

THE ROLE OF ALTERNATIVE DISPUTE RESOLUTION IN THE ELECTORAL PROCESS

BY

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1.1 Introduction

Dispute will always arise, and when it arises, there are many ways to settle it. In a word game such as scrabble, a disputed spelling can be quickly resolved by reference to a dictionary; in a game of cricket, the toss of a coin will determine which side has the choice of whether to bat or to bowl; in a minor car accident, an apology and a hand-shake may be sufficient to settle the dispute. However, where major interests are at stake, something more substantial is required to settle the dispute.

Adversarial adjudication is the conventional first choice in dispute resolution. That is why all other methods of dispute resolution are described as “alternatives” to adversarial adjudication, and therefore collectively grouped together as ADR. ADR methods include arbitration, early neutral evaluation, negotiation, Med/Arb, conciliation and mediation. It may be said that arbitration typically involves the help of a neutral third party. But arbitration (like litigation) is a contentious process. The question then arises whether it would not be better if the parties settle their differences in a less confrontational manner. The answer to this question is mediation and conciliation.

Mediation lies at the heart of ADR. Parties who have failed to resolve a dispute for themselves turn to an independent third person, or mediator, who will listen to an outline of the dispute and then meet each party separately – often “shuttling” between them – and try to persuade the parties to moderate their respective positions. The task of the mediator is to attempt to persuade each party to focus on its real interests, rather than on what it conceives to be its contractual or legal entitlement.

The terms “mediation” and “conciliation” are often used as if they are interchangeable; and there is no general agreement as to how to define them. Historically, a conciliator was seen as someone who went a step further than the mediator, so to speak, in that the conciliator would draw up and propose the terms of an agreement that he or she considered represented a fair settlement. In practice; the two terms seem to have merged.

Conflicts are often unavoidable aspects of any society. However the impacts of these conflicts need to be minimized in the society. It can be described as a situation in which interdependent people express their disagreement in their desire to satisfy their needs and protect their interest. Traditionally, the act of conflict resolution has been the exclusive preserve of the courts through litigation. However litigation has such presiding problems as court congestion, high cost of litigation, cumbersome procedures, public hearing, strained relationship amongst disputants, amongst other problems. Furthermore, Litigation has the ‘winner takes it all’ approach. For these reasons, the need therefore arose for the sourcing of alternative ways of resolving disputes and these methods are called Alternative Dispute Resolution (ADR) Methods/Techniques.

1.2 Alternative Dispute Resolution Methods

ADR is a term often used to describe a wide variety of dispute resolution mechanisms that are short of or alternative to full scale court processes. ADR also refers to the set of mechanisms a society utilizes to resolve disputes without resort to costly adversarial litigation. It is an approach designed as a substitute to the rigorous and time-consuming litigation approach to dispute settlement. It is also described as an alternative to adversarial process such as litigation that results in win/lose outcomes. The ADR methods include Arbitration, Mediation, Conciliation Negotiation, mini trial, Med-Arb, Facilitation, Expert Assessment , Co-operative Problem Solving, Rent-a-Judge, Facilitation, Early Neutral Evaluation, etc. These methods are becoming very popular in the resolution of disputes. These ADR methods have been adopted by in Nigeria along with international best practices in the resolution of disputes.

1.3 Objects of Alternative Dispute Resolution Methods

Alternative Dispute Resolution Methods have their objects and these include expediency, affordability, choice of arbitral tribunal, expertise, flexibility and certainty, preservation of privacy and subject matter of the dispute, representation of the Parties, less cumbersome procedure, fostering of better relationship among disputants etc. It is important to note that submission to Alternative Dispute Resolution mechanisms must be voluntary. Voluntary submission can be in a dispute resolution clause contained in a contract. It is pertinent to state that a dispute resolution clause may vary in content. It can be through an agreement, an exchange of letters, telex or other means, any form of recording reference to agreement etc. ADR can also be ordered by the Court, where the parties have resorted to litigation. Parties can also agree to use any of the ADR methods, after the dispute has arisen.

1.4 The Electoral Process In Nigeria

An election is a formal group decision-making process by which a population chooses an individual or individuals to hold public offices. Elections have been the usual mechanism by which modern representative democracy has operated since the 17th century. Democracy is underpinned by three essential components: healthy competition among political parties, political participation by the populace in electing their leaders, and a credible electoral process. In a democracy, power and significant decisions in a society is distributed among the population which is carried out by the elected representatives of the people. Viable political parties and credible elections are essential components of a democracy. Electoral systems in civilised societies permit the co-existence of different units, tribes, nations and diverse schools of political ideologies and religious beliefs to live in peace and harmony by surrendering their rights to the people they have elected to govern and manage their resources for a given period of time. Ariwoola JSC held in *N.D.P v INEC* (2013) 20 WRN 1 that electoral process is the method, “by which a person is elected to public office in a democratic society”.

Nwabueze observed that a credible electoral process must include:

...the suffrage, the registration of voters, delimitation of constituencies, the right to contest elections, electoral competition between rival parties, the body charged with the conduct and supervision of election, the method of electing candidates within the political parties, nomination of candidates, method of voting, the actual conduct of elections, the determination of results, trial and determination of election disputes, electoral malpractices and their consequences.

An effective democracy and electoral system is founded upon the ability to hold free and fair elections, independent and effective electoral umpire, effective policing, and incorruptible and responsive judiciary. It is no news that the electoral process in Nigeria, as in most developing democracies is fraught with several challenges, these spans operational, technological and institutional among several others. In the storied history of electioneering in Nigeria therefore, only two exercises have been internationally acclaimed to be patently credible, the June 1993 and March/April 2015 general elections. This underscores the onerous responsibility for conducting free and fair elections in Nigeria. This also highlights the fact that in our electoral process, conflicts and disputes may arise, some which can be settled using Alternative Dispute Resolution Methods.

Before we x-ray the use of ADR in our electoral process, it is pertinent to examine the kinds of disputes that exist in our electoral process. It is pertinent to note that political parties, politicking and the electoral process, being avenues for the pursuit of power, have 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. Nigeria and Africa have not been left out of this. Furthermore, inter and intra party disputes also exists .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, 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. 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 characterized by incorrect assertions) between parties in power and the opposition. may touch on and include the bodies or organizations responsible for organizing elections, which in Nigeria is the Independent National Electoral Commission (INEC). These generally centre on disagreements between parties over how a certain thing has allegedly been done or not done to favour or disfavour one party or the other, the rigging of elections, etc. It is important to state that no matter the disputes in the electoral process, those disputes can also be properly resolved through the ADRs, rather than the sole dependence on litigation as a means of settling disputes. It however seems very cumbersome to settle disputes bordering on election petitions through ADR, and the speaker calls for the need for a paradigm shift from this.

1.5 Legal Provisions For The Utilization Of ADR In The Electoral Process

It is necessary at this point to briefly examine the law on the resolution of disputes that occur in the electoral process through ADR. The Constitution and the Electoral Act, 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.

The question thus arises, Can our legal system allow the use of Alternative Dispute Resolution in the settlement of electoral disputes? The answer is “Yes”. Even our electoral umpire, the Independent National Electoral Commission (INEC) had canvassed adoption of Alternative Dispute Resolution (ADR) in addressing many of the electoral disputes in the country. Speaking at an event organized by the Institute of Chartered Mediators and Conciliators (ICMC) in Abuja recently, the Secretary to the commission, MsAugusta Ogakwu, emphasized that the commission had established its Alternative Dispute Resolution Units to propagate and implement the use of ADR in electoral disputes, workplace conflicts and others since 2009. She thus urged ADR professionals to work more with political actors in order to translate theory to practice as the country prepares for the 2019 general election. One is however yet to see the effective utilization of ADR methods in the settlement of electoral disputes in Nigeria.

It is obvious that 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. 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 draft a Bill.

Furthermore, 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, mediators, conciliators etc. in political disputes. The power

to make original or default appointments of arbitrators, mediators 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.

It must be stated that resolving electoral disputes outside the normal courts is not new in other countries of the world. . Societies the world over have long used non judicial, indigenous or informal methods to resolve electoral conflicts and other disputes. for instance, in the United States of America, Alternative electoral dispute resolution mechanisms have been introduced in some states to resolve electoral disputes through methods like mediation, negotiation etc, and to address the increased delays inland expense of litigation arising from and overcrowded court s y s t e m . Furthermore, the South Africa's Independent Electoral Commission established a conflict management programme for some years now. . This programme operates only at election time and draws on experts in conflict management, such as attorneys, teachers and religious leaders in the community, who are hired a few weeks before the election. They are given training in election law and can be called on as needed. The experts use their mediation and conciliation skills and submit reports to the Electoral Management Board where a number of electoral disputes are greatly dealt with, resulting in the reduction in the number of electoral disputes that eventually go to court. Even in other countries, including Afghanistan, the Democratic Republic of the Congo, Indonesia, Malawi and Mozambique etc, there have been widespread uses of methods of negotiation and arbitration to manage electoral disputes through the assignment of adjudicative functions and powers to civic based structures. These had the power to arbitrate and deliver decisions that were binding on the disputants. Countries such as Ghana and Botswana, which are often cited as model democracies in Africa, use party liaison committees and other community based structures to assist the Electoral Bodies in promoting transparent and

credible elections through effective conflict mediation, management and resolution methods.

1.6 Challenges To The Use Of ADR In The Electoral Process

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. Furthermore, 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 judgments of Courts and election tribunals without unnecessarily abusing or harshly criticizing the judge(s) however clearly rooted in law and justice the judgment may be. They are not likely to accept the awards of arbitrators, much less so the opinions of mediators etc.

It is also pertinent to mention that 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.

In addition, 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 Arbitration and Conciliation Act of Nigeria covers only the arbitration and conciliation of commercial disputes. Though “commercial” is very liberally defined, it does not cover political disputes. It is also pertinent to note that there is no statute at all on mediation and negotiation. 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. Though the regulation of

political parties is on that List 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 departmentalization 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 and this may well take a long time before all the states or even a majority of them will enact such a statute.

1.7 CONCLUSION

It is clear that unless we find a new constitutional, statutory and administrative framework for the resolution of election disputes, the problems of calling endless witnesses, legal manoeuvres, exhausting the appeal process and fishing for jurisdiction in election matters may not abate. It is therefore imperative to consider the resolution of some electoral disputes through Alternative Dispute Resolution Mechanism (ADR). The resort to Courts can be time consuming and acrimonious. At the end, parties either win or lose. The winning party goes away celebrating and the losing party retires to lick his or her wounds and sometimes plan counter strategies on how to cripple the mandate of the winning party. I therefore advocate the greater use of Alternative Dispute Resolution in not just our electoral process, but in the resolution of disputes in our daily lives.