



Necessity as the Mother of Trail Blazing: Applying Alternative Dispute Resolution Mechanisms to Political Party Disputes in Africa

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Abstract

To be able to continue working together for the interest of their political party or country, persons involved in a political dispute need to have the root cause of the dispute removed and their pre-dispute relationship restored. The declaration of rights and liabilities – which is the only thing a Court can do in trying to resolve any dispute - is ineffective for such disputes. It is particularly so where there is case congestion and the attendant serious delay in the hearing and determination of cases in the Courts as is the case in practically all African countries. The alternative dispute resolution mechanisms can become the panacea for all such problems and the ideal way of resolving political disputes. This article considers these issues.

Keywords: Alternative dispute resolution methods (ADRs), Political disputes

1. Introduction

This article seeks to show how practically all political disputes, intra and inter party disputes with the exception of election petitions, may be resolved through arbitration and the Alternative Dispute Resolution Mechanisms (ADRs) (Note 1) in Africa, using Nigeria as a case study. It shows that it will be for the general good of all political parties, politicians and indeed all African countries for the necessary legal structures to be erected for the formal adoption of those mechanisms for the resolution of such disputes. It is part of the article's thesis that in formalising such a practice, African countries may well be blazing a trail and that the fact that it has not been done elsewhere before, especially in the Western world, is not a reason why it should not be done in Africa and soon too. It is also hoped that the discussion will provide a guide post for those other countries and regions and other countries or regions of the world that are also enmeshed in difficulties with respect to the handling of political disputes in their Court systems. It is hoped that the discussion will enable those countries and regions to chart this new course and reap the benefits thereof.

We first examine the different types of political disputes that occur in African countries which we propose can be appropriately dealt with through the ADRs. We then show that litigation, which most Africans (including politicians and political parties) have normally generally resorted to for the adjudication of disputes, is incapable of actually resolving disputes. We shall see that the ADRs, are more consistent with the African culture of everyone being the brother's keeper and a generally communal lifestyle (Note 2) and have over the ages been very effective in the resolution of African political disputes. As a way of more clearly showing that the ADRs actually have the capacity to properly and thoroughly resolve political disputes even in the future, we examine some of the several advantages which they enjoy over litigation, that are relevant to this discussion. The legal and other challenges against the resolution of political disputes through the ADRs are discussed together with their solutions.

For convenience, we shall in this discussion classify arbitration and the conventional Alternative Dispute Resolution Mechanisms (the ADRs) together as ADRs. Otherwise, arbitration is no longer so classified. Though it is an alternative to litigation in the general sense, it is no longer regarded as an ADR in the technical sense. Experts have since come to accept it as a different dispute resolution mechanism from both litigation and the ADRs. Dispute resolution media are therefore generally classified as litigation, arbitration and the ADRs. The ADRs consist of early neutral evaluation, conciliation, mediation, negotiation, rent-a-judge, med-arb, arb-med and other modes and combinations of modes that have been fashioned out or are being fashioned out by commercial men, their legal advisers and ADR practitioners in response to practical needs in the market place of life.

The reference to ADRs here in the sense already explained is their Western style forms, not customary law equivalents. This writer has shown in a number of other works that in all pre-colonial African traditional societies (including the ones that eventually made up the present day Nigeria), arbitration and such ADRs as conciliation, mediation and negotiation were in constant employment to resolve disputes. It has also been shown that in their employment and use Africa, at least in some areas, has normally been ahead of the rest of the world. For instance, though in Europe and the Americas, those mechanisms have over the ages been used for mainly commercial disputes, Africans did in the ancient and immediate past use them for the resolution of practically all sorts of disputes including public sector disputes such as tortuous human rights infringements and disputes most of which (in Africa) often have their roots in political differences and disagreements. This article demonstrates that even in the present times most of Africa's troublesome political disputes have been resolved not through the Courts but the ADRs. It canvasses that by formally recognising and providing for the resolution of political disputes through the ADRs, modern African legal systems shall only be effecting a return to what their predecessor native societies had always done but which was cut off from the laws and norms of Africa's modern States by the interregnum of the colonial process. It further contends that in so doing African States shall blaze a trail for the modern world and once more show direction to the world in a new use of the ADRs.(Note 3)

2. Political Disputes in View

Political parties and politicking, being avenues for the pursuit of power, disputes are inevitable amongst them. In every age and clime, the pursuit and maintenance of power and influence amongst persons and nations/peoples has been the source of most of mankind's wars and conflicts.(Note 4) In partisan politics, it is particularly so in an environment like Africa's where selfless service does not always seem to be the primary motive for seeking political power.(Note 5) Again, internal democracy and fairness to all members also do not always seem to constitute the hallmark of political party administration. Inter and intra party disputes arise out of those situations. In addition to such inter and intra party disputes, other forms of political disputes afflict African nations. They include politically inspired disputes between regions and blocks.

It is necessary to state at this point that the disputes for discussion in this work are domestic disputes i.e. political disputes occurring within a country, not inter state disputes.

2.1 Intra and Inter Party Disputes

More than anything else, intra party disputes have the capacity to seriously weaken a political party. It is also particularly so in a setting like contemporary African politics in which, with the exception of a few places like South Africa, party supremacy and discipline often seem to be rather low.(Note 6) The disputes easily develop and fester. They include disagreements over elections or appointments into party offices; the choice of party flag bearers for municipal, state and national elections; the sharing of appointive offices after a party has won elections or been invited to join a government by a winning party; the handling of party funds; recognition of particular members' importance in the party; the godfather syndrome(Note 7); deep seated sectional/tribal sentiments and rivalry etc. They lead to further disputes and eventually to formation of camps (real camps or mere propaganda camps), decamping of members and in some cases the actual demise of the party in question. The recent difficulties in Niger Republic arose out of the tenure elongation efforts of President Tanja Mamodu leading him to dissolve Parliament, toy with the nation's judiciary and alter the Constitution. Squabbles for position in a party led to the initial parting of ways between President Robert Mugabe of Zimbabwe and his long time ally, Mr. Morgan Tsvangiria and their eventual contest for the Presidency which, but for the successes of the ADRs, could have torn the country apart.

Inter party disputes are mostly rooted in deep seated controversies over whether or not a particular candidate (belonging to a particular party) has been properly elected and declared, and press wars (sometimes characterised by incorrect assertions) between parties in power and the opposition. The dispute between Robert Mugabe and Morgan Tsvangiria after the Zimbabwean elections in 2008 also exemplifies this.

2.2 Other Political or Pseudo Disputes

Some inter party disputes sometimes touch on and include the bodies or organisations responsible for organising elections, which in Nigeria is the Independent National Electoral Commission (INEC). They are mainly disagreements between parties over how a certain thing has allegedly been done or not done to favour or disfavour one party or the other. Often, however, a party or the other makes such matters take on the nature of a new kind of dispute between it and the electoral body. In Nigeria, for instance, some political parties recently established a very sharp disagreement with INEC and threatened to sue it for its perceived silence over the launching by the ruling People's Democratic Party (PDP) for funds with which to build the party's national Headquarters which those parties claim INEC should have intervened with respect to.(Note 8) Again, whether such disputes are properly resolved or not goes to affect the confidence or otherwise with which the parties, especially those in the opposition, behold the electoral body and its activities. It also affects how the electoral body perceives such parties, the sincerity of their opposition and issues that

they may subsequently raise against it and its activities. Those disputes also need to be properly resolved through the ADRs.

In some African countries, political parties also seem to be developing a new genre of political disputes in the country – a rather surprising one sided kind of dispute between any party that loses a Court case and the judiciary. Though the judiciary is by no means a disputant with any political party (or any litigant for that matter), in recent times in countries like Nigeria any party that loses a case in Court (particularly an election petition) sees the judiciary as an opponent that is bedevilled with all sorts of vices and deserving of nothing but the harshest forms of criticism. Meanwhile, when the same party wins a case the same judiciary is declared upright, courageous and the last hope of the common man indeed.(Note 9) Such ‘disputes’ or pseudo disputes are beyond the scope of this discussion and indeed are not actually disputes properly so called since they are *inter alia*, one sided. The silence with which the judiciary treats such unfair criticisms whilst continuing in its rigorous self assessments and improvement is an ample response to or settlement of such ‘disputes’.

These different types of disputes referred to above can be pre or post an election. The discussion shall cover all of them except election petitions. We shall see that under the law as it presently stands, election petitions cannot be settled through the ADRs and that there may not be any need indeed for a change of legal policy on the point.

3. Past and Present Use of ADRs for Political Disputes

As already indicated, in the past the African kingdoms and societies resorted to customary law arbitration, conciliation, mediation and negotiation for the settlement of all sorts of disputes. Recourse to them was not hampered by any principle of arbitrability or otherwise of any particular dispute or indeed any such thing. Though these mechanisms were not called these English names and might in some societies not have been clearly differentiated one from the other,(Note 10) they were in constant use by the people.

Though these mechanisms were used to settle disputes arising out of commercial transactions, they were not restricted to such disputes but were used for all sorts of disputes including political disputes, matrimonial matters and sometimes even criminal cases. Thus if there was a chieftaincy struggle between two or more ruling houses, chiefs and elders would be called in. If there was a misunderstanding between close relations, an elder or elders of the family would intervene. If it was between couples, one or some of their parents, brothers and, or sisters or friends would intervene. In Igboland in Nigeria, if it was between members of a village who were members of the same age grade, the age grade could be invited into the matter. If two villages or communities were involved in a dispute, the chiefs and leaders of thought of the larger kindred would be invited into the matter. Each of these interveners or invited adjudicators would consider the case with a view to doing justice between the contesting parties or families by declaring what was the right thing to do following the ancient customs and laws of the land. In thus declaring the law, they would also pay due attention to what would preserve the social relationships, the cohesion and virtues of the family or community as the case may be. If one of the parties had instituted the proceedings in a manner which required that whichever party was eventually found to be wrong should be sanctioned, it was customary law litigation and would be conducted as such. If he did it in a manner that he did not necessarily seek vengeance or sanction, it would be an ADR proceeding – which could be arbitration, conciliation, mediation etc. The character of the proceeding and the end result determined which ADR it was. These mechanisms and their employment for the effective resolution of these and all other kinds of disputes have since time immemorial been recognised for instance in Nigeria and Ghana in a long stream of judicial decisions.(Note 11)

In the past as well as the present African traditional societies, litigation in the sense of mere declaration of right and wrong and award of compensation or imposition of sanctions was and is far less employed than the ADRs. The traditional Africans have always found the ADRs more akin to their philosophy and life style. The ADRs, even in Western societies, are geared towards the administration of enduring - not just technical - justice and the restoration of pre-dispute relationships. As a commentator has noted of the African system,

“The quintessence of the African jurisprudence is that in a dispute, no party is totally at fault or completely blameless. As such, a high value is placed on reconciliation and everything possible is done to avoid the severance of social relationships. Where men must live together in a communistic environment, they must be prepared for give and take relationship and the zero sum, winner-takes-all model of justice is inappropriate in their circumstances.”(Note 12)

Even in the present day Africa, the ADRs have proved more effective in the resolution of thorny political disputes. It has almost always turned out that when political disputes (such as who has been duly elected or returned in an election) are settled through the Courts, the parties may accept the verdict and the declared winner forms the government, but the parties would go on in residual disputes. It would be very difficult for them to come together and work together for the interest of the country. This has happened at one point in time or the other in Nigeria, Ghana, Liberia, Egypt, Madagascar and in countries outside Africa such as Chile and Sri Lanka. This would make room for unhealthy political rivalry most of the times. It has become a reoccurring event in Africa however that even when a political dispute has

become so deep-set that it is insoluble through the Courts or any other medium, it can be sorted out through the ADRs. Examples abound but two recent and prominent ones should suffice. The nearly intractable post-election dispute in Kenya between President Mwai Kibaki and Mr. Raila Odinga was eventually resolved through mediation by another African, Mr. Kofi Anan the immediate past UN Secretary-General. This was after so much life and property as well as national reputation had been lost. Following the Zimbabwean national elections of 2008-9, the equally destructive and intractable dispute between President Robert Mugabe and Morgan Tsvangirai was eventually settled through the mediatory efforts of the then President Thabo Mbeki of South Africa. Despite Mugabe's unnecessarily hard stance, the mediation worked and was able to bring the parties to a point where they could negotiate their way out of the problem and proceed to form a unity government for the good of the country.

Probably in realisation of the effectiveness of the ADRs – formally or informally undertaken – in the African society, the African Union has prescribed and implemented in a fairly faithful manner the idea of peer review and mediatory interventions in intra and inter State conflicts on the continent. This article simply canvasses that this wonderful practice be formalised in the domestic law of each country so that the benefits of effective resolution of political disputes will avail each African nation and its people.

4. Effective Dispute Resolution: Litigation v. the ADRs

Most African countries provide for the resolution of disputes, including political disputes, through the Courts.(Note 13) Sometimes the provision is crafted in a manner that is so firm in favour of the Courts that other dispute resolution mechanisms are seemingly excluded.(Note 14) In addition, most of the countries that practice multiparty democracy have provisions for the resolution of election related disputes through the Courts or such other equivalents as Election Petition Tribunals. In Nigeria, s. 285 of the 1999 Constitution prescribes for the determination of election petitions by Election Petition Tribunals though appeals lie to the Courts, to the Court of Appeal with respect to governorship election etc disputes and up to the Supreme Court with respect to presidential election disputes.

The meaning of all these is that law and policy makers seem to have made litigation the preferred medium of attempting the resolution of political disputes on the continent. This legal regime was put in place by each African country unmindful of the fact that litigation is not an effective medium for dispute resolution, much less so political disputes and even much less so in Africa. It is also partly traceable to the effects of the colonial process. It was the colonial interregnum that disrupted the warm recourse to the ADRs for resolution of disputes in the traditional African societies. To worsen things, whilst Western style ADRs were developing in the West they (the Western style ADRs) were in stife in Africa. They were no efforts by the colonial governments to encourage the use of those processes in the general body of the law outside the customary law. The French colonial system even discouraged their use by not providing for them at all. When resort to them was to be rejuvenated, educated Africans were already seeing them as parts of the detested colonial process.(Note 15) The perception was worsened by the repulsive bias and seeming stereotype with which several Western arbitrators on the international circuit were already treating Third World interests to the knowledge of Africans and other Third World elite.(Note 16)

In consequence of those legal regimes, political disputes have normally been taken to litigation fora when the disputes arise. Now and again they are insoluble through litigation with attendant resort to violence and other forms of self help. In fact, many times even before or without attempting a resort to litigation, a residual apprehension that the Courts may not render justice at all or timeously pushes political gladiators into resort to rigging of elections, political violence and other unlawful actions in the bid to protect their interests. In most of the cases in which the ADRs had been resorted to on the continent it was when the frustration of settlement failure had led to loss of lives and property due to violence. This happened in Kenya and Zimbabwe. It need not be so. If the suggestion in this article is implemented it will no longer be necessary to wait for lives and property to be lost before resort to the ADRs for effective resolution of the disputes is made.

We shall now consider the different challenges and difficulties encountered in Africa in attempts to resolve political disputes through litigation. We shall be seeing how the ADRs can and in fact do take care of all those difficulties and frustrations. They constitute more reasons why African countries and indeed all other countries – particularly those with similar challenges in their legal systems as African countries have – should provide legal regimes for the resolution of at least some political disputes through the ADRs in their shores.

4.1 The Need for Actual Dispute Resolution

The first need for the embrace of the ADRs is the need for the disputes to be actually settled or resolved. As already indicated, though most African politicians and political parties resort to the Courts the resort to Court does not achieve effective or actual resolution of the disputes. In Nigeria, the other alternative adopted with some level of regularity is settlement through “the party’s instructions”.(Note 17) “Party’s instructions” is a euphemism for hardly objective and often very unfair orders arrived at through influence peddling by party “big men” and then handed down to disputing party men through the party’s officials for willy nilly obedience.

Properly resolving a dispute means settling it i.e. removing the misunderstanding and, if possible, the source of misunderstanding and returning the parties to their pre-dispute relationship or situation. Such a resolution engenders the removal of hurts and offences, healing of the mind and ego of the disputants. It invigorates them for continued (and possibly greater) productivity. In a political party setting, it works needed unity ensuring that every one continues to put in his best for the party rather than engaging in anti-party activities or just lying low waiting for the appropriate time to decamp from the party or “revenge” within the party by hurting it in one way or the other.

If a misunderstanding is not so dealt with, it has not been resolved. There may have been a dispute management effort but not a dispute resolution. It is such dispute management without resolution that happens ever so often in litigation. Traditionally, what a Court does over a dispute that comes before it is to deliver a judgement based on the parties’ legal rights and liabilities. The Court is ill-equipped to, and indeed does not, concern itself with whether or not the judgement achieves peace amongst the parties. Practically every judgement is therefore an imposed term for the cessation of combat. Just as happens in every other war, if parties desire to achieve peace they will have to go beyond the judgement. They have to negotiate amongst themselves expressly or otherwise or settle by some other means.(Note 18) Therefore, when a dispute develops between party members on election into a party office, nomination of a candidate for an election, the contribution or management of election funds etc and it is taken to Court, the Court can only deliver a judgement which judgement can only, at best, compel cessation of open combat but does not secure peace. In fact, it sometimes leads a deepening of the dispute. It is the same when all that the political party does is to hand down an instruction “from above” to the disputing parties or sides without necessarily hearing them out.(Note 19) A grave yard ‘settlement’ is achieved in each case. The parties may “accept” the judgement or the party’s decision. In the latter case, they may even physically embrace themselves or vigorously shake hands as if they have mended fences but the real dispute remains. At the least opportunity, the parties react to the perceived injustice.

4.2 Quality of the Resolution

In more ways than one, the ADRs avail political disputants an opportunity for very qualitative or very effective resolution of their dispute more than any other dispute resolution mechanism can avail them. In effect, it is not only that the disputes are actually resolved; a quality of resolution that may not be available in any other forum is achievable.

4.2.1 Quality of Dispute Resolvers

The ADRs afford disputants the opportunity to stipulate the quality of their would-be dispute resolvers and to in fact choose those dispute resolvers by themselves. Traditionally, therefore, arbitration and conciliation legislations preserve the parties’ rights to determine the number, quality/qualifications and mode of appointment of arbitrators or conciliators to hear and determine their matter.(Note 20) The parties are thus able to insist on persons with requisite knowledge not just of the relevant area of law but also of the dynamics of the area of human endeavour from which the dispute has arisen. Sometimes, pragmatism necessitates the choice of dispute resolvers who may have no knowledge of the law but have a deep knowledge of the dynamics of the relevant area of endeavour. Thus if a political dispute is to be arbitrated or mediated, for instance, the parties should be able to choose as arbitrators or mediators etc persons who have knowledge of the relevant areas including the principles of decent politicking. In a dispute over an elective office such as the Presidency of a country, for instance, a sitting or former President or other high office holder will more easily understand the issues at stake – the compromises that need to be made, the bluffs that need to be called etc – than a judge given to declarations of right and wrong. The choice of such an arbitrator, mediator etc, particularly when made by the disputants themselves, will go a long way to create a “we-we” atmosphere in the proceedings and enhance the acceptability of the award or other end result.

Such things are not possible in Court litigation or when the political party simply hands down an instruction crafted by persons with vested interests or who may not even be imbued with the skills for effective resolution of the dispute in question. In litigation and the party instructions approach, the disputants, their political party or political relation as well as the citizenry are the losers.

4.2.2 Informality and Quality of Proceedings

Each of the ADRs is normally conducted in a relaxed and more or less informal atmosphere. The arbitrators, mediators etc deliberately create a genial and conducive atmosphere for hate free interaction between the parties. This is done with a view to engendering the discovery of the real facts of the dispute and eventually restoring old relationships as much as possible. This ensures that the parties and their witnesses are not hampered or hindered by the frightening rigidity and formality of the Courts. It also disposes the witnesses to being truthful in their testimony, which in turn engenders the achievement of quality justice based on the true facts. It also helps to heal the parties’ hurts and offences thereby disposing them to amicable settlement and speedy restoration of pre-dispute relationships. The informality of the ADR processes is infinitely invaluable.(Note 21)

For a political dispute, mediation is often the most appropriate mechanism. One of its core strategies consists of helping the parties identify their interest as against their wants or the dictates of their egos. Once politicians and political

disputants are brought to this point in the course of a settlement and ego is dealt with, things would normally run in a quick succession to settlement. The oft repeated quib amongst politicians that there are no permanent friends or enemies but interests becomes helpful. Save for the very self centred ones, a sprinkling of whom can often be seen in Nigerian nay African politics, it is often not very difficult to show in an intra party dispute that the interests of the two sides are the same. It is particularly so if it is a politician of equal or higher hue that is doing the pointing out of interests to them. They feel proud that they have “disagreed to agree”.

4.3 Speed of Dispute Resolution

One of the problems bedevilling the political process in Nigeria nay Africa is the delay in the resolution of political disputes. A party conducts primaries for the selection of its candidates for an election slated to hold 6 months thereafter or less. A dispute arises as to whether or not the preferred candidate was properly chosen. One of the unsuccessful contestants insists on testing the selection process in a Court proceeding. In Nigeria and probably all of Africa there is as yet no way the Courts can determine the question within the 6 months. This is attributable to the high level of congestion and delay in the Courts. Even though such disputes are often given priority attention – to the detriment of other pending cases – experience shows that since the judges have to write in long hand and work under very difficult infrastructural and other difficulties, such time frames are so short.

The scenario has often engendered a situation where a political party gets into an election with unresolved disputes over who has been chosen in the primaries as its candidate. The Courts are completely unable to do anything effective with such time bound matters. The party machineries are often under pressure at such times and too encumbered by deference to party men in government and to other vested interests to be fair, just and effective in resolving such disputes. On the other hand, each of the ADRs – being much faster than litigation and far more effective than the party machinery – can very quickly and effectively handle such disputes. Time frames can be met. Even if parties themselves, or any of them, becomes dilatory, structures exist (or can be erected) with which the dispute can still be timeously handled. For instance, s. 21 of Nigeria’s Arbitration and Conciliation Act (Note 22) (ACA) enables arbitrators to proceed to conclusion even if a Claimant or Respondent fails to appear to present its/his case.

4.4 Cost Effectiveness of Resolution

All things considered, the ADRs are cheaper means of dispute resolution in the long run. Because litigation is relatively quite cheap on the continent, the ADRs may be dearer in the short run than litigation. The parties have to pay the arbitrators, mediators etc and bear other overhead costs in addition to paying their own lawyers, which is not the case in litigation. However, the ADRs are still relatively cheap in the continent even if not as cheap as litigation. When the overall financial and other costs of delay – including the frustrations, loss of lives and property – are taken into consideration it is easy to see that indeed the ADRs are far cheaper than litigation. It is far cheaper for a country, the political parties and individuals involved that the issue of who has been properly nominated for an office is properly rested before elections hold than to go into elections with uncertainty on the point with attendant possible upsets as have happened in Nigeria before. (Note 23)

In addition, the parties to a political dispute are not normally hampered by costs. Political parties always seem to have enough to spend to prosecute or defend claims in Court or anywhere else. What is more, it is far more cost effective for their disputes to be resolved timeously than to have the disputes prolonged on account of very little money to be saved otherwise.

4.5 Confidentiality and Protection of Party/Personal Secrets

The ADRs are purely private proceedings to which members of the public are not admissible except with the consent of the parties. The dispute resolvers, arbitrators for instance, are also forbidden from divulging information gathered in the course of the proceedings to other people. Even a Court of law is disentitled from requiring them to testify on such matters. (Note 24)

Political parties and politicians are therefore able to testify on their secrets in the proceedings and same will still remain secrets. On the other hand, any thing that transpires in Court becomes a matter for public knowledge. A party or politician with sensitive personal or legitimate secret information will often not want the secrets divulged in, or on account of, any proceedings. Very often, political disputes are complicated and founded as much on ego, wheeling dealing for power, cold self interest calculations and sometimes even deliberate mischief as on noble facts and considerations. Unless those issues of ego, wheeling dealing and improper motives etc are brought to the fore, no settlement can be achieved. Those factors may never be given in evidence in any public Court or other proceeding. They can very safely be divulged in a private proceeding leading to proper resolution. As a result of these things, the ADRs are the most suitable for the resolution of political disputes.

4.6 Absence of Corruption, Declining Erudition and Deference to Power

We have been able to show elsewhere that there may indeed be a few corrupt and lazy persons in the Nigerian nay African judiciary. We also pointed out the infinitesimal existence of judicial pandering to executive wishes in far in

between cases. We equally argued that the insufficiency of facilities like well stocked libraries hardly promote continued enhancement of quality of output on the Bench but may well in extreme cases tend to lower it. Though extremely few, the corrupt or lazy judicial officers create the false impression that a sizeable fraction of the judiciary may be corrupt or not continuously improving in erudition. (Note 25) Of course, undue deference to executive power by some Courts is neither an African thing nor is it new. (Note 26) It is equally true however, and particularly worrisome, that in the adjudication of political disputes in an African environment, the possibility of deference to power and corruption is more real than with respect to other kinds of cases that come before the Courts.

As argued in the work under reference, corruption is able to occur at all in the Courts because they are public institutions. The presiding judge as it were owes no direct duty of care to the individual litigants. His allegiance is to the State - that abstract normally simply referred to as "the government" in many African countries. On the other hand, in the ADRs the parties or their agents appoint the arbitrator, conciliator etc. The arbitrator, conciliator etc owes the parties a direct responsibility or account as it were on how professionally and diligently he goes about his work. If he gets corrupt, he can be far more easily challenged and removed than a judge can be challenged. He is a private man who does not wield coercive powers that a Court wields and whose level of respect depends on his personal quality not his office.

The ADRs are private sector trades plied by people who would normally not be cajoled into corruption or wrongdoing by money however huge. At the risk of repetition, Nigerian judges are, mainly upright, courageous learned gentlemen who eschew bribery and corruption. Be that as it may, a private plier of a lucrative trade like arbitration is more likely to absolutely shun every shade of corruption, monetary or otherwise, than a salary earner even if the salary earner is on the Bench. The often touted few cases of corruption in the judicial handling of disputes is likely to be completely erased with respect to political disputes if they are handled by arbitrators, conciliators etc.

Just as in the case of corruption, declining erudition and competence on the Bench, if any, may be tolerated and endured because the judge is a public officer serving the State and not particular parties. Even if the parties were to be aware from the outset that the erudition and competence of a particular judge to which their case has been assigned are in decline, they can hardly do anything about it. It will be a really strong-willed set of parties advised by lawyers of their kind that would ask for a transfer of their case on the basis of an allegation that the judge is declining in learning and competence. Such an allegation could border on contempt.

In arbitration, conciliation etc declining learning and competence cannot be tolerated or endured. Such an arbitrator, conciliator etc would not be patronised by anyone. He would fall into disuse and go out of business. What is more, even for the few cases he may handle before going out of business, this writer has consistently maintained that he is liable in negligence for any injury occasioned by his lack of skill or delay unlike the judge who enjoys judicial immunity whether or not he is sound in learning. (Note 27)

5. Legal and Other Challenges

In this part of the work, we shall be considering if there is anything in the Nigerian law for instance that forbids recourse to any of the ADRs for the resolution of a political dispute. We shall be seeing that indeed there is no such thing. We shall canvass however that, for the avoidance of unnecessary arguments and controversies it will be necessary for laws to be enacted to very explicitly enable the resolution of political disputes through those media. It is hoped that other African countries (and indeed all other countries anywhere that have similar legal regimes with Nigeria on the point) will find guidance in the discussion.

5.1 Public Policy/ Constitutional and Other Legal Considerations

In Africa, the major challenge concerning the settlement of disputes outside the customary law and other than by litigation is the question whether or not public policy permits the employment of the particular dispute resolution mechanism in question. (Note 28)

That notwithstanding, the question does not seem to have received serious attention in connection with the traditional ADRs i.e. outside arbitration. It is in arbitration that the issue of arbitrability is a notorious one to which many a mind will normally be addressed. Outside the customary law, a dispute is generally not arbitrable if it cannot be the subject of accord and satisfaction or if by specific legal prescription it is exempted from arbitration. Examples are crimes and matrimonial causes. It has not been seriously considered in legal doctrine whether for being unarbitrable a dispute is excluded from settlement through conciliation, mediation and negotiation. It seems to follow however that if a matter is not a proper subject of accord and satisfaction, it cannot be subjected to those dispute resolution media. They are, like arbitration, based on accord and satisfaction. (Note 29) Be that as it may, if any dispute is not excluded from arbitrability by public policy there is nothing in law and practice that excludes it from resolution through any of the traditional ADRs.

In the light of the foregoing, once we determine that any political dispute is not excluded from arbitrability in Nigerian law, it will follow that public policy does not exclude it from being subjected to any of the traditional ADR mechanisms.

The common law, as a part reflection of the Nigerian public policy on the point, restricts only very few disputes from arbitrability – such disputes as crimes and matrimonial causes. (Note 30) Statutes exclude only disputes on copyrights under the Copyright Act (Note 32) and patents under the Patents and Designs Act. (Note 33) All other disputes including political party disputes are arbitrable. (Note 31) Surprising yes, but true! We will now see how.

The other Nigerian legislations, including the Constitution, concern themselves with jurisdiction as between the Courts and do not tamper with the arbitrability of disputes. For instance, s. 251(1)(n) of the 1999 Constitution confers jurisdiction on the Federal High Court “to the exclusion of any other court” on civil causes and matters relating to mines and minerals including oil fields, oil mining, geological surveys and natural gas. That the Court’s exclusive jurisdiction is only as between Courts is made clearer when the provision is read together with the Petroleum Act. (Note 34) Under art. 41 of its First Schedule the Act requires any question or dispute arising in connection with any licence or lease to which the Schedule applies (i.e. an Oil Exploration Licence, Oil Prospecting Licence and Oil Mining Lease) to be “settled by arbitration unless it relates to a matter expressly excluded from arbitration or expressed to be at the discretion of the Minister”. Nothing in the Nigerian Oil and Gas sector is expressly excluded from arbitration by any law. The legal position is therefore that any dispute with respect to any of those licences or leases will be arbitrated. (Note 35) However, if any other matter that concerns oil fields, oil mining etc (and indeed if any of the matters covered under the Act and its First Schedule by virtue of the Minister’s discretion for instance) is to be taken to Court, it must be the Federal High Court. Therefore, the fact that the Federal High Court has exclusive jurisdiction *if or when the matter gets to Court* does not mean that such a matter may not be adjudicated or settled any how else. Otherwise, it would mean that once a dispute arises over any matter covered by the subsection (and indeed every thing under s. 251), the parties must go to Court (the Federal High Court) and may not settle the matter by any other means whatsoever before or after going to Court. The Nigerian Constitution definitely did not intend to institute such a drastic and unrealistic legal regime. No known legal system imposes on parties to a civil dispute a duty to go to Court willy nilly.

In the same way, up to June 13, 2006 the Trade Disputes Act, (Note 36) at s. 21 conferred jurisdiction on the National Industrial Court “to the exclusion of any court” on trade disputes as outlined in the section. The same Act at ss. 8 and 9 endow a conciliator appointed for the purpose as well as the Industrial Arbitration Panel (IAP) with jurisdiction to entertain a matter and settle it if they can before even the matter gets to the National Industrial Court. In fact, it even imposes a duty on the parties to have a resort to a conciliator and the IAP before approaching that Court. If the conciliator or the IAP is able to settle the matter, it does not get to the Court at all and its “exclusive jurisdiction” is otiose. (Note 37) Since June 14, 2006, the conferment of jurisdiction on the National Industrial Court has been enshrined at ss. 7 and 11 of the National Industrial Court Act. (Note 38)

In the same way, apart from with respect to election petitions, neither the Constitution nor the Electoral Act excludes any intra party or inter party dispute from arbitration, conciliation, mediation, negotiation or indeed any other dispute resolution mechanism. (Note 39) There is no specific mandatory provision on how political party disputes other than election petitions may be settled. They are therefore covered, with respect to adjudication by Courts and public tribunals, by the general provisions of ss. 6 and 36 of the Constitution. Section 6 vests the “judicial powers” of the Federation and federating states in the Courts. “Judicial” simply means “of, relating to, or by the court” and “judicial power” means, the “ ... authority vested in courts and judges to hear and decide cases and to make binding judgements on them ...”. Therefore, the section covers only litigation and does not touch the powers of dispute resolution through the private dispute resolution mechanisms.

In complimenting s. 6, s. 36(1) provides that in the determination of his civil rights and obligations a person shall be entitled to a fair hearing within a reasonable time “*by a Court or other tribunal established by law* and constituted in such manner as to secure its independence and impartiality”. (Note 40) Subsection (3) requires the proceedings (including the announcement of decisions) of a Court or a tribunal relating to the matters mentioned in subsection (1) to be held ***in public***. We have since shown elsewhere that an arbitration tribunal falls outside the “other tribunal established by law”, which are rather public tribunals. The section does not pretend, for instance, that from the date it came into force all arbitral tribunals in Nigeria must now hold public hearings and render their awards in public. Such a position would have made them public rather than private proceedings and effectively destroyed confidentiality which is one of their attractive hallmarks. (Note 41) In that case, any arbitration conducted in private would amount to a breach of the parties’ right to public hearing and public pronouncement of decision.

Such a legal regime would hardly be consistent with the country’s deliberate and concerted efforts (already made through modern and progressive arbitration statutes) to attract direct foreign investment and to make her shores an attractive venue for transnational arbitrations. (Note 42) It is inconceivable that the country would in 1999 want to

remove or destroy the prime characteristics and advantages of arbitration over litigation (privacy etc) by requiring all arbitral proceedings to be held in public.

It should also be noted that despite such efforts, Western style ADRs are in Nigeria, nay Africa and the Third World, relatively new and not as known as litigation though their customary law equivalents are in upbeat prosperity. As already stated in this work, until recently, many African minds conceived of dispute resolution outside the customary law simply as Court litigation. Even as lately as 1998/99 when the 1999 Constitution was fashioned, the ADRs were not as popular with most of the military personnel and few civilians who made the Constitution as much as litigation had always been. In consequence, arbitral tribunals and the conventional ADRs were not had in view or contemplation when the Constitution was being drafted. The words “other tribunal” was therefore not a reference to arbitral tribunals but to official or public quasi-judicial tribunals such as tribunals of inquiry set up by government.

Again, the requirement of **both** independence and impartiality of an arbitration tribunal and its duty to treat the parties equally consistent with the strict principles of fair hearing is firmly provided for at ss. 7 and 8 of the ACA. It is not normally so with the Courts and official or public tribunals as such provisions are missing from their constituting statutes. (Note 43) The provision is missing because the Constitutional provisions on fair and public hearing unflinchingly bind those Courts and public tribunals. The provision appears in the ACA because the draftsmen, knowing that the Constitutional provisions do not apply to arbitral tribunals, had to make the provisions for arbitral tribunals. If such provisions were not made in the ACA or in other arbitration statutes, arbitral tribunals would infringe no statutory law if they did not observe fair hearing!

Article 7(a) of the African Charter grants every individual the right of access to “competent national organs” and art. 7(d) grants him “the right to be tried within a reasonable time *by an impartial Court or tribunal*” (Note 44). The phrases do not seem to have come up for interpretation by the African Commission or an African Court. However, a jurisprudence which supports our view has been developed around art. 6 of the European Convention on Human Rights which has a similar provision – for determination of civil rights and obligations by “by an independent and impartial tribunal established by law”. It has been held repeatedly, *inter alia*, that “tribunal established by law” in that provision does not include an arbitral tribunal in a voluntary arbitration. (Note 45) It has equally been held that for a tribunal to be a “tribunal established by law” it needs to, amongst other things, exercise judicial functions, be independent of the executive arm of government and the parties, have a duration of its members’ term of office and have guarantees afforded as to its procedure. (Note 46) These are persuasive decisions to guide our thoughts.

The International Covenant on Civil and Political Rights, of which Nigeria is a member, provides at art. 14, *inter alia*, that in the determination of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing “by a competent, independent and impartial tribunal established by law”. In addition, “any judgement rendered … in a suit at law shall be made public” except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children. Though the General Comment 13 of the UN Human Rights Committee, (Note 47) which has no binding effect on any country, suggests that the article applies to all courts and tribunals within the scope of that article whether ordinary or specialised, different countries such as Hong Kong/China have interpreted it as exclusive of arbitral tribunals. (Note 48)

In the light of all the foregoing, it can confidently be asserted that all political disputes – intra and inter party disputes and non-party based political disputes - are resolvable through the ADRs. There is nothing in the law or public policy against it. It is not just so; even disputes that are more in the public domain such as human rights violations are, as already indicated, capable of being settled through arbitration and the conventional ADRs. (Note 49)

Though election petitions are not our core concern in this paper, it is apposite at this point to briefly examine the law on their resolution through the ADRs. The Constitution and the Electoral Act, 2006 (Note 50) have conferred exclusive jurisdiction on the Court of Appeal and Election Tribunals to the exclusion of other modes of dispute settlement. Though s. 239 of the Constitution confers jurisdiction on the Court of Appeal for presidential elections only “to the exclusion of any court of law in Nigeria”, s. 285(1) and (2) confer jurisdiction on the National Assembly Election Tribunals and the Governorship and Legislative Houses Election Tribunals “to the exclusion of any court or tribunal” with respect to National Assembly, Governorship and House of Assembly election matters. It is arguable that “tribunal” in the provision is also a reference to a public tribunal; so that the jurisdiction conferred is not exclusive of arbitral tribunals for instance. Be that as it may, s. 140 of the Electoral Act prescribes an election petition filed at a competent tribunal or Court as the only way of challenging the election and return at an election. In the light of such a clear provision, no other dispute resolver other than an Election Tribunal as constituted under s. 285 of the Constitution or the Court of Appeal acting as such under s. 239 can entertain an election petition as a Court or tribunal of first instance. There is therefore no room in the present legal regime for an election petition (or dispute over the propriety or otherwise of the conduct of an election or declaration of a particular candidate as winner) to be taken to arbitration or any of the conventional ADRs.

Whether or not such disputes (election petitions) should be resolvable by arbitration or any of the conventional ADRs is highly debatable. The desperate winner takes-all-disposition of many a politician when it comes to election results is by no means consistent with the cordial, informal truth based environment within which the ADRs are normally best conducted. For such politicians (who clearly seem to be in the majority) the stakes may well be considered so high as to accept anything not backed by the fierce coercive powers of the State. The Courts and election tribunals operate with such coercive powers but which arbitrators, mediators and conciliators clearly lack. Many politicians still find it difficult to accept the judgements of Courts and election tribunals without unnecessarily abusing or harshly criticising the judge(s) however clearly rooted in law and justice the judgement may be. They are not likely to accept the awards of arbitrators, much less so the opinions of mediators etc. Secondly, there may be much room for abuse of the system if ADRs are used for election petitions. The number of competent arbitrators, mediators etc that will be needed for such volume of work is presently not available in the country. The effect will be that the all comers syndrome with which very successful ventures are often greeted in the country in recent times will set in and ruin the system. (Note 51)

With respect to other political disputes other than election petitions, a major problem with the employment of the ADRs for their settlement is that though there is no law against it, there is as yet no law specifically enabling it or governing the procedure. The ACA covers only the arbitration and conciliation of commercial disputes. Though “commercial” is very liberally defined, (Note 52) it does not cover political disputes. There is no statute at all on mediation and negotiation. With respect to political disputes, there is need for clear provisions covering these media of dispute resolution and the procedure that may be adopted. In the absence of that, some recalcitrant parties may, through Court Suits and interlocutory injunctions, frustrate any resort to those dispute resolution media.

The greater difficulty is even the fact that arbitration, mediation etc are not in the Exclusive Legislative List over which the National Assembly can legislate for the entire country. (Note 53) Though the regulation of political parties is on that List (item 56), not all issues in political disputes can come under that. Some of the disputes will directly touch on the rights of members as individuals/citizens. What is more, election issues are on the Concurrent List over which the Federation and the states share legislative competence. Even the departmentalisation or division of competence between the Federation and states attempted by clauses 11 and 12 of the List is not helpful in this matter.

As a result of these things, even if a model statute is agreed on and drafted for the regulation of the settlement of political disputes through the ADRs, it will have to be enacted by the different state Houses of Assembly. Experience with the Child Rights Bill (Note 54) and such other model Bills suggests that unless strong political will and influence are exercised “from above” it may well take a long time before all the states or even a majority of them will enact such a statute.

5.2 The Do or Die Attitude of Some Politicians

As already indicated, one problem that may militate against the effective resolution of political party disputes through the ADRs is the desperate, do or die attitude with which some politicians seem to approach politics, power and influence. The violence that attends some (few) political campaigns, monitoring of the voting process on election days and in some cases the declaration of results is very surprising. Unless there are express legislative prescriptions requiring such politicians to submit to the ADRs, they are not likely to do so. Even after being compelled to so submit, some of them may still explore every possible avenue to scuttle the process.

The attitude also manifests in a winner-takes-all disposition. Dispute resolution media like mediation are completely inconsistent with such dispositions and results. A mediator will seek a win-win situation for both sides and such a politician, particularly when he perceives himself as holding the longer end of the stick than the other party, may not be amenable to such a resolution. He may only accept the result of mediation, for instance, if legislation compels him to accept whatever the mediator’s eventual opinion is i.e. making his consent irrelevant. Such a process would no longer be mediation properly so called. It would be lacking in the very thing that makes mediation an effective medium of dispute resolution – mutuality of the end product. Any such mediation may have the same problem of judgment without settlement which litigation presently has. It may not be a solution to the present problem but a replacement of one problematic mode of dispute resolution with another.

5.3 Fight-to-Finish Attitude of Party Legal Advisers and Lawyers

A major problem with the ADRs in a developing common law country is the unduly adversarial disposition of many a lawyer. Some such lawyers, living in deference to the illiterate or semi literate gallery, take on a fight-to-finish attitude so as to show that they are “tough lawyers”. They erroneously behold such theatrics as synonymous with effective lawyering. They therefore often advise their clients against amicable settlement of matters. Desperate politicians often seem to find soul mates in such lawyers and hire them. Such lawyers may do any thing they can to frustrate the resolution of political disputes through the ADRs which they may consider ‘weak’ means of sorting out political differences. Happily, such lawyers are getting more and more into the minority in the country and even for that minority there is a solution as we shall see shortly.

5.4 The Nature of Some Outcomes

Another major challenge to the use of the conventional ADRs for the resolution of disputes is the fact that their outcomes are at best in the nature of an agreement or contract. If a party defaults in executing the terms, the other party may only resort to litigation or arbitration to enforce compliance. As a result, they are ordinarily not effective with high stake disputes. In the present Nigerian political terrain, almost every political dispute is made out as a high stake dispute.

It must be noted however that arbitration does not have that kind of difficulty though it is not free of difficulties with respect to enforceability. An award is immediately enforceable. It is also not appealable. However, a Court order of enforcement, an order of denial of enforcement or a setting aside orders is appealable. As a result, an application for enforcement, denial of enforcement or a setting aside order can sometimes snake all the way from the High Court to the Supreme Court, wasting time and resources.

6. The Way Forward

Obviously, the major challenges against using ADRs for political disputes resolution are the absence of a legal framework for their use, difficulties with the enforceability of the outcomes/decisions of most of them, and the possible absence of requisite co-operation on the part of some disputants. Those problems can be easily dealt with by an Act of the National Assembly and Laws of the State legislatures, as we shall see *anon*.

6.1 Enactment of Enabling Statutes and Provisions in Parties' Constitutions

It is quite possible for a model Bill to be drafted for enactment by the National Assembly and the different State Houses of Assembly to govern the resolution of political disputes (possibly with the exception of election petitions) through the ADRs. The statutes would provide for reference of intra and inter party disputes other than election petitions to the ADRs in the manners to be provided also. INEC or relevant Committees of the National Assembly can start the preliminary work by gathering experts in the fields of arbitration and the conventional ADRs as well as draftsmen to craft a Bill. (Note 55)

Though delays have been encountered in enacting other model statutes in the states, this one can have a different experience. If the political parties that control the National Assembly and the states (the Executive and, or the Houses of Assembly) see the need for the statute, they can simply convince (instruct?) their members in those legislatures to ensure speedy passage and it will be done.

There may also be a need for political parties to insert into their Constitutions a provision requiring such disputes to be referred to any of the ADRs as may be appropriate. The enabling statutes and parties' Constitutions may prescribe minimum qualifications and experience for would be arbitrators etc in political disputes. The power to make original or default appointments of arbitrators etc could also be vested in a trusted institution such as the Chief Justice of Nigeria or the President of the Court of Appeal.

INEC can sponsor the Model Bill about which we speak or require political parties to insert an ADR facilitating provision in their Constitutions by virtue of its general powers and duty of supervision over political parties under s. 86 of the Electoral Act. (Note 56)

6.2 Immediate Enforceability of Decisions/Outcomes

Despite the problems already pointed out hereinbefore about enforceability of the outcomes of ADRs, let it be noted that flexibility and creativity are hallmarks of those dispute resolution media. This ensures that they can always be adapted to suit various circumstances. Thus it is possible to work out a situation in which their end products can become immediately enforceable as has been done in the Multidoor Court houses in the country. In Lagos State, for instance, there is an ADR judge. Once he appends his signature on a settlement reached in an ADR proceeding in the Multidoor Courthouse, the terms of the settlement become enforceable as a Court judgement. The same arrangement can be worked out for settlements reached in ADR proceedings over political disputes of the genre discussed in this article.

With respect to arbitration and other end results, the Act and state Laws that we canvass for can also remove the enforceability of political disputes awards from the regular Courts and vest same in the Supreme Court or Court of Appeal or at least in particular Divisions of the High Courts. It can also be provided that the decision of the Court of Appeal on such applications is final in these ways, delay attendant to the enforcement and challenge of awards etc will be erased.

6.3 Non Co-operation by Parties and, or their Lawyers

In view of the great virtues of flexibility and adaptability which the ADRs have, the statutes which this article canvasses for can prescribe ways and means by which proceedings can go on in spite of any party's recalcitrance or non co-operation. Section 21 of the ACA is already a good example in this regard. In a situation where the Claimant fails to attend proceedings or to present its case, the tribunal can dismiss the case. If it is the Respondent that so fails, an award

can be made against it as well, provided that that its absence or failure to present its case is not taken as an automatic proof of its liability. A similar provision could be made with respect to the settlement of political disputes through the ADRs.

It also very often happens now that when fight-to-finish parties or lawyers appear before arbitrators who know their onions, those parties and lawyers quickly learn to abandon their unhelpful traits and embrace needful culture. It can happen with respect to political disputes when they are processed through arbitration and the conventional ADRs.

Conclusion

Using Nigeria as a case study, but with ample examples from and references to developments in other African countries, this article has tried to show that in Nigeria nay Africa, all political disputes except election petitions are resolvable through the ADRs. It has also demonstrated that with the exception of election petitions, it is better for African countries to resort to the ADRs for the resolution of political disputes.

In Africa, political disputes can be quite damaging both to the political parties and the countries themselves. Because of the total absence of, or low observance of, the principle of party supremacy, intra party disputes easily fester and weaken the political parties in question. In some cases, they develop into the kind of situation that arose in Zimbabwe, Niger Republic and Sierra Leone in recent years. Inter party disputes also often lead to dire consequences for the countries where they occur. Ordinarily, persons involved in a political dispute normally need have the dispute and its root causes removed or properly resolved. This is so as to enable them get back together to work for the interests of their political party and country. Incidentally, Court litigation – which is the mode of resolution that the disputants almost routinely resort to in the continent for the resolution of political disputes – is unsuitable for the resolution of those disputes. In the first place, a Court can only declare rights and liabilities for the disputing parties and cannot really resolve disputes in the sense of removing a dispute and its causes. Secondly, even if it could ordinarily have been an actual dispute resolution medium, litigation in Africa is bedevilled with some serious difficulties such as case congestion and its attendant delay in the conclusion of cases. Again, even if litigation was an actual dispute resolution mechanism and even if those peculiar difficulties were not there in Africa, the ADRs are still far better means of dispute resolution. For instance, the ADRs allow disputants to set standards or qualifications for their own adjudicators or dispute resolvers. The disputants also have the option of directly appointing those dispute resolvers themselves or by persons they (the disputants) have authorised to do so following some pre-set conditions and modalities. These things in turn ensure a far higher quality of resolution than litigation often offers.

Dispute resolution through the ADRs is also more consistent with the African doctrine and practice of each person being the brother's keeper. The doctrine has ensured that in dispute resolution in the traditional sense in Africa, reconciliation is seriously pursued; no party is totally at fault or completely blameless and everyone is expected to adopt the give and take approach. As a result, Africans used the ADRs to effectively resolve all sorts of disputes – including political disputes – before the advent of colonialism. Even now, each time the ADRs – which have been adopted in the NEPAD documents – are resorted to in the resolution of political disputes very good results have been achieved even when those disputes had clearly been insoluble through other means of dispute resolution. This recently happened concerning the disputes in Kenya and Zimbabwe which nearly dissolved those countries.

Though in the present legal settings in most African countries the use of the ADRs for the resolution of political disputes may have some challenges stemming from the do-or-die attitude of some politicians etc, those challenges are clearly surmountable. Structures such as the Multidoor Courthouse scheme are already in place in some African countries to take care of those challenges. Statutes can also be enacted to take care of those challenges as is already being considered in the case of Nigeria. Again, though there may be challenges with the enactment of such laws at the federal and state levels in Nigeria, the challenges are also by all means surmountable as has been shown in this work. It is equally most gratifying in this connection that most African countries are not federations and are therefore not likely to encounter such challenges should they choose to enact similar statutes.

Considering that dispute resolution is more effective through the ADRs even in Western and other developed countries that may not have the level of Court congestion and delay that occurs now in African and similar jurisdictions, it will still be good for those developed countries – and indeed all other kinds of countries – to adopt the ADRs for the resolution of some political disputes.

It is hoped that the suggestions made in the article, such as the initiation of efforts for the enactment of enabling laws, will be taken seriously by all relevant countries. If they do and resort is soon had to the ADRs for the resolution of most political disputes within their shores, it will further engender political maturity and deeper civility in the political process.

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Notes

Note 1. All hereinafter grouped together as the ADRs for explanations given shortly

Note 2. This is not a reference to communism but to the general love-informed communal African lifestyle of interdependence where the collective is superior to the individualistic, where the common good/interests overrides individual rights and interests, where in a dispute no one person is seen as completely right or completely wrong and reconciliation with a view to restoring social harmony is the aim of every dispute resolution effort, where unnecessary levels of individualism or selfishness are extremely strange deviant behaviours that attract serious public opprobrium.

Note 3. This writer has also shown that by the adoption and domestication of such international arbitration legal materials as the UNCITRAL Model Law on International Commercial Arbitration and the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards Africa has worked out a completely novel concept and practice in arbitration namely, international customary law arbitration which is now obtainable in Africa and the Carribbeans and can be borrowed and adapted by peoples elsewhere who have similar legal milieu in their environments. See The Internationalisation of African Customary Law Arbitration note 5 *supra*.

Note 4. This is true whether it is the home, the larger family, association, even a company involved principally in commercial enterprise, a community, a nation or a country that is under consideration. See, for instance, Robert Greene, *The 48 Laws of Power*, Profile Books, London, 2000.

Note 5. In the ancient pre-colonial traditional African societies regulated by laws of very high ethical content, social taboos etc, rulers etc acquired power and generally used it for the good of their community. Of course, there were some deviants just as is normally the case in any age and clime. However, those deviants were clearly in the minority. Again, the harshness and oppressive tendencies of rulers were directed at outsiders, not members of the domestic community or kingdom.

Note 6. Definitely lower than what it was in the First and Second Republics. Political scientists may vary in their assessment of the causes but it seems rather clear that desperation on the part of some political actors (rooted in unbridled selfishness, unnecessary sectionalism/tribalism etc) makes it difficult for them to submit to the party or to allow fairness to have a free reign in every matter.

Note 7. In Nigeria, the godfather syndrome is a euphemism for the practice by which some influential persons in a political party select candidates for elections and party offices rather than have such positions filled through the due process of election. The persons so chosen are expected to function in their office as mere rubber stamps of the influential men who selected them.

Note 8. Even though those electoral bodies are human institutions which could be expected to sometimes sincerely err, they often operate in ways and manners that create residual worries about their independence. Normally appointed or constituted by the government in power, they often tend to overly show favour towards the party in power. Such things and the worries they create further engender suspicions in the minds of the opposition parties.

Note 9. Such things only show how mature or sportsmanlike some of the politicians are not. All impartial observers agree that the judiciary has creditably acquitted itself in the country in the past decade and has indeed been the strongest chord that has held the country together in the face of several acts of political carelessness and developments since 1999.

Note 10. For instance, in some communities there was a thin line of distinction between conciliation and mediation such that they may have been used so interchangeably as to create the impression that they are the same. As a matter of fact

they share several characteristics such that even in the borrowed English law version they are often confused by some persons. Some people even refer to mediation as reconciliation and use it to indicate that the two are the same.

Note 11. See, as examples, *Kobina Foli v. Akese* (1930) 1 WACA 1; *Assampong v. Amaku & Ors* (1932) 1 WACA 192; *Inyang v. Essien* (1957) 2 FSC 39; *Obodo v. Oline* (1958) SCNLR 298; *Ahiwe Okere & 2 Ors v. Marcus Nwoke & 4 Ors* (1994) 5 NWLR (pt. 343) 159.

Note 12. O. Adigun, *The Equity in Nigerian Customary Law* in Y Osinbajo and A. Kalu (eds) *Towards a Restatement of Nigerian Customary Laws*, Federal Ministry of Justice Nigeria, 1991 pp. 11 – 12.

Note 13. See, as examples, chapter 5 of the Ghanaian Constitution, 1992; chapter 4 of the Constitution of the Federal Republic of Nigeria, 1999; art. 7 of the Constitution of Benin Republic.

Note 14. For instance, art. 37 of the 1994 Ethiopian Constitution provides that every person has the right to “justiciable disputes to, and obtain a decision or judgement by a court of law or, where appropriate, by another body with judicial power”. Art. 68 of the Egyptian Constitution prescribes that “the right to litigation is inalienable for all, and every citizen has the right to refer to his competent judge”.

Note 15. For these things see this writer in (2001) Enhancing the Implementation of Economic Projects in the Third World through Arbitration 67 *JCIArb*, 240

Note 16. Per Jan Paulsson, a prominent international arbitrator “It may be true that in the beginning of this century, and until the 1950s, arbitrations conducted by various international tribunals or commissions evidenced bias against developing countries.”: (1987) Third World Participation in International Investment Arbitration 2 *ICSID Rev.* 1, 19

Note 17. Though the Constitutions of the different parties contain provisions for internal settlement of disputes, what happens most of the times is that party big wigs, godfathers or ‘elders’ take a position and instruct the party accordingly. It is particularly so with dispute on party elections and nomination of candidates

Note 18. This very often includes, not by any design of the parties or the Court, the forgiveness and healing engendered by the passage of time.

Note 19. Considering the vast membership and geographical spread/stretch of a party properly so called, it can hardly hope to hear out details of even a fraction of the disputes that arise within it. Even concerning those that it attempts to hear out the disputants, very often what happens is that it hands the dispute over to some of its members to handle and report – persons who may well handle the matter under the influence of some vested interests often unknown to party authorities. Even when there are no such interests, those persons are not likely to be skilled in dispute resolution. Dispute resolution is undoubtedly an art. Either way, the dispute is not really resolved.

Note 20. In Africa, see as examples, ss. 11 – 13 of the Kenyan Arbitration Act, 1995; ss. 10 – 12 of the Ugandan Arbitration and Conciliation Act, 2000; s. 12, Zambian Arbitration Act, 2000; ss. 11 – 13, International Arbitration Act, 2008 of Mauritius; ss. 10 – 12, Zimbabwe’s Arbitration Act, 1996; articles 15 and 17 of Egypt’s Law No. 27/1994 promulgating the Law Concerning Arbitration in Civil and Commercial Matters ss. 6 – 8 of Nigeria’s ACA.

Note 21. For more on these from different perspectives matters which space and time constraints do not permit examination of here see this writer in (1998) Commercial Arbitration as the Most Effective Dispute Resolution Method: Still a Fact or Now a Myth? 15 *J. Int. Arb.* 4, 81; (2005) Arbitration and the ADRs as Panacea for the Ills in the Administration of Justice in the Third World 1 *EBSU LJ*, 102; (1997) The UNCITRAL Model Law and the Problem of Delay in International Commercial Arbitration 14 *J. Int. Arb.* 1 125

Note 22. Cap. A18, LFN 2004; s. 26, Kenya’s Arbitration Act; s. 25, Uganda’s Arbitration and Conciliation Act; s. 15, Zambian Arbitration Act, 2000.

Note 23. In the 2007 general elections in Nigeria, some governorship elections held without a certainty as to who had been nominated by particular parties. In Rivers State and Imo States, the nomination of the ruling Peoples Democratic Party remained uncertain as the party went into the elections. A rerun election had to be organised in Imo State when after the elections the Supreme Court overturned the candidature of the person who flew the party’s flag during the election. In Rivers State, the party won the election whilst its flag was flown by a person other the properly chosen candidate. After that wrong candidate had been in office for well over a year, the Supreme Court restored the candidature of the duly chosen candidate and returned him as Governor of the State: *Rt. Hon. Rotimi Amaechi v. INEC & Ors* [2007] All FWLR (Pt.407) 1.

Note 24. For the critical nature of confidentiality, which imposes such obligations of non-disclosure on arbitrators, see as examples the English cases of *Dolling-Baker v. Marrett & Anor* (1991) 2 All ER 890 and *Hassney Insurance Co. of Israel v. Mew* (1993) 2 Lloyd’s Rep 243

Note 25. (2007) A Synergy of Opposites: Effective Commercial Justice, Rights and Liberties in African Jurisprudence chapter 6 in *Growing the Law, Nurturing Justice: Essays in Honour of Niki Tobi*, JSC, Lawhouse Books, Port Harcourt, Nigeria.

Note 26. In England of the 1940s it was so disturbing in manifestation that Lord Atkin had to issue his eternally refreshing rebuke to his Learned Brothers in *Liversidge v. Anderson* (1942) AC 206, 240 (“I view with apprehension the attitude of judges who on a mere question of construction when face to face with claims involving the liberty of the subject show themselves more executive minded than the executive.”)

Note 27. See this writer in (1998) The Parties’ Rights Against a Dilatory or Unskilled Arbitrator: New Possible Approaches 15 *J. Int. Arb* 129 – arguing that even when an arbitrator has not acted out of malice or *mala fide* if it can be shown that he was at the time of his appointment insufficiently knowledgeable for the arbitration in question but deliberately gave himself out as being knowledgeable and failed to point out that deficiency to the parties when approached for appointment but went on to accept the appointment, he would be liable for any injury caused any party by such deficiency in knowledge. The parties should not have the principle of *volenti non fit injuria* raised against them.

Note 28. It is beyond the scope of this paper to examine the position of the customary law on this matter. It is enough to state here that the problem of unarbitrability hardly exists in the customary law save and except to the extent to which statutory law has affected the customary law.

Note 29. For instance, parties to a statutory marriage should be unable to award divorce and maintenance orders to themselves through conciliation, mediation or even a negotiation between them however mutually acceptable the terms may be. The public interest in the maintenance of the marriage institution is so high for all about the legal dissolution a marriage to be left to the idiosyncrasies of parties, particularly estranged spouses.

Note 30. *United World Ltd Inc v. MTS Ltd* (1998) 10 NWLR (pt. 586) 106, 116

Note 31. Cap C28 LFN 2004. Section 46 provides “The Federal High Court shall have exclusive jurisdiction for the trial of ... disputes under this Act.” Unlike most other Nigerian statutes that concern themselves with jurisdiction as amongst Courts, this provision reserves the trial of all disputes under the Act for the Federal High Court alone not just as amongst Courts but as amongst all processes of dispute resolution.

Note 32. Cap P2 LFN, 2004. Section 26 vests “jurisdiction to hear and dispose of legal proceedings under this Act ... in the Federal High Court”. Though it may be arguable that “legal proceedings” in the provision simply means “Suits” and so does not include arbitral proceedings or proceedings in other dispute resolution mechanisms, it is this writer’s considered view that the draftsman meant to include such proceedings in his usage “legal proceedings” thereby vesting only the Federal High Court with jurisdiction over patent disputes. That position is also consistent with the favoured position of most nations that, for obvious economic and security considerations, would rather have disputes in that important area of the economy under the firm control of their Courts and not other private sector dispute resolution mechanisms – the US for instance.

Note 33. For a closer examination of the role of public policy in arbitrability of disputes in Nigeria and other UNCITRAL Model Law jurisdictions see this writer in (1999) Public Policy and Arbitrability under the UNCITRAL Model Law *Int. Arb LR* 70.

Note 34. Cap P10, LFN 2004

Note 35. This is also the general position under the International Convention for the Settlement of Investment Disputes between States and Nationals of other States (ICSID Convention) 1965 of which Nigeria is a member sequel to which she enacted the ICSID (Enforcement of Awards) Act cap I20, LFN 2004 in 1967.

Note 36. Cap T8, LFN 2004.

Note 37. It is in the same manner, and no other, that the exclusive jurisdictions of the Supreme Court (s. 232 on inter state and Federal v. State disputes, s. 233 on appeals from the Court of Appeal, which section even says “to the exclusion of any other court of law”), the Court of Appeal (s. 239 on presidential elections, s. 240 on appeals from High Courts and their equivalents) must be understood. Therefore, States A and B that have any arbitrable dispute may decide not to go to the Supreme Court but to arbitration or to a mediator. It is only if they decide to go to Court at all that the exclusive jurisdiction of the Supreme Court becomes relevant. *A fortiori*, 2 parties may after the Court of Appeal has delivered judgement on their matter decide to go to arbitration, a mediator or even a conciliator and not the Supreme Court. The arbitrator(s), for instance, definitely can render an award different from the Court judgement, which would also be binding on the parties. However, the Courts need not be worried whether or not the arbitrator is sitting on appeal over the Court of Appeal judgement. No, he would be incompetent to do so. But it can deliver an award which the parties may decide to obey or enforce in abandonment of the Court judgement. The analogies can further be drawn with respect to the exclusive jurisdiction of the Court of Appeal and lower Courts. It is simply amazing how creative the

Nigerian law can be used in these matters for the effective resolution of disputes and achievement of enduring justice, not just technical justice.

Note 38. Act No. 1 of 2006. The Act went into operation on June 14, 2006.

Note 39. In addition to what has been said in the immediate foregoing footnote, it should be clearly noted that no Court in Nigeria presently enjoys the kind of unlimited jurisdiction which the State High Courts enjoyed under s. 236 of the 1979 Constitution. A combination of the jurisdictions of the Federal High Court under s. 251 and the State High Courts as well as the High Court of the Federal Capital Territory under ss. 270 and 257 respectively does not even amount to an unlimited jurisdiction even if they were vested in one Court, which is not the case. Since every Court now has a circumscribed jurisdiction, the country has moved from presumptive jurisdiction to specifically prescriptive conferment of jurisdiction. Thus, no Court or other tribunal can claim to have a jurisdiction that is exclusive to not only other Courts but also all the other dispute resolution mechanisms unless there is a statute specifically (not impliedly) conferring same. What is more, even the unlimited jurisdiction of a State High Court under the 1979 Constitution was also as between Courts and did not exclude other dispute resolution mechanisms from validity or effectiveness.

Note 40. Italics supplied.

Note 41. The essence and bedrock of the ADRs rests in extensive party autonomy, private hearing and declaration of award, and confidentiality. Without those things the ADRs can hardly be preferred over and above litigation.

Note 42. Such statutes as the Arbitration and Conciliation Act which was enacted in 1988 as one of the earliest arbitration statutes to be enacted across the world based on the UNCITRAL Model Law on International Commercial Arbitration, 1985 soon after the Model Law was made and indeed the first in Africa; the ICSID (Enforcement of Awards) Act note 35 *supra*. For further elaboration of the point see generally Andrew Chukwuemerie, (2003) Commercial and Investment Arbitration in Nigeria's Oil and Gas Sector 4 *Journal of World Investment*, 828; *Africa and the UNCITRAL Model Law on Arbitration: Winning and Losing to Win* (forthcoming); (2006) Salient Issues in the Law and Practice of Arbitration in Nigeria 14 (1) RADIC, 1.

Note 43. The High Court Laws of Eastern, Northern and Western Regions which apply in all the State High Courts in the country contain no such provision. So also the Court of Appeal Act and Supreme Court caps C36 and S15 respectively LFN, 2004. Nor does the Tribunals of Enquiry Act cap T21 contain any such provision.

Note 44. Emphasis is this writer's

Note 45. See *Deweerd v. Belgium* (1980) 2 EHRR 439; *KR v. Switzerland*, Application No.10881/84, Decision of March 4, 1987.

Note 46. *Le Compte, Van Leuven & De Meyere v. Belgium*, Decision of the European Human Rights Court of May 27, 1981.

Note 47. Adopted by the Committee on April 12, 1983 at its 516th meeting.

Note 48. In *R v. Town Planning Board ex parte Kwan Kong Co. Ltd* (1995) 3 HKC 254 Wang, J held *inter alia*,

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

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

Note 49. See Arbitration and Human Rights in Africa note 6 *supra*.

Note 50. Act No. 2 of 2006

Note 51. For an examination of how that is already creeping into arbitration in the country (a practice whereby many persons who have not had any training whatsoever in arbitration pass themselves off as arbitrators) see this writer in (2005) Preliminary Meetings, Preliminary and Interlocutory Orders in Secured Credit Arbitrations *Nig. Bar Jnl*, 108

Note 52. At s. 57 which simply copied the footnote to the Model Law. For its examination see Peter Binder, *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions*, Thompson Sweet & Maxwell, London 2005 and this writer in (2004) New Hopes and Responsibilities in the Maturing Process of Arbitration Law and Practice in Africa: Nigeria as a Case Study *Nig. Bar Jnl*, 55

Note 53. The 2nd Schedule to the 1999 Nigerian Constitution creates 3 lists of items and subjects over which the Federal and State legislatures have legislative competence. Whilst the Exclusive Legislative List is for only the Federal

Legislature, the Concurrent Legislative List is for both and the Residuary List - an unwritten list of things not covered by any of the first 2 lists – is for the State governments alone.

Note 54. A Bill drafted in Nigeria since about the late 1990s meant for enactment by the Federal legislature but which very many state legislatures still not been able to enact in their states.

Note 55. This writer is already working together with INEC on a model Bill to tackle these matters.

Note56. Note 50 *supra*