UNDERSTANDING AND APPLICATION OF ALTERNATIVE DISPUTE RESOLUTION (ADR) SYSTEM IN THE MAGISTRATES COURTS.[1]

INTRODUCTION

It gives me great pleasure to be in this August gathering of newly appointed magistrates from all over the Federation. I must extend my profound appreciation to the Administrator of the National Judicial Institute, for the invitation extended to me once again, to be a part of this timely, forward looking, training workshop. The NJI as the foremost judicial training Institute in the country is without a shadow of doubt consistently discharging her statutory functions with great aplomb.

I will like to start my presentation with a quote by Chief Justice Warren Burger of the United States Supreme Court[2]:

> "*The entire legal profession---lawyers, judges, law professors---has become so mesmerized with the stimulation of the court room, that we tend to forget that we ought to be the* ***healers of conflicts****. For some disputes, trials will be the only means, but for may claims, trial by the adversarial contest must in time go the way of the ancient trial battle. Our system is too costly, too painful, too destructive and too ineffective for really civilized people*".[3]

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[1] Hon. Justice O. Atinuke Ipaye, MCI.Arb. CEDR, being paper delivered at the Training Workshop for Newly Appointed Magistrates organized by the National Judicial Institute (NJI) Abuja FCT held 11th – 13th July 2016 at the Andrews Otutu Obaseki Auditorium.

[2] The 15th Chief Justice of the United States from 1969-1986. (Born 17th September 1907. Died 25th June 1995).

[3] Annual Report on the State of the Judiciary, 24th January 1982, quoted with approval by Hon. Justice M.A Owoade, JCA in "Global Trends in Court Connected ADR & The Role of the Bench in Relation to ADR" being paper presented by his lordship at a Workshop for Lagos Judges 28th May 2008, LMDC.

I think we can all agree with the sentiments of Justice Warren Burger and we do not have to look far to come to the realization that there are too many cases in our dockets, some raising serious and novel legal issues and some downright ridiculous, frivolous and petty. All these matters contend for the precious time and energy of the judicial officer. The problems confronting justice administration in modern times include but are not limited to: -

- delays,
- rising costs,
- inadequate infrastructure,
- heavy dockets,
- case backlogs,
- staffing problems and inadequacies,
- declining competencies of lawyers (and if the truth be told of judicial officers),
- the monster of corruption.

The administration of justice must constantly review its processes, and adjust itself in order to remain vibrant and ensure the actualization of the principles of the rule of law, not only on paper but in concrete terms and in terms which gives maximum satisfaction to the stake holders, consumers of justice, court users and the public at large. An efficient judicial system is not only the hall mark of a well-developed and civilized society, it is a necessary pre-requisite in ensuring political stability and socio economic progress.

Accordingly, most States have devoted huge sums of money to justice sector reforms. Since 1999 Lagos State in particular has been constantly improving on the deliverables, which has included to mention a few:

- a review of her rules at the lower and higher bench,
- infrastructural developments to accommodate more court rooms,
- introduction of technology to drive efficiency,
- improved staff welfare and compensation packages
- the formal introduction, adoption and integration of ADR techniques into justice administration.

NEW TRENDS

At this juncture I am persuaded that a brief discourse on the ADR concept and mechanisms is appropriate and helpful. Let me however start by saying that the "**litigation process"** of which we are all very familiar is adversarial in nature. The judge or magistrate is the designated **impartial arbiter**, he refrains from descending into the arena, the disputants are akin to gladiators, facing off each other, through their lawyers who use every trick wholesome and unwholesome to beat the opponent including, the springing of surprises at the last minute in what has been called "**the sporting theory of justice."**[4]

ADR on the other hand is a generic term, which describes **other** methods of resolving disputes. Man is a social animal and lives in a community with other like-minded or not so like-minded people. Conflict is a necessary occurrence because the resources natural and man-made, available to man are finite. The most common ADR methods for resolving disputes include but are not limited to;

- Mediation.
- Arbitration.
- Early Neutral Evaluation.
- Negotiation.
- Conciliation.
- Facilitation.
- Mini-Trial.
- Hybrids such as Med-Arb; Lit-Med etc.

Arbitration: Arbitration as a mode of ADR is a well-known method. Arbitration of a dispute is usually by agreement of the parties. The court has a role to play by ensuring that parties adhere to the terms of an agreement they have voluntarily entered into. Thus reference of a dispute to arbitration is usually consensual. The parties to the dispute agree to submit the dispute to a neutral person or panel of their choice. Both sides then make their representations to the arbitrator. The

[4] See Roscoe Pound "The Causes of Popular Dissatisfaction with the Administration of Justice" an address delivered at American Bar Association on 29th August 1906.

arbitrator studies all the materials presented and he gives a binding decision at the end of the day. The arbitrator is usually an expert in the area of the dispute. Although arbitration has been around for a very long time and is very popular in commercial and maritime disputes experience has shown that an arbitral award does not necessarily end the dispute as the award sometimes becomes the subject of litigation and ends up in the court.

Conciliation: This process is relatively informal. Neutrality and confidentiality are usually not guaranteed as the intervener or conciliator is acting as a go between to encourage improved communication and working relationships between the parties. Conciliation is often described as a "**cooling off**" forum where the conciliator usually offers counsel, advice and suggestions on the way forward in order to de-escalate the conflict.

Early Neutral Evaluation:
This is a process where parties submit to a neutral evaluator, who studies the strength and weaknesses of the parties case and renders a "**non-binding prognosis"** or **opinion** of the outcome if the matter goes to litigation. It is hoped that such an impartial opinion will push the parties towards an amicable settlement.

Negotiation:
Negotiation is usually a voluntary process in which the parties themselves sit down, identify and discuss the issues that is causing the conflict. They will attempt to work out a solution to the problem. This method is dependent on the parties being effective communicators with great interpersonal skills. The draw back is that in most areas of conflict there is usually a dominant party and it might be rather difficult negotiating with the side who holds almost all the aces.

Facilitation:
This is very often a process used to help a group of people or parties hold constructive discussions about complex or potentially controversial issues. The facilitator provides assistance by helping the parties to set ground rules for the discussions, he helps to keep the group focused on the issues at stake and keeps them on track so they don't deviate from the rules set. Hopefully, the discussions will yield to compromises. Giving

credence to the principle that is beneficial to "**jaw-jaw than to war-war."**

Mediation[5]:

In mediation there is usually an impartial person called a mediator who helps the parties try to reach a mutually acceptable resolution of the dispute. Most significantly, the mediator does not decide the dispute. His role is principally to bring the disputants to the negotiation table, facilitate the airing of their grievances and manage the process of negotiation until a closure of the process. Mediation leaves control of the outcome with the parties. The mediator may suggest or propose a resolution but he does not ram it down the throats of the parties. The parties may use the proposal as a template for further negotiations until all the areas of dispute are finally settled and documented. The clear advantage of the mediation process is that it is most amenable to the preservation of the relationship between the parties before the commencement of hostilities. Thus, it is very attractive in the resolution of family disputes, labor disputes, commercial disputes or other kinds of disputes where parties are in a fiduciary or other kinds of relationships deemed worthy of preservation. The mediation process is most successful when both parties are willing to cooperate, sit together and negotiate a compromise. Of course, it is almost impossible to mediate where a party is unwilling and refuses to honor an invitation to the mediation table. Experience has also shown that where one party is in a position of significant advantage socially and financially it may be tedious and difficult to get such a party to the table.

THE COURT CONNECTED ADR CENTRE

The **traditional courthouse** offers to the public only one door for resolving disputes, namely the litigation door which we have identified above as being fraught with problems of delays, backlogs and expense. The Multi-Door Courthouse concept has arisen out of the realization that litigation is not the best choice for resolving many disputes. In addition, to adjudication, contemporary wisdom is that parties ought to be offered a range of alternatives such as those mentioned above. Furthermore,

[5] Hon Justice HAO Abiru, "Shifting Paradigms & New Reference in Jurisprudence" being paper delivered at an 2013 ADR Workshop for Judges."

parties should have access to assistance in screening their cases or evaluating their cases to determine which of the resolution processes is most appropriate and best suited for their dispute.

The concept of the **Multi-Door Courthouse** was first mooted in **1976** by a Harvard law professor, Professor Frank E. A Sander.[6] Professor Sander graduated from Harvard with a degree in Mathematics in 1948 and Harvard Law School in 1952. He is regarded as the **Father of ADR in the United States**. It was Professor Frank Sander who first proposed assigning certain cases to ADR or a sequence of processes after a screening in a Court Connected Dispute Resolution Centre. His idea was that the Court House ought not to be myopic, focused simply on litigation but ought to offer an array of options in the settlement of disputes from meditation to arbitration to conciliation and so forth. This comprehensive approach to resolution of dispute is the model many countries are now adopting[7]. The Chief Justice of Singapore commenting on the reasons why ADR was introduced into judicial administration stated thus:

> "*We introduced mediation primarily because of the understanding that adjudication is not always the most appropriate as disputes differ widely in nature. The court must be able to offer the most effective responsive and appropriate methods for resolving disputes. The must be able to offer alternatives to the traditional resolution path. With a variety of dispute resolution mechanisms available disputants can then match the forum to their particular dispute rather than being required to fit their dispute to the adversarial forum. The subordinate courts have taken the lead*

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[6] At the 1976 Pound Conference on the Varieties of Dispute Processing.

[7] E. g in Australia mediation has been introduced formally to resolve commercial disputes, and the courts were given powers to order that disputes before them be resolved through mediation. In India pursuant to the promulgation of the Legal Services Authorities Act of 1987 ADR Mechanisms were introduced at the trial courts known as **Lok Adalats.** See also Section 89 of the Pakistan Civil Procedure Code, which introduced the concept of ADR.

and set the pace for the use of mediation as a dispute resolution process. Unlike some other court jurisdictions where it had its genesis as a diversionary measure to deal with back logs and delays our motivation was a different as the problem was absent. Rather we saw the an opportunity to reintroduce into our culture a process to which it was not a stranger. In fact our own mediation roots can be traced back to the early 19th century."[8]

One of the way that ADR can be seamlessly integrated into administration of justice be it civil of criminal is to adopt the idea of a Multi-Door Courthouse. This ensures that under one roof i. e the Courthouse, different doors are available through which the litigants and disputants may pass in a bid to speedily, efficiently and in a cost effective manner have the dispute resolved. The Courthouse must be akin to **Multi Function Service Centre** offered to the public. A fully functional ADR Centre ought to be connected to the Courthouse, so as to create the opportunity for disputes may be settled by means otherwise than by litigation. A party may **walk in** of his own volition to engage the services offered by the Centre or a dispute may be referred from the court (**court-referral**) i.e from the High or Magistrate Courts to the ADR Centre.

THE ROLE OF THE MAGISTRATE

The paradigm shift is the realization that not all disputes ought to be settled thorough litigation. Settlement of disputes and conflicts outside of the familiar courtroom is now the **norm and new gold standard**. I have tried to explore briefly the history and reasons behind this change. The obvious inadequacies of the adversarial system, the failure of the system to deliver timely, cost effective solutions to conflicts, the increasing frustration and perceptions of disputants that the court room only favors the most expensive lawyers in town.

[8] Singapore Subordinate Courts Annual Report 1999.

Both the High Court and Magistrate Court Laws have always contained provisions, which empower the judge or magistrate to refer cases for settlement outside of the court-room and or explore the possibility of an amicable resolution of the dispute between the parties.[9] Traditionally, the judge/magistrate wore the toga of an impartial umpire throughout the proceedings; he ultimately makes a decision based on facts presented before it. He is not to descend into the arena of the dispute, he is not to ask any questions himself or seek to unearth the truth. He must allow the parties to conduct their case in the way and manner they deem fit within the confines of the rules of his court. His interactions with the claimant or the defendant is kept to the barest minimum.

The modern day judicial officer must increasingly get proactive. At the earliest opportunity he must begin to ask the questions: **How can I get the parties to settle amicably?, How can I get the parties to settle by a method other than by litigation (in my court room)? Which alternate settlement method best suits the facts of this dispute? How can I decongest my court?** This is an ongoing engagement and the magistrate must begin to ask these questions at the earliest opportunity. This would usually be when pleadings are closed and both parties have submitted to the jurisdiction of the court.

The 21st Century judicial officer must be firmly in control of proceedings in his court, he has an advantage of being in a superior position to the lawyers and the parties. The judicial officer **must leverage on his position of authority,** until he elicits necessary cooperation from the lawyers and the parties to submit to methods of settling the dispute in a manner other than by litigation. The judicial officer must be ready to work hard and prepare for the case, familiarize himself with the facts and be ready to spend a little more time explaining the benefits of the proposed ADR method to the parties and counsel appearing before

[9] See Sections 24 & 25 of the High Court Law, Cap H3, 2003 Laws of Lagos State, which empowers the judge to encourage, promote and facilitate settlement in an amicable manner in civil proceedings. See also Order 25 rule 1 (2) (c) of the 2012 HCLCPR which encourages the judge to promote amicable settlement of the case or the adoption of ADR. Order 27 rule 2 of the 2012 HCLCPR in addition, empowers the judge to refer a cause or matter to be tried before an official referee or officer of the court.

him/her. As magistrates, you are all well placed and advantageously positioned to promote and actualize the goal of resolution of disputes by **litigation as the last resort.**

- As presiding officers, you are in control of the proceedings in your court, you are in the **driver's seat** and you will not allow any lawyer or litigant take the wheel from you.
- Remember you are the **authority figure** in the courtroom; the arsenal of powers at your disposal are formidable. You are in the position to let the court users i.e. counsel and litigants know the mind of the court, thus strong hints from the bench goes a long way in eliciting cooperation and getting to the desired destination.
- Never forget that you are statutorily empowered to facilitate and encourage amicable resolution. You can equally reverse the situation and pointedly let the recalcitrant counsel also realize that he is a co-minister in the temple of justice and by the rules of his profession, he is enjoyed to cooperate with the judge to foster amicable resolution.
- In addition, the magistrate should have the mindset that there is no dispute under the sun that cannot be settled and much encouragement, suggestions and pointers from the bench can facilitate settlement.
- Finally, the magistrate must develop, sharpen and master the art and skills of persuasion in order to achieve the desired goals of facilitating an amicable resolution **or** encouraging the use of the facilities available at the ADR Center[10].

RECENT DEVELOPMENTS:

In the bid to popularize, encourage and mainstream ADR as part of the dispute resolution infrastructure in Lagos State, the civil procedure rules of the High Court were reviewed thus giving birth to the 2012 Edition.[11] I will like to just mention three significant changes introduced by the new rules of court.

[10] Be a good listener, deconstruct the objections, engage the litigants directly, lightly descend into the arena (if you have to)

[11] High Court of Lagos State (Civil Procedure) Rules 2012.

Adoption of Pre Action Protocols:

The rationale behind the adoption of **pre action protocols** and the **adoption of best practices** is to encourage the buy-in of lawyers and litigants into ADR methods.. The traditional bulwark of resistance to change has been from counsel and you cannot really blame them. Law is a very conservative profession; we are on safe ground when we have precedents to follow. So the lawyers for want of a better phrase have been **breaded and buttered** on litigation. They have honed their skills as litigators, they are on familiar turf when they are in the courtroom and they can present you with their arguments and trial tactics. Even the media is on their side. We all grew up watching Perry Mason. The OJ Simpson murder trial is still fresh in our minds, equally the prosecution of Mr. Micheal Jackson on child molestation charges. Every body wants their day in court. But we know as judicial officers that not all disputes are suited for the courtroom and a **negotiated settlement** is sometimes to be preferred. By virtue of Preamble 2 (2)(e) of the 2012 HCLCPR both the claimant and his legal practitioner are enjoyed to cooperate with the court to further the over-riding objectives of the court by complying with the requirements of the pre-action protocol to wit furnishing the court with the information:

(i) That he has made attempts at an amicable resolution of the dispute through mediation, conciliation, arbitration or other dispute resolution options.
(ii) That the dispute resolution was unsuccessful and that by a written memorandum to the defendants he set out his claims and the options for settlement.
(iii) And that he has complied as far as practicable with the duty of full and frank disclosure of all information relevant to the issues in dispute.

I was delighted to come across **Section 38(1)-(4)** in the Magistrates Court Law[12], which provides thus:

1. A legal practitioner acting for parties in any proceedings in the Magistrates Court **shall** advise the parties to the proceedings on the

[12] 2009.

process of Alternative Dispute Resolution (ADR) that may be used to resolve any matter in dispute.
2. It **shall** be the duty of any legal practitioner to write a letter of demand before commencing action in all civil proceedings in a Magistrate Court.
3. The letter of demand referred to in subsection (2) above **shall** specify the nature of the claim and the remedy sought.
4. Failure to write a letter of demand will go to the **issue of costs** as set out in the Magistrate Courts (Civil Procedure) Rules.

I can only encourage your Honors to make great use of these provisions to get round the foot-dragging lawyer.

The ADR Track.

By virtue of Order 3 rule 11 "all originating processes shall upon acceptance for filling by the Registry be screened for suitability for ADR and referred to the Lagos Multi Door Court-House or other appropriate ADR institutions, or practitioners in accordance with the Practice Directions that shall from time to time be issued by the Chief Judge of Lagos State"[13].

By this provision and the practice directions made thereunder, civil matters upon filling shall be screened, to determine their suitability for resolution by a method other than litigation. Registry staff, following stipulated guidelines are trained to screen all matters. Even when a matter is on the ADR track it is still under the supervision and management of an **ADR Judge**. The ADR judge takes all interlocutory applications and once that is exhausted, the matter goes to the ADR Centre for resolution by the most appropriate method. From the returns available as many as 70% of cases filed qualify for the ADR Track. The feed back has been very positive and encouraging thus far.

Court Room Referrals.

This preserves the discretion in the judge to refer a matter for resolution to the ADR Centre. In the High Court, this event will usually occur at the

[13] 2012 HCLCPR.

case management stage when both parties are before the court, and pleadings have been concluded[14]. Promotion of an amicable settlement must be part of the **case management agenda.** Section 28 of the Lagos State Magistrates Courts Law 2009, enumerates the civil jurisdiction of the magistrates and it includes personal actions arising from contract, tort or both where the amount claimed does not exceed ten (10) million Naira; landlord and tenancy matters where annual rent values does not exceed ten (10) million Naira, appointments of guardians ad litem, appeals from customary courts, and recovery of statutory penalties, charges rates etc not exceeding ten (10) million Naira, and statutory offences as stipulated under the Urban and Regional Planning and Development Laws, Environmental Sanitation Laws, Personal Income Tax Laws to mention a few. Of significant importance is **Section 35 (1)- (3)[15],** which provides thus:

1. In civil cases a Magistrate shall, so far as there is proper opportunity, promote reconciliation among persons over whom he has jurisdiction, also encourage and facilitate settlement in an amicable way of matters in difference between them
2. The Magistrate **may refer proceedings** in relation to any action, part of or any matter out of it, for mediation to the Citizens' Mediation Centre established under the Citizens' Mediation Centre Law and or Lagos Multi-Door Court House.
3. Reference to mediation under the provisions of subsection (2) of this section shall be made with the consent of the parties to the proceedings.

Equally, Section 37 empowers the magistrate to encourage settlement in criminal proceedings such as common assaults, or other offence not amounting to a felony, and not aggravated in degree, on terms of payment of compensation or other terms approved by him. I am persuaded that a combination of these provisions gives sufficient teeth to the agenda of mainstreaming ADR on the lower bench. Your Honors are encouraged to think outside of the box, and use all the powers at your disposal to encourage settlement of disputes by means other than litigation. The litigants will be happier because the alternative means are

[14] See for example Order 25 rule 2(c) of the 2012 High Court of Lagos Civil Procedure Rules.

[15] Magistrates Court Law 2009.

timely and pocket friendly. As Chief Justice Warren Burger famously stated "Concepts of justice must have hands and feet or they remain sterile abstractions. The hands and feet we need are efficient means and methods to carry out justice in every case in the shortest possible time and at the lowest possible cost." Adoption of ADR mechanisms into the administration of justice you will agree is long overdue and I believe we are on the right track in Lagos State. An efficient use of judicial time and resources ought to be pursued and the doorway to litigation left open for the more complex cases.

CONCLUSIONS

As I conclude I need to answer one critical question which may agitate your minds:

How Do I Deal with Recalcitrant Counsel/Parties.

Experience has shown that much of the resistance to the use of ADR mechanisms comes from the lawyers. This is to be understood because they have been well trained in the litigation adversarial method of resolving disputes, they are thus unfamiliar with the other models and are hence resistant to change. But change has come and they have to jump on board the train or they will be left behind at the station. It is always appropriate for the magistrate to seek to know the reasons for non-submission to ADR. It is also within the purview of the magistrate to seek to address the concerns. Where in spite of all that is said and done there is a non participation, such is to be noted in the case- file and may be taken into consideration in the award of costs at the final resolution of the matter. My final words are that the justice sector will make measurable and significant improvements in justice delivery by the increased use of ADR mechanisms. Litigation will always have its place in the scheme of things but it will not remain the first and only port of call. Other ports are now available and they are to be embraced by all.
Your Honors the privilege of addressing you has been mine.

Thank you for your rapt attention.

Honorable Justice O. Atinuke Ipaye. (Mrs).