

Looking Past English Law: Alternative Dispute Resolution Through the Customary Law Lense in Nigeria

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Abstract

Alternative Dispute Resolution (ADR) is often framed within the received English common law system in Nigeria, with emphasis on arbitration, mediation, and conciliation as statutory or court-annexed procedures. Yet, long before the introduction of English law, indigenous Nigerian societies developed sophisticated mechanisms for managing conflict that prioritized restoration, social cohesion, and communal harmony. This paper examines ADR through the lens of Nigerian customary law. The study examined that customary ADR, characterized by flexibility, accessibility, voluntariness, and restorative outcomes, remains relevant and widely utilized, especially in rural and semi-urban communities. However, challenges including lack of formal enforcement, repugnancy tests, gender bias, and conflict with constitutional rights persist. The paper concludes that a pluralistic approach which integrates customary ADR into the formal justice system will enhance access to justice, decolonize dispute resolution, and preserve indigenous jurisprudence. Recommendations include statutory recognition, capacity building for traditional adjudicators, and harmonization with human rights standards.

Keywords: Alternative Dispute Resolution, Customary Law, English Law, Dispute Resolution.

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INTRODUCTION

The Nigerian legal system is fundamentally pluralistic, comprising English-derived statutory and common law, Islamic law, and a vast body of customary law. While the received English legal tradition dominates formal adjudication, dispute resolution in Nigeria predates colonialism and continues to thrive outside courtrooms. Alternative Dispute Resolution (ADR) has gained prominence as a mechanism for decongesting courts, reducing cost, and preserving relationships. Yet, mainstream ADR discourse in Nigeria is heavily anchored on Western models of arbitration and mediation imported through legislation such as the Arbitration and Mediation Act and other relevant laws, including the various High Court Rules.

This orientation obscures the reality that indigenous communities have practiced ADR for centuries through institutions deeply embedded in their socio-cultural fabric. Under customary law, dispute resolution is not merely an alternative to litigation but the primary and preferred means of achieving justice. It operates through family heads, councils of elders, age-

grades, village assemblies, and traditional rulers, emphasizing reconciliation, restitution, and the restoration of social equilibrium over punitive sanctions. The process is oral, flexible, cost-free, and conducted in familiar language and environment, making it more accessible to the majority of Nigerians than the technical, expensive, and adversarial common law courts.

This paper therefore looks past English law to interrogate ADR through the customary law lens in Nigeria. It seeks to identify the concept, prospects and institution of traditional dispute resolution, including challenges of integrating customary ADR into Nigeria's formal justice architecture. The study contributes to ongoing debates on legal pluralism, access to justice, and the decolonization of dispute resolution in Nigeria.

History and Development of Alternative Dispute Resolution

Alternative Dispute Resolution originated in the United States of America in a drive to find alternatives to the traditional legal system, felt to be adversarial, costly, unpredictable, rigid, over-professionalised,

damaging to relationships, and limited to narrow rights-based remedies as opposed to creative problem solving. The American origins of the concept are not surprising, given certain features of litigation in that system, such as: trials of civil actions by a jury, lawyers' contingency fees, lack of application in full of the rule "*the loser pays the costs.*"

Beginning in the late nineteenth century, creative efforts to develop the use of arbitration and mediation emerged in response to the disruptive conflicts between labour and management. In 1898, Congress followed initiatives that began a few years earlier in Massachusetts and New York and authorised mediation for collective bargaining disputes. In the ensuing years, special mediation agencies, such as the Board of Mediation and Conciliation for railway labour, (1913) (renamed the National Mediation Board in 1943), and the Federal Mediation and Conciliation Service (1947) were formed and funded to carry out the mediation of collective bargaining disputes. Additional state labour mediation services followed. The 1913 New Lands Act and later legislation reflected the belief that stable industrial peace could be achieved through the settlement of collective bargaining disputes; settlement in turn could be advanced through conciliation, mediation, and voluntary arbitration.

At about the same time, and for different reasons, varied forms of mediation for non-labour matters were introduced in the courts. When a group of lawyers and jurists spoke on the topic to an American Bar Association meeting in 1923, they were able to assess court-related conciliation programs in Cleveland, Minneapolis, North Dakota, New York City, and Milwaukee. Conciliation in a different form also appeared in domestic relations courts. An outgrowth of concern about rising divorce rates in the post-war 1940s and the 1950s, the primary goal of these programs was to reduce the number of divorces by requiring efforts at reconciliation rather than to facilitate the achievement of divorces through less adversarial proceedings. Following privately funded mediation efforts by the American Arbitration Association and others in the late 1960s, the Community Relations Service (CRS) of the United States Department of Justice initiated in 1972 a mediation program for civil rights disputes.

With the enactment of statutory ADR systems, lawyers and entrepreneurs realised the importance of providing nongovernmental voice to ADR-related policymaking. In 1926, the American Arbitration Association ("AAA") was formed to provide guidance to arbitrators and parties as to ADR methods and time-tested procedures. Using the collective expertise of

individuals in the field, AAA developed and promulgated rules on the proper methods for arbitration. Over the years, AAA has become the premier organisation promoting and nurturing business arbitration in the United States. [1]

Throughout the 20th Century, ADR grew in popularity as an alternative to the litigation process. At the governmental level, state and federal governments began utilising ADR in a number of programs. For instance, during the 1970s, the Department of Health, Education and Welfare was designated as the administrator of the Age Discrimination Act of 1975, to resolve claims of age discrimination in federal workplaces. To facilitate speedy resolutions of the matters, the Department enlisted the help of FMCS to mediate complaints under the new law, a process that became routine in 1979. At the academic level, the 1980s brought significant interest from legal experts in the usage of ADR in a variety of fields. Universities and law schools began introducing courses and degrees in ADR related topics. By the turn of the 21st Century, an American Bar Association survey showed that the majority of law schools had some form of ADR-related program, including extracurricular competitions. [2]

Today, arbitration exists at all levels of the U.S. legal profession. Law firms regularly employ retired judges or AAA certified attorneys with ADR expertise to offer mediation, negotiation, and arbitration services to individuals and businesses. In 1979, retired Judge Warren Knight of California started the Judicial Arbitration and Mediation Service, an organisation dedicated to providing law firms, businesses, and individuals with access to judges willing to serve in ADR capacities. In 1995, database providers, like Martindale-Hubbell, began publishing routinely-updated directories of ADR practitioners, their firms, and areas of practice, affording more individuals access to ADR-related services. Thus, ADR as a legal system has become firmly entrenched in the United States. [3]

Although, a small number of individual lawyers had been interested in and were practicing mediation ADR in Britain for some years, it was only in 1989 when the first British-based ADR Company - IDR Europe Ltd. - bought the idea across the Atlantic and opened its doors for business. This was the start of ADR Group. Since then, many other ADR organisations, including CEDR (Centre for Dispute Resolution), followed suit and assisted in the development and promotion of ADR in the UK. ADR, or mediation is used world-wide by Governments, corporations and individuals to resolve disputes, big or small, of virtually any nature and in most countries of the world.

¹Drinker Biddle & Reath LLP (2011). Brief History of Alternative Dispute Resolution in the United States. <www.cadmusjournal.org> 22 August 2025

² *Ibid.*

³ *Ibid.*

In developing countries like where most people opt for litigation to resolve disputes, there is excessive over-burdening of courts and a large number of pending cases, which has ultimately led to dissatisfaction among people regarding the judicial system and its ability to dispense justice. This opinion is generated largely on the basis of the popular belief, "Justice delayed is justice denied". However, the blame for the large number of pending cases in these developing countries or docket explosion, as it is called, cannot be attributed to the Courts alone, the reason for it being the non-implementation of negotiation processes before litigation. It is against this backdrop that the mechanisms of Alternative Dispute Resolution are being introduced in these countries. These mechanisms, which have been working effectively in providing an amicable and speedy solution for conflicts in developed economies, are being suitably amended and incorporated in the developing countries in order to strengthen the judicial system. Many countries such as India, Bangladesh and Sri Lanka have adopted the Alternative Dispute Resolution Mechanism. However, it is for time to see how effective the implementation of these mechanisms would be in these countries. [4]

Dispute Resolution Processes under Customary Law

The customary ADR is handled by elders, who may include religious leaders, wise men, and other community leaders, who are well known and respected members of the community. However, based on specific regional customs and practices, their make-up, number, and method of operation may differ from one ethnic group to another. Unlike the judges in the formal legal system who are appointed by the judiciary based on their knowledge of state laws, elders are chosen by the disputing parties or their families on an ad hoc basis, based on their 'reputation for their sense of justice, impartiality, deep knowledge of community norms, wisdom and rich experiences'. Instead of penalising the offender, they continually seek to understand the underlying factors that led to the conflict in order to restore the balance and create a lasting peace in the neighbourhood.

The decisions may vary depending on the type and gravity of the dispute and the particular customary practice. Some minor offences and wrongdoings committed by family members may just call for an apology or pardon in the name of God, with no payment. In such a situation, maintaining long-lasting community peace is the main goal. The customary ADR gives the parties the most flexibility possible to fully describe every aspect of the conflict and to express their emotions without being constrained to only the pertinent issues in an effort to learn the whole truth about the wrongdoing. Other members of the community are welcome to attend

and participate in the process, in addition to the families of the parties and the elders who are chosen to oversee and direct the traditional conflict settlement procedures.

Some traditional societies demand and encourage their young members to participate in their methods or resolving disputes in order to ensure the survival and continuity of their traditions from generation to generation.

Alternative Dispute Resolution Mechanisms under Customary Law

The *Black's Law Dictionary* defines custom as: law consisting of customs that are accepted as legal requirements or obligatory rules of conduct; practices and beliefs that are so vital and intrinsic part of a social and economic system that they are treated or accepted as if they were laws. Customary law can also be described as usage or practice of the people which by common adoption and acquiescence have become compulsory and have acquired the force of law with respect to the place or the subject matter to which it relates. It is the norms, traditions and rules of behaviour of the people. It is law propelled by beliefs and value of the people. In *Oyewumi v Ogunesan*⁵ customary law is defined as

"The organic or living law of the indigenous people of Nigeria regulating their lives and transaction. It is organic in that it is not static. It is regulatory in that it controls the lives and transaction of the community subject to it."

A community can maintain peace and settling while setting disagreements, courtesy of the traditional ADC method. These practices have a long history in Nigerian native law, which differs by ethnic group and is derived from long-standing practices that have governed and controlled local residents' relationship. The principles of natural justice are deeply rooted in conflict resolution among the Yoruba. There is the common adage: "*Agb'ejo enikan da agba osika ni*" which connotes that the arbitrators must listen to both parties before giving their verdict. There is no distinction between civil and criminal offences under the native law and custom. It does not mean that matters of horrible nature are not severely punished but nearly every party whose case cannot be supported must be met with specific sanction. However, some traditional messengers or young persons in the case of family dispute are readily available at the command of the arbitrators to summon the parties to give evidence. The trial could be private or public depending upon the nature of the conflict, failure to honour the summons could be treated as contempt or might spoil the case of the disobedient party no matter the genuineness of his grievances. [6]

⁴ *Ibid.*

⁵ (1990) 3 NWLR (Pt. 137) 182

⁶ G D. Oke 'Traditional System of Conflict Resolution' in J A. Yakubu (ed) Conflict Management Techniques

Investigation of any conflict might commence from the spot of adjudication as testimonies might reveal. It could also take the form of invoking the spirits or the applications of juju to secure confession. Modern jurists and lawyers more often than not regard this kind of confession as involuntary confession. Whatever the misgiving of the modern people about this, it is submitted that it has its own value. For example, a woman confessed that she killed her albino granddaughter in response to the dictates of her confederates in witchcraft and she was convicted of murder by the regular court of law.[7]

There had been a modern form of trial by ordeal in the U.S. by the use of the so called “truth serving” to secure confession from an offender. Drugs like sodium analytical and sodium pentothal are being used to secure confession. In Nigeria, particularly in Irun, a town in Ekiti formerly under Ikare Local Government, people go there to take a kind of *juju* known as *agira* to secure a confession. In Ikale and Ilaje areas of Ondo State and some part of Edo State people always go to *ayelala* shrine to secure a confession. However, this has been one of those reasons why some English men held the belief that Africans have no organized law. [8]

Before the common law was incorporated into our legal system, the vast majority of the traditional and indigenous cultures resolved their disputes through mediation and settlement. Instead of the State, they are connected to the cultural norms and worldviews of the people.

The Customary ADR mechanisms are age-old customs that help a community stay peaceful and stable while resolving disputes. These customs have a long history in Nigerian native law, which varies by ethnic group and stem from long-standing customs that have governed and managed the interactions of the local populace. Nearly majority of our traditional and indigenous civilisations settled their problems through reconciliation and settlement prior to the introduction of the common law into the legal system. The community values act as their base for legitimacy rather than the State and they are connected to the cultural norms and worldviews of the people. Due to the multi-ethnic nature of the country, typical ADR procedures operate in accordance with local traditions or cultural norms but may not always hold true across the board. Customary ADR and arbitration are still in use in our founding communities.

and Alternative Strategies to Conflict Resolution (DEMYAXS Law Publishing 2000) 18-19

⁷ *Ibid*, 19

⁸ *Ibid*, 19

⁹ (1999) 9 NWLR (Pt. 618) 290 SC

It was argued that colonial masters misunderstood the entire system and rejected it as being incompatible with natural justice, equity, and good conscience, which is why they introduced litigation to our legal system. Some pre-colonial traditional system among the natives occasionally involved use of scorn, ordeals, witchcraft, or threats of expulsion as a means of getting the parties to settle. Alternative dispute resolution as it is currently understood is often more of a repackaging and reintroduction of something that has always been a part of customary jurisdiction. As long as the process adheres to the fundamental principles of justice, the Nigerian Supreme Court has frequently affirmed the validity of arbitration under customary law. The Supreme Court ruled in *Oparaji v Ohanu*⁹ that “where arbitration under customary law is pronounced valid and binding it would be repugnant to good sense and equity to allow the losing party to reject the decision of the arbitration to which he had previously agreed.”

Mediation between the opposing parties and their separate families is a common practice in conventional ADR. It also entails the parties making amends and mending fences with one another in addition to resolving their differences. It also tries to maintain the parties’ previous peaceful relationship within the community and to restore their present and future peaceful relationships by avoiding the culture or vengeance.

Limitations of Customary ADR

The traditional dispute resolution processes, while helpful for enforcing justice in our societies, are not without flaws. Limitations primarily stem from violations of human rights norms, particularly with regard to the unequal treatment of men and women. Most of the time, women are not treated equally in most traditional dispute resolution procedures.¹⁰ Women in some cultures might not have “a standing to appear before elders in the customary dispute resolution processes on their own, and may require a male relative to represent them.” In a similar vein, institutions of traditional dispute resolution may render judgments that are unfavourable to women. A girl might be forced to become the wife of a deceased person’s relative in some traditional dispute resolution processes in exchange for bride compensation.

CONCLUSION AND RECOMMENDATIONS

The discourse on Alternative Dispute Resolution in Nigeria remains incomplete without a deliberate shift away from English law as the sole

¹⁰ Section 15(2) of the Constitution of the Federal Republic of Nigeria, 1999 provides thus: “Accordingly, national integration shall be actively encouraged, whilst discrimination on the grounds of place of origin, sex, religion, status, ethnic or linguistic association or ties shall be prohibited.”

reference point. As this paper has demonstrated, customary law systems across Nigeria embody rich, functional, and legitimate ADR mechanisms that predate colonialism and continue to serve millions. Family meetings, councils of elders, age-grade associations, and traditional rulers do not merely offer an “alternative” to litigation. For many communities, they are the primary and preferred forum for justice. Their processes emphasize restoration over retribution, community participation over individualism, and social harmony over strict legalism.

Contrasting these indigenous systems with English-style arbitration and mediation reveals both convergence and divergence. Both frameworks value voluntariness and confidentiality. However, customary ADR is distinguished by its orality, accessibility, cost-free nature, and cultural embeddedness. It speaks the language of the disputants, both literally and figuratively, and locates justice within the social context that gave rise to the dispute.

Yet, customary ADR is not without flaws. The repugnancy test, lack of written records, enforcement hurdles, and concerns over gender bias and fair hearing limit its standing within the formal legal order. These challenges have led to its marginalization in policy and scholarship, reinforcing the false impression that ADR in Nigeria began with the Arbitration and Mediation Act.

This paper concludes that decolonizing dispute resolution requires more than importing Western ADR models. It demands the validation, reform, and integration of indigenous jurisprudence. A pluralistic justice system that recognizes customary ADR as equal and complementary to statutory processes will expand access to justice, reduce pressure on formal courts, and preserve the legal heritage of Nigerian peoples.

It is recommended that the Arbitration and Mediation Act and relevant High Court Rules should be amended to expressly recognize customary arbitration and mediation. Such recognition should provide a clear pathway for registration and enforcement of customary ADR outcomes, similar to the enforcement of arbitral awards under the Arbitration and Mediation Act. The National Judicial Institute, Multi-Door Courthouses, and the National Council of Traditional Rulers should collaborate on training programs for elders, chiefs, and family heads. Training should cover principles of natural justice, gender sensitivity, conflict of laws, and basic human rights to address concerns raised under the repugnancy doctrine. Existing Multi-Door Courthouses should establish “Customary Settlement Desks” staffed by trained traditional neutrals. Matters with strong customary elements, especially land, family, and chieftaincy disputes, should be referred to these desks before litigation. Outcomes can then be adopted as consent judgments.