

Rethinking Conciliation and Mediation as Tools for Dispute Resolution in Nigeria

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Abstract

This study conceptualizes disputes as an integral part of human existence, which could arise as a result of differences in opinions, political ideologies, land matters, bad governance, ethnic nationalism, family issues, economic, or religious reasons, among others. In resolving these disputes, parties often resort to some form of dispute-resolution mechanisms, the most popular being litigation. However, in civil disputes, parties have the option of exploring non-conventional, peaceful, and alternative methods of settling disputes and resolving conflicts by agreement, whether directly or with the help of a third-party mediator or conciliator and in the process save time and get hold of justice. This paper examines the nature of alternative dispute resolution (ADR) mechanisms, particularly mediation and conciliation, what the law provides, and how the proceedings of both mechanisms are conducted as means of resolving disputes among belligerents. It establishes that mediation and conciliation are often times mistaken for each another and are sparsely used, particularly in Nigeria and, therefore, recommends a holistic approach to the institutionalization of ADR as a viable means of resolving disputes amongst feuding parties and that governments should encourage its embrace by creating, like courts' system, formal institutions for its application.

Keywords: Conciliation, Dispute, Institutionalization, Mediation, Resolution, System

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INTRODUCTION

Man is a social animal constantly engaged in disputes with one another in the cause of constant some less formal and effective means of mediation and reconciliation which in modern times are referred to as alternative dispute resolution (ADR). Mediation and conciliation are two potent ADR mechanisms, amongst others, which include: arbitration, negotiation, and neutral evaluation. They are, however, preferred processes used in dispute resolution because of their ability to maintain mediation and conciliation amongst feuding parties and engender peaceful coexistence. It is worth noting that mediation and reconciliation for resolving disputes peacefully according to Clarke and Davies [1] has been in Nigeria from time out of mind. They were alternatives to wars and battles in ancient times and in modern times too, they remain useful mechanisms in dispute resolution [2]. Arbitration (and the other ADR mechanisms)

in ancient times differs from the present-day arbitration, in that the former was usually oral, unlike in recent times, when such agreements are required to be in writing for them to be enforceable. Mediation and other ADR mechanisms have been used all over the world, particularly in Ancient Egypt, Ancient Greece, China (Confucianism) and Asia, Japan, Africa, Islamic Regions, Western Judeo-Christian Culture Regions, United States, and the United Kingdom [3–6].

Conciliation and mediation as parts of methods and procedures used in resolving disputes under the ADR mechanism have been classified to belong to the group of “the non-binding ADR. These methods have both been known as methods of settling disputes by consensus rather than by adjudication [7]. It is important to state that these methods are similar and at times used interchangeably. This is because resolution of disputes in both the

methods is by consensus and entirely a decision of the parties, not that of the conciliator or mediator. Also, in both cases, a neutral third party is always appointed to facilitate resolution of the dispute.

However, a major distinction between both terms is that in conciliation all that the neutral party (the conciliator) does is to explore opportunities for settlement. The conciliator is more involved, pro-active and evaluative in leading both parties to a settlement, in that he may make recommendation, and persuade the parties to be more flexible in their positions to reach a settlement, while in mediation, the neutral (mediator) is usually less proactive and tends to only help/facilitate communication between the parties in resolving their disputes on their own.

EXAMINATION OF MEDIATION AND CONCILIATION AS ALTERNATIVE DISPUTE RESOLUTION

Mediation

Mediation is one of the many types of ADR Mechanisms and has been defined by the Civil Law Mediation Act (2003) as ‘an activity voluntarily entered into by the parties, whereby a professionally trained neutral facilitator (mediator) using recognized methods, systematically encourages communication between the parties with the aim of enabling the parties reach a resolution of their dispute’. In the United States, it was defined by Section 2 (1) of the Uniform Mediation Act 2004 as ‘a process in which a mediator facilitates communication and negotiation between parties to assist them in reaching a voluntary agreement regarding their dispute’. Section 5 of the Commercial Mediation Act 2005 in Nova Scotia adds that ‘... a mediator does not have any authority to impose a solution to the dispute on the parties. It is defined as a process which emphasizes the participants’ own responsibilities for making decisions that affect their lives [8].

Mediation involves a neutral 3rd party, known as the Mediator, who persuades parties to the dispute to focus on their underlying interests and concerns, and move away from fixed positions; his function is to act as a facilitator

or honest broker [4]. A mediator assists, facilitates, and helps parties reach a conclusive and mutually satisfactory agreement. He works with the parties to resolve their disputes by agreement, rather than imposing a solution. Mediation is not binding; it facilitates communication between parties, but agreement reached may be made enforceable as contract or court order. It is a process aimed at finding a mutually satisfactory agreement that all parties believe is beneficial [9].

Mediation in Nigeria could take two forms: private mediation and court-annexed mediation [10]. The former involves parties enlisting assistance from an independent party at a fee, while the latter involves matters already filed in a court but with directives from the court that parties explore amicable settlement via mediation. For court-annexed mediation, the multi-door courthouses and mediation centers are the established fora for the mediation process. Unlike arbitration and conciliation, there is no harmonized legislation governing the process of mediation in Nigeria; as a result of this, mediation processes are largely governed by various regulations and rules of the court [10].

The Nigerian government, in recognizing the advantages of ADR mechanisms as against litigation, has recently set up mediation centers, where disputing parties could request mediators as well as conduct mediation proceedings. The centers also support the training of mediators. Lagos State, for example, has the Citizen’s Mediation Center (CMC), where mediation and settlement of a range of civil disputes by trained and seasoned mediators could occur in a non-adversarial platform. Other mediation centers available for resolution of civil disputes include Lagos Court of Arbitration, Lagos Multi-Door Courthouses, Court of Appeal Mediation Program and the Nigerian Institute of Chartered Arbitrators, amongst others. Commendably, services rendered by the CMC are free for indigent residents of Lagos State, and proceedings at the CMC are governed by the Citizens Mediation Centre (Procedure) Guideline Practice Rules (2011).

Conciliation

Conciliation is defined in UNCITRAL Model Law on Commercial Conciliation (2002) as “a

process whereby parties request a third person or persons (the conciliator) to assist them in their attempt to reach an amicable settlement of their dispute arising out of or relating to contractual or other legal relationship. The conciliator does not have the authority to impose upon the parties a solution to the dispute. It is defined as ‘a process where the neutral takes a relatively active role, putting forward terms of settlement or an opinion on the case’ [11].

Originally, conciliation was a process where a third party assists or persuades the parties to a dispute to solve their dispute by agreement on their own, without anybody mediating to resolve the disputes. However, in recent times, conciliation involves the third party actively proposing terms of compromise and suggestions for arriving at a solution. They propose terms, which could be accepted, rejected, and even modified by the parties. When the parties finally accept the proposed terms of agreement, it is signed by both parties. The agreement is executed with the help of the conciliator and is expected to be kept confidential, except when its implementation or enforcement dictates otherwise.

CONCILIATION PROCEEDINGS

Preliminary Matters: Commencement

Parties wishing to resolve disputes through conciliation may devise rule that would govern the process or decide on existing rules within a particular jurisdiction or that of some mediation and conciliation organizations to govern the process. In Nigeria, Section 44 of the ACA provides that parties to a dispute may agree that the disputes be settled in accordance with the Conciliation Rules. These rules are optional and can be applied to the parties, if they so agree [4].

Section 37 of the ACA makes provision for disputants to amicably settle disputes relating to agreement via conciliation. Thus, a party desiring this shall send a written request to conciliate to the other party, which shall contain a brief statement setting out the subject of the dispute. Section 39 of the ACA provides that the conciliation proceedings shall commence on the date the request to conciliate

is accepted by the other party. Therefore, the acceptance of parties to go into conciliation signifies the commencement of the conciliation process.

Articles 2 (2)– (4) of the Conciliation Rules specify that if such acceptance is made orally, it is advisable that it be confirmed in writing. Where such invitation is rejected, there would automatically be no conciliation proceedings. Where the initiating party fails to receive a reply within 30 days of his invitation or within a specified period (as stated in the invitation), he may treat it as a rejection for the invitation to conciliate and may choose to inform the other party of this. In the UK, when a party sends an invitation to conciliate, an unreasonable refusal on the part of the other party to conciliate usually results in a punishment by a costs sanction, as was held in the cases of *PGF IISA v. OMFS Co. Ltd.*, *Garrit-Critchley & Ors v Andrew Ronnan & Solar power PV Ltd. and Laporte & Anor. v. The Commissioner of Police for Metropolis*. It is important to state here that though this has an advantage in helping disputants try to resolve matters via ADR first, it could also lead to waste of time and resources. This is because a party could accept the invitation to mediate/conciliate, just in a bid to avoid being slammed with costs sanctions during litigation. In *Carleton & Ors v Strutt & Parker*, both parties’ conduct led to the failure of the mediation; it was held that a party who agreed to mediation but then caused the mediation to fail because of his unreasonable position was in the same position as a party who refused to mediate.

Appointment of Conciliator(s)

By virtue of Article 3 of the Conciliation Rules, upon acceptance, parties shall refer the dispute to a conciliation body, which could be made up of one, two, or three conciliators, which would be acceptable to the parties. A conciliatory body refers to a body or individuals constituted by consensus to assist or persuade parties to agree to a term of settlement of dispute [12]. Section 40 of the ACA and Article 4 (1) of the Conciliation Rules makes it possible for the parties to agree to appoint a sole conciliator jointly and/or where two conciliators have been agreed upon,

each party to appoint one conciliator, and in the case of three conciliators, each party is to appoint a conciliator and then jointly appoint the third conciliator. Parties by reason of Rules 3rd Article 4 (2) of the Schedule to the ACA may seek help from any appropriate institution(s) or person(s) in making their choices. It is important that conciliators selected should be independent and unbiased, so that the whole process could be fair and impartial in the real sense of it. Where conciliation is to be administered by an institution, a request is made to that institution. A good example is that of International Chamber of Commerce (ICC) Conciliation.

Article 2-4 of the ICC Rules of Optional Conciliation stipulates that a party requesting conciliation shall apply to the secretariat of the International Court of Arbitration of the ICC, specifying the purpose for the request alongside the required fee to open a file. The Secretariat will then inform the other party about this request and this party would within 15 days indicate whether it agrees to conciliate or not. In cases where the other party agrees to conciliate, he shall inform the secretariat, who would in turn appoint a conciliator. Parties, by the 3rd schedule to Article 16 of the ACA are required to undertake not to resort to any arbitral or judicial proceedings in respect of the pending dispute, during the conciliation proceedings.

The 3rd Schedule to Article 6 of the ACA allows parties to a conciliation process to appear in person or by legal representation and they may be represented or assisted by persons of their choice and are to communicate in writing to the conciliator and to each other, the name and addresses of such persons and the purposes for the appointment (that is whether for representation or for assistance).

Meetings

Article 6, 3rd Schedule of the Conciliation Rules enables the parties to fix the place of meeting with the conciliator, but where they fail to do so, place of meeting will be determined by the conciliator(s) after consultation with the parties. The role of a conciliator is also clearly and particularly spelt out in Article 7 of the Conciliation Rules.

Proceedings Proper

Article 5 of the Conciliation Rules requires that upon appointment, the conciliator(s) is/are required to request submission of a brief written statement, describing the general nature of the dispute and identify issues for resolution between the parties; the other party is also sent a copy of the said statement. Additional written statement supplemented with documents and other forms of evidence may further be required by the conciliator(s) as he may deem fit from time to time during the reconciliatory process. Each party is allowed by Article 12 of the said Act to submit suggestions for the settlement of dispute or the conciliator may on his own, in compliance with Article 13 of the Act, formulate terms of possible settlement and send the same to the parties for their observations, after which he could re-formulate the same to include the parties' observation(s).

Upon reaching an agreement of settlement, the parties or the conciliator (upon request) draw up a written settlement agreement (record of settlement), which the parties sign. Upon signing the agreement, the dispute comes to an end and parties are bound by the agreement. Though a settlement agreement could be made orally, it is advisable to be reduced into writing, so as to clear up ambiguities or avoid variations. In *United Health Alliance v. United Medical*, a Delaware court refused to enforce an oral settlement reached in mediation due to an existing disagreement over a material term. Also, in *Baraban v. Hammonds*, the appellate court urged parties to put settlement agreements in writing.

Where parties do not agree with the terms of settlement, they may, subject to Section 42 of the ACA, exercise either of these options, i.e., (a) Submit the dispute to arbitration; or (b) Resort to litigation.

This goes to say that the reconciliation proceedings shall not in any way affect parties' legal right of recourse to other means of resolving their dispute. However, parties are required by Article 20 of the Rules to undertake not to rely on or introduce as evidence in arbitral or judicial proceedings views expressed, suggestions or admissions

made by the other party, and proposals made by the conciliator or willingness of the other party to accept proposals. Article 19 further requires parties and the conciliator to undertake that the conciliator shall not act as a representative of a party, an arbitrator or as a witness in future proceedings entered into in an attempt to settle the pending dispute. In *Baraban v. Hammonds*, an appellate court held that the trial court erred in permitting a mediator to testify admitting mediation communications, which occurred during the mediation proceedings, stating that the general rule of confidentiality to mediation applied.

FEATURES AND SIMILARITIES OF MEDIATION AND CONCILIATION

One of the features of mediation is that it is usually voluntary, consensual and non-adversarial in nature, same for conciliation. However, the voluntary nature of mediation/conciliation may be lost due to automatic referral or compulsory mediation.

Other features are that the parties control the content and outcome while the mediator only controls the process; agreement reached by the parties themselves is not binding (in the sense of being enforceable in the court of law) unless the parties choose to make the agreement contractually binding [13]. In a similar vein, conciliation is also non-binding; the conciliator is required to make non-binding recommendations, if accepted by both parties, may be enforceable as contract or court order.

It is important to enforce mediation or conciliation agreements because it could become difficult to do so in future. In the case of *Bukley v Shealy*, the appellate court, affirming the trial court's position, refused enforcing a mediated divorce settlement, due to the fact that the agreement was over a decade old and was never submitted to the court for enforcement.

Conciliation or mediation can be used at any stage of a dispute; it could be used at the first step/stage, during litigation, or arbitration, or even negotiation [4].

Conciliation like mediation involves disputing parties and a neutral third party who seeks to examine how the dispute should be resolved [14].

Another feature is that both mechanisms are more common in settlement of disputes between managements and labor unions [10].

In both cases, there is no plaintiff/claimant and defendant, as in litigation and or arbitration or right or wrong parties, the import here is for parties to reach an agreement that is mutual and beneficial to both; agreements reached are ordinarily not binding.

DIFFERENCES

In its report, the Law Reform Commission on Alternative Dispute Resolution (Mediation and Conciliation) stated that the major difference between mediation and conciliation is that a conciliator may make suggestions, give expert advice and use intervention techniques that do not only actively influence the likely terms of an agreement, but also encourage all parties to settle, while a mediator generally assists the parties to communicate with each other so that they can identify, clarify, and explore the issues in dispute before they consider their options to reach a mutually acceptable negotiated agreement. Another difference identified by Gadzama [15] is that the conciliator may intervene more, by narrowing down issues, recommending solutions and encouraging parties to make concessions.

BENEFITS

The benefits of mediation and conciliation are numerous in that:

- They save time and cost (cheaper and quicker).
- They are usually voluntary.
- Flexible and informal (this makes parties more relaxed).
- They are more convenient, private, and confidential.

These mechanisms according to Oyegbile [16] are self-empowering as the parties control the content and outcomes, there is greater satisfaction with the resolution/decision and hence high level of compliance with agreement reached, since the outcome reached was negotiated rather than imposed on the parties; most importantly, relationships are preserved, and they aid in reduction of court backlogs.

PROBLEMS

Much as beneficial and laudable the concepts of mediation and conciliation are, they also consist of some palpable problems, which are as follows:

- *Lack of public scrutiny:* In view of this agreement repugnant to public policy could be resorted to; due to their confidential nature.
- *Lack of precedence and predictability in mediation and conciliation matters:* There is absence and/or failure of precedence which could have acted as a form of guide to fresh mediators/conciliators.
- *Enforceability of agreements:* The decision of the court in *Buckley v Shealy* is demonstrative of the fact that failure to enforce agreements reached timeously could prevent them from being enforced in future.
- *Failure in universal application:* Mediation and conciliation have not become a widely used technique for resolving international business disputes due to problems of unfamiliarity with them as ADR mechanism and the huge costs their application at the international front may entail, particularly, due to geographical distance, language barriers, issues of interpreters as well as selecting a neutral mediator familiar with cross-cultural differences of the parties [17].
- *Uncertainty of resolution of dispute:* There is no absolute certainty that the dispute would be resolved [18].

RECOMMENDATIONS

Mediation and conciliation are not readily available or present in areas not having a developed legal/regulatory and institutional framework [19]. It is, therefore, recommended that more states in Nigeria embrace and create more institutions where ADR, particularly, mediation and conciliation, can be accessed. For instance, creating multi-door court houses that include other forms of ADR, not just arbitration and conciliation. It is necessary that all the various ADR mechanism should be included in the Act and expressly defined and distinguished from each another to avoid confusion that arises due to their similarities.

It is pertinent that mediation and conciliation should be given more recognition, weight, and

bite. This is necessary to prevent waste of time and resources. A party who freely surrenders to the jurisdictions of mediation and or conciliation should not be allowed to unilaterally withdraw therefrom simply because the prognosis for success is poor. Where, however, he chooses to withdraw he must do so with the consent of the other party. Where the consent is not obtained or duly received, then such a withdrawing party, must pay withdrawal fees to be determined either by the parties prior to commencement of the proceedings, the conciliator/mediator or legislation. This undoubtedly would make parties place more value on these forms of ADR mechanisms and encourage disputants to opt for them more.

It is incontrovertible that certain conflicts do have third-party interest, in which cases, such third party, often, becomes affected by the decision of the mediation or conciliation proceedings and thus desires to be joined as necessary party to the proceedings. However, the present legislations, i.e., the Arbitration and Conciliation Act and the Conciliation Rules, do not make provisions for joinder of parties. Amendments to these legislations are, therefore, necessary in order to take into consideration the interest of interested third-parties in their proceedings and avoid a situation where such interested third party/parties, on the ground of being affected and not being heard, begin to contest agreed terms of settlement and challenge its enforcement. In a nutshell, provisions on joinder will save time and prevent multiplicity of actions.

In enforcing terms of settlement from mediation or conciliation processes, other legal options can be employed rather than resorting to a court for the enforcement of a settlement agreement. This is necessary because the parties from the onset opted for a process other than formal court. Mediation/reconciliation process should, therefore, have inbuilt mechanisms for enforcement of settlement agreement, for instance provision could be made for an 'authentication' by a notary public, which would be done in the presence of both the parties, signifying that they both desire that the terms of settlement or settlement agreement be binding and enforceable on them.

Lawyers and draft men often prepare and or draft agreements on behalf of their clients; in doing this, they should insert in the drafted agreements, conciliation and mediation clauses and can even include 'multi-door dispute resolution clauses', especially where it is obvious that the parties are not interested in resorting to court proceedings.

In order to have more successful proceedings, mediation and conciliations should be undertaken by persons who have undergone some form of training/accreditation in the act of mediating and conciliating respectively. Disputants need to be further enlightened in order to ensure that a greater percentage of them are exposed to the benefits of mediation and conciliation.

Section 73 of the Nigerian Communications Commission Act 2003 and the Electric Power Sector Reform Act 2005 allow the communication and power sector to embrace ADR processes in resolution of disputes involving the sectors respectively. This, in my opinion, is a commendable step. Other sectors of the Nigerian economy should also be enlightened and encouraged to embrace ADR in resolving their disputes.

Mediators and conciliators according to Lord Justice Tomlinson in *David Frost vs Wake Smith and Tofileds*, need to take care when drafting a settlement agreement and advising clients about its enforceability, as there is a risk of claim if the settlement agreement is negligently drafted and results in making the settlement agreement unenforceable. Mediators and representatives need to avoid giving guarantees about settlement agreements. A solicitor (representative) has a duty to advise his client, especially a lay client, of the nature of the (mediation) process and the status of any agreement reached thereby [20].

Regarding the Arbitration and Conciliation Act (ACA), Section 40 makes provision for one of the three conciliators, and their mode of appointment, and Article 4 of the Conciliation Rules, Third Schedule to the same Act makes provision for the appointment of one, two, or three conciliators. Following the rules posed a

problem particularly when parties opt for two conciliators. Though Article 3 states that the conciliators ought 'to act jointly', in practice, this may not be feasible, as a single conciliator, he may want to take side with his 'employer' than being impartial. It is, therefore, recommended that the Rules be amended to restrict the number of conciliators to one or three as provided for in the Act.

Taking into consideration international relationships and trade, and the possibilities of disputes across frontiers of different countries, the Act should be amended to accommodate disputes across international boundaries and/or even disputes involving parties within the same country but are far apart from one another. It would be unconscionable to mandate parties from different countries or in extreme ends of the same country to travel all the way to attend conciliation meetings. Though Article 6 of the Rules makes provision for representation and assistance, a party may not feel comfortable or even trust any other individual to handle such a dispute. Therefore, room should be made for Online Dispute Resolution where parties can resort to sending documents and using other means of communication in sorting out disputes.

Conciliators are expected to be impartial and unbiased; however, meeting with disputants separately, may be an issue, in that parties may seek to bribe the conciliator, or win him over to their side, to make him more favorable to their case. This may even make parties lose confidence in the entire conciliation process.

The provisions of Articles 19 and 20 of the Conciliation Rules provide that parties are to undertake not to use certain information, admissions, proposals, and views in subsequent dispute resolution of the same dispute. This would mean having to start afresh in the event of failure of conciliation and or mediation and the parties decide to approach other means of dispute resolution such as arbitration or litigation. This has its advantages though, however, it could pose as a disadvantage, in that it could be a waste of time and resources. It is, therefore, recommended that decisions of mediation/conciliation committee should be admissible in subsequent proceedings.

CONCLUSION

Before the advent of formal litigation, mediation, conciliation and other ADR mechanisms were traditionally in use as means of resolving disputes in virtually everywhere in the world, including Nigeria, where traditional and spiritual leaders, chiefs and elders intervened as neutral third parties in dispute resolution. It suffices to say that till date various ADR mechanisms continue to be in use though with various modern modifications. However, these modern ones differ majorly in the area of documenting the agreement(s) reached. Disputants in Nigeria are yet to fully embrace mediation and conciliation as an alternative to litigation and as such, there is need for further enlightenment to ensure that a greater percentage of disputants are exposed to the benefits of mediation and conciliation and the goals of ADR mechanisms which are to reduce burden on the courts are achieved.

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