation failing in which no action may commence shows not only the complementary role but also the institutionalization of alternative dispute resolution as an integral part of the judicial process.¹¹³ For criminal matters, the Administration of Criminal Justice Law (ACJL) of Lagos State, just like the Administration of Criminal Justice Act (ACJA) at the Federal level, demonstrates the meeting of the primary objective of ensuring speedy dispensation of justice, as one of the fundamental objectives of the justice system, and in particular, the court as a dispute resolution mechanism.

¹¹¹ Justice sector comprises all the institutions and actors involved in the provision, management and delivery of justice. The court system is the key institution, around which access to and justice delivery revolves. However, other institutions such as law enforcement agencies such as the police, Correctional centres as well as private defence lawyers also form an integral part of justice administration.

¹¹² See *Expeditious Disposal of Civil Cases Practice Direction No 1, 2019 (Backlog Elimination Programme)* for timely disposal of backlog cases, and *Expeditious Disposal of Civil Cases (Practice Direction No 2, 2019 (Pre-Action Protocol)* for fresh actions.

¹¹³ See *High Court of Lagos Civil Procedure Rules 2019, Order 5, Rule 1 (2) & 5*. Under the rules, a “Written Memorandum of Claim & Options for Settlement” is mandatory.

Institutionalizing an effective dispute resolution process, for example, arbitration, within the context of ADR, complements the court system in the dispensation of justice in a variety of arbitrable subject matters, although mainly limited to a broad range of commercial transactions. The growing popularity of arbitration has continued to raise questions about its subsistence without the interference of the formal court system. Under the ACA, provisions relating to circumstances where the court is empowered to intervene in arbitral proceedings such as in the appointment of arbitrators where one party has failed to make an appointment, where a party seeks to set aside an award or to remove an arbitrator, and for the purpose of enforcing an award are a clear indication of the synergy of the two forms of dispute resolution mechanisms. With the customary system also being administered within the court system, albeit through the Customary and Sharia courts administering customary and sharia law respectively, it is safe to assert that both the ADR and customary systems are adjuncts of the formal court system. Consequently, the reality of the court system as the paramount legal mechanism for resolving all disputes, many of which are outside the purview of either ADR or customary systems of dispute resolution, is primarily the creation of the legal system. A good case can be made for ADR and arbitration in particular as a preferable dispute resolution mechanism: ADR can contribute to building an effective dispute settlement system and bridge the gap between the formal legal system and traditional modes of African justice. ADR is also useful in settling natural resource disputes among communities, government and investors. Therefore, the institutionalization of ADR in the various legal systems in Africa through the instrumentality of laws and policies in the justice delivery sector as it has done in settling international commercial disputes is a welcome development. The debate on the expansion of the purview of arbitration as ADR has remained a recurring question. With trusted processes and skilled personnel, an effective justice delivery is assured. An important question that has agitated the mind of scholars and arbitrators is the possibility for ADR to stand alone without the interference of the formal court systems. For experts in the field, further research on this will assist in shaping the future of the legal system in expanding the framework of the dispute resolution mechanism to serve the ends of justice.

The concerns over judicial intervention should not be overstretched, particularly as ADR, particularly in the context of arbitral proceedings, always needs the support of the court. For example, in three recent decisions, the Supreme Court has pronounced the need to obey arbitral

awards in unequivocal terms.¹¹⁴ That by itself is a clear indication of judicial support for the sanctity of arbitration agreements, the proceedings, and the awards arising from them. The supporting judgement of Rhodes Vivour JSC in *Metroline (Nig.) v. Dikko*¹¹⁵ lends credence to that position.

The Nigerian Legal System, following international standards, has legislated on the nature of arbitration awards to be final and binding and only to be interfered with by the courts in the exceptional circumstances enunciated in the relevant arbitration statutes. Arbitration is widely acknowledged as an alternative to litigation which enables expeditious dispute resolution. Commendably, the legal framework provides for court interference in specified circumstances only.

In effect, the absence or indifference of the court is a disservice to arbitration. Rather than outright non-intervention, minimal judicial intervention remains a fundamental principle of universal application. While the growth of arbitration as the major ADR has been generally acknowledged in the Nigerian legal industry,¹¹⁶ at least, three main imperatives or better still stages are crucial in the consideration of its future role in the hierarchy of established dispute resolution mechanisms. The first is the adoption or institutionalization of arbitration as an integral part of the settlement of commercial disputes. This stage has already been achieved and has equally set the stage for the emergence of the legal framework. Secondly, by the operation of ACA, the legal framework for ADR mechanism and at this stage, in the juridical relationship between arbitration and the court system as defined under ACA. Though with its distinctive characteristics, notably that of party autonomy and *competenz kompetenz*, the abundance of arbitration jurisprudence has reflected the preeminent powers of the court, notwithstanding minimal court interference in arbitration as a matter of general rule.¹¹⁷ Thirdly, already a permanent feature of the Nigerian legal system, the preferences or choices of disputants, whether as parties in arbitration or litigants who rely on both institutions, will ultimately shape the landscape of dispute resolution.

¹¹⁴ See *Metroline (Nig.) Ltd v. Dikko* (2021) 2 NWLR (Pt.1761) 422; *Optimum C & P Ltd. v. Ake Shareholding* (2021) 18 NWLR (PT. 1807) 148; and *Bill & Brothers Ltd. v. Dantata & Sawoe C. C Ltd* ((2021) 12 NWLR (PT. 1807) 50.

¹¹⁵ *Metroline (Nig.) v. Dikko* (2021) 2 NWLR (PT. 1761) 422.

¹¹⁶ See M. Akanbi, Lukman A Abdulrauf & Abdurazaq A Daibu, "Customary Arbitration in Nigeria: a review of extant judicial parameters and the need for paradigm shift," (2015) 6 (1) *Journal of Sustainable Dev Law & Policy*.

¹¹⁷ See A. Akeredolu, "Attitude of the Nigerian Supreme Court to Commercial Arbitration in retrospect: 2001-2010," (2012) 4 (5) *Journal of Conflict Resolution*, 77-84, Okezie C, "Judicial Supervision of Commercial Arbitration," (1999) 15 (2) *Arbitration International*," see also Hong-Lin Yu, "Total Separation of International Commercial Arbitration and National Court Regime," (1998) 5 (2) *J. Int'l Arbitration*, 148.

As part of the institutionalization process, the judiciary of states should train ADR practitioners and employ them in the multi-door court houses. This will bring awareness and reduce the workload on the court, thereby making arbitration panels busy. That arbitration is seen as expensive and thus not an alternative to litigation is due to the fact that it deals with commercial transactions involving big companies, and seats of arbitrations are usually outside the country as a result some smaller businesses find it difficult to brief an arbitrator. Government should establish arbitration seats in the commercial centres in Nigeria across the geopolitical zones. Although, the customary system will continue to feature in that landscape, it would appear that the increasing sophistication of society and commercial disputes does not present many prospects for it as a dispute resolution mechanism beyond the subsistent and localized level at palace courts and at best dressed in the borrowed robe of the formal court. From the historical perspective, ADR as a lawyer's great invention and the direct offspring of litigation attests to the difficulty in completely severing the mechanics of the two mechanisms, in particular arbitration. Successive attempts at legislating judicial intervention can only be 'minimal,' not absent. While the court will remain the dominant forum, ADR is a great instrument of dispute resolution and justice delivery and with ADR firmly integrated into the judicial process, the prospects of a more flexible and preferable dispute resolution options and process are high.

Conclusion

This paper has identified the modern dispute resolution mechanism available to parties to settle their disputes. This includes litigation, arbitration, mediation, conciliation, negotiation, reconciliation, customary arbitration. This includes forms of traditional dispute settlement that have been adopted across Africa involving the family heads, chief, age grade, and kings. This paper has identified that there are gaps in all of them. ADR in Nigeria excludes some forms of disputes such as human rights, taxation, traffic offences and criminal matters while mediation and negotiation do not have any legal framework establishing them, thus they are not binding on parties who adopt them. The African traditional system of dispute settlement is recognised by the courts in Nigeria if they meet the requirements outline in *Agu and Ikewibe*.¹¹⁸ Across Africa, ADR is now popular, however, they need to be institutionalized and given legal backing. The gaps in the court system have necessitated the need for ADR and more recently the adoption of ODR forum. Although there are gaps in the court system, they are still popular

¹¹⁸ *Supra*.

as recourse is still made to it even under ADR mechanisms, which has proved suitable for commercial and international commercial transactions

In the light of promoting ADR, the paper recommends the expansion of ADR legal framework to cover a wider range of disputes and their rapid institutionalization. In particular, Nigeria's ACA should be amended to allow for other forms of disputes such as taxation, traffic offences, and employment contracts as applicable under customary arbitration. With this, ADR will become more popular and a true alternative to litigation. More lawyers as well as non-lawyers should be trained on ADR to enable the development of knowledge and expertise on its use and adoption with a view to eventually becoming an established and distinct field of dispute resolution practice. It should be appreciated that all the different mechanisms have their place in effective resolution of disputes. Overall, an improved enabling environment for the operation of all the dispute resolution mechanisms available will truly provide alternatives for citizens to settle their disputes and at the same time assist to promote the speedy dispensation of justice, and an orderly and just society, which are essential ingredients of development, peace, and security that many African countries have always needed.