ACCESS TO JUSTICE: EXPLOITING THE USE OF ALTERNATIVE DISPUTE RESOLUTION (ADR) SYSTEMS

A Paper delivered at the Refresher Course for Magistrates on Current Trends in Law and Administration of Justice, on Thursday 21st April, 2016

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INTRODUCTION

The Administrator, National Judicial Institute; Worshipful Magistrates – Good Morning. It is a great honour to have been invited by the National Judicial Institute to present a paper at this workshop with the theme: ***Promoting Judicial Performance Through Innovations and Reforms***.

Today, I will be discussing the role of Alternative Dispute Resolution (ADR) in providing Access to Justice. I wish to begin my presentation by examining the import and meaning of the concept of access to justice.

WHY IS ACCESS TO JUSTICE IMPORTANT?

The rule of law is a central feature of a modern democratic society. It is the fundamental protection that gives people and organisations confidence that the society's rules (laws) will be respected and upheld.

Maintenance of the rule of law is fundamental to Nigeria's economy and prosperity. Indeed, this is a central theme of President Muhammadu Buhari's Administration.

The rule of law frames the relationship between state and society, founded upon an accepted set of social, political and economic norms. A strong rule of law means that a country has less corruption, protected and enforceable legal rights, due process, good governance and an accountable government.[1] The World Bank ranks Nigeria low on the quality of our rule of law,[2] having remained below the 30th percentile over the last decade.[3]

The link between the rule of law and economic prosperity is demonstrated by the World Economic Forum's Global Competitiveness index, which uses elements of the

[1] P Domingo, 'Why the rule of law matters for development', (May 2009) *Overseas Development Institute* 131.
[2] The World Bank Group, *Worldwide Governance Indicators 1996–2014*, Washington, 2014, viewed 26 March 2016, <http://info.worldbank.org/governance/wgi/index.asp>.
[3] Ibid.

rule of law as part of the basic institutional requirements for global competitiveness (elements including the efficiency of the legal framework, judicial independence, and the protection of property rights). The 'institutional framework has a strong bearing on competitiveness and growth. It plays a central role in the ways in which societies distribute the benefits and bear the costs of development strategies and policies, and it influences investment decisions and the organization of production'.[4]

There is also a correlation between a weak rule of law and poor socio-economic performance.[5] Difficulties in obtaining access to justice reinforce poverty and exclusion.[6] Maintaining a strong rule of law is a precondition to protecting disadvantaged communities and helping people leave poverty behind. Research has found that improvements in governance that increase the rule of law in a country can be linked to increases in per capita GDP.[7]

Access to justice is a fundamental corollary to the rule of law. Without access to justice, the rule of law is nothing more than a concept or an ideal. Justice institutions enable people to protect their rights against infringement by government or other people or bodies in society, and permits parties to bring actions against government to limit executive power and ensure government is accountable. Continuing improvements in access to justice are, therefore, important to maintaining a strong rule of law.

WHAT IS ACCESS TO JUSTICE?

'Access to justice' is a phrase often heard. A subject on which many have written, many have spoken and many have campaigned. The fact that it is such a continually

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[4] World Economic Forum, *Global Competitiveness Report 2008–2009*, Geneva, 2009, viewed 26 March 2016, <http://www.weforum.org/documents/gcr0809/index.html>.

[5] United Nations Development Programme, Millennium Goals Report 2003, accessed 26 March 2016, <http://hdr.undp.org/en/media/hdr03_complete.pdf>.

[6] United Nations Development Programme's Commission on Legal Empowerment of the Poor, 'Making the law work for everyone' (2008) 1, 33.

[7] D Kaufmann and A Kraay, *Governance and Growth: Causality which way? – Evidence for the World, in brief*, Washington, 2003, viewed 18 August 2009, <http://info.worldbank.org/etools/docs/library/18034/growthgov_synth.pdf>, 6.

recurring issue leads to the inescapable conclusion that this is something which urgently needs attention.

Yet, as important as the concept is, it is one that defies precise definition. Nigerian case law emphasises its paramount status without shedding much light as to what it is. For instance, in ***Atolagbe v. Awuni*** **(1997) 9 NWLR (Pt. 522) 536**, the Supreme Court found that the right of access to justice is an immutable Constitutional right which cannot be taken away by any other law. This is an important point; to which I will return shortly.

The dissenting opinion of Aderemi, J.S.C. in ***Ojukwu v. Yar'Adua*** **(2009) 12 NWLR (Pt. 1154) 50 at 192**[D-G] is equally insightful in the context of this discussion. His Lordship held:

> ***"Faced with the materials before us, I regret to say that to dismiss this appeal is to forever block the appellant from accessing justice. An inhibited accessibility by a citizen to [a] court of law to ventilate [his/her] real or imagined grievance is a hallmark of determining the degree of civilization of a country. Let is be said that the quest for justice is insatiable when it is realised that the great phenomenon called JUSTICE is not a one way traffic; not even a two way traffic; I beg to say that a court of law which is also a court of justice must always ensure that JUSTICE flowing from its sanctuary which, of course, must be in accordance with laws of the land, is not only for the plaintiff (the complainant) not even only for the defendant (the person complained against) but also for the larger society whose psyche is always affected, one way or the other, by any judicial pronouncement."***
> (Underlining for emphasis.)

In ***SPDC v. Agbara*** **(2015) LPELR-25987(SC)**, the Supreme Court, through Muhammad, J.S.C., reiterated:

> *"**It is settled law that a court of law will not allow the provisions of an enactment to be read in such a way to deny access to courts by citizens. Thus, it is not the intention of the law to deny any litigant access to justice.**"* (Underlining for emphasis.)

Likewise, in ***Buraimoh v. Alejo* (2014) LPELR-23203(CA)**, the Court of Appeal, through Denton-West, J.C.A. held:

> *"**A.A. Ojopagogo & Co. is not listed as a legal practitioner qualified to carry put legal practice in Nigeria. See Okafor v. Nweke (2007) 10 NWLR (Pt. 1043) 521 at 531. The combined effect of these provisions is that for a person to be qualifies to practice as a legal practitioner, he must have his name in the roll, otherwise he cannot engage in any form of legal practice in Nigeria.***
>
> ***Although it is my view that this stipulation in Okafor's case (supra) is causing a lot of havoc which unsavourily in on innocent litigants who have employed the services of counsel but are now being shut out from access to justice because their counsel had been negligent in duty during the preparation of court processes by the failure to insert his personal name on the writ or any processes instead of merely using the firm name.**"* (Underlining for emphasis.)

A common theme runs through these decisions. Under Nigerian law, access to justice has traditionally been seen as access to the courts. This much is borne out by an examination of Section 36(1) of the 1999 Constitution (as amended):

> "**In the determination of his civil rights and obligations, including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such manner as to secure its independence and impartiality**."

The Constitution is the supreme law of the land and has binding force on all authorities and persons in Nigeria.[8] It has been described by the Supreme Court as the organic law or *grundnorm* of the people, which not only provides for the machinery of government, but also provides for rights and imposes responsibilities on its constituency. The rights guaranteed to Nigerian citizens under the Constitution are provided as Fundamental Rights under Chapter IV of the Constitution.

Three things are discernable from an examination of Section 36(1) of the Constitution:

1. People have, and will continue to have disputes – this informs the reference in Section 36 of the ***determination of his civil rights and obligations***.
2. In the resolution of the said disputes, a person is entitled to a fair trial within a reasonable time.
3. Most importantly, these disputes are resolved by recourse to the formal machinery of justice – i.e. resolution by a ***court or other tribunal established by law***.

The problem with equating Access to Justice with Access to the Courts

Section 36(1) of the Constitution, to my mind, reinforces the historical dominance of state-sponsored adjudication, and hence litigation, in the theory and practice of civil justice in common law jurisdictions. Litigation has, for this reason, acquired a privileged status as the approved mode of dispute resolution. Likewise, lawyers have, through the practice of litigation, achieved a near monopoly over dispute management.

This causes a fundamental problem. Equating access to justice with access to courts ignores the barriers that exist once an individual gains access to the courts. The result

[8] Section 1, 1999 Constitution (as amended). ***Attorney-General of Abia State v. Attorney-General of the Federation* (2002) 6 N.W.L.R. (Pt. 763) 264**.

is a failure to examine and criticise the aspects of our legal system that present barriers to the individual.

This approach also involves an assumption that access to justice is ensured when an individual has access to the Courts, regardless of what follows in the legal process and the many possible forms of injustice that they may face.

Court structures and litigation procedures bear directly upon the individual's ability to resolve their legal problem. The more prominent issues are those of the cost and delay of legal proceedings. However, there are other fundamental and equally critical issues, which reduce access to legal processes. The complexity of the rules of court and court forms produces a significant barrier to litigants, especially those who have a social or economic disadvantage. Likewise, the physical environment of courts, which may produce an atmosphere of exclusion, alienation or disempowerment, or may simply lead to problems of audibility, impinges upon the individual's access to just processes.

Equating access to justice with access to courts is, simply speaking, too narrow. The traditional view is that courts are the central 'suppliers' of justice. To some extent this remains true in Nigeria. Courts are ultimately the arbiters of legal issues, able to declare what the law is, what the rights and obligations of parties are and enforce those declarations.

However, our Courts are overburdened, such that a broader concept of justice is now required. This begins with the realisation that access to justice is not only about accessing institutions to enforce rights or resolve disputes, but also about having the means to improve 'everyday justice'; the justice quality of people's social, civic and economic relations. This means giving people choice and providing the appropriate forum for each dispute, but also facilitating a culture in which fewer disputes need to be resolved. Claims of justice are dealt with as quickly and simply as possible — whether that is personally (everyday justice) informally (such as ADR) or formally (through courts or tribunals established by law).

Improving access to justice requires improving access to formal *and* informal justice mechanisms. This approach recognises that a focus on formal justice, while important, is by itself not enough. Rather, access to justice entails, amongst other things, the equality of access to legal services – which ensures that that all persons, regardless of means, have access to high quality legal services or effective dispute resolution mechanisms necessary to protect their rights and interests.

ESTABLISHING A FRAMEWORK FOR ACCESS TO JUSTICE

The purpose of this discussion is to address the use of Alternative Dispute Resolution Systems as it concerns access to justice. However, any initiative to improve access to justice should not be implemented on an *ad hoc* basis. Such initiatives should be guided by principles that set out the objectives of the civil justice system, and a methodology designed to translate the principles into action. This will ensure that new initiatives and reforms to the justice system best target available resources to improving access to justice.

Guiding Principles:

The civil justice system should be based on:

Accessibility: Justice initiatives should reduce the net complexity of the justice system. For example, initiatives that create or alter rights, or give rise to decisions affecting rights, should include mechanisms to allow people to understand and exercise their rights.

Appropriateness: The justice system should be structured to create incentives to encourage people to resolve disputes at the most appropriate level.

Legal issues may be symptomatic of broader non-legal issues. The justice system should have the capacity to direct attention to the real causes of problems that may manifest as legal issues.

Equity: The justice system should be fair and accessible for all, including those facing financial and other disadvantage. Access to the system should not be dependent on the capacity to afford private legal representation.

Efficiency: The justice system should deliver outcomes in the most efficient way possible, noting that the greatest efficiency can often be achieved without resorting to a formal dispute resolution process, including through preventing disputes. In most cases this will involve early assistance and support to prevent disputes from escalating.

The costs of formal dispute resolution and legal assistance mechanisms—to Government and to the user—should be proportionate to the issues in dispute.

Effectiveness: The interaction of the various elements of the justice system should be designed to deliver the best outcomes for users. Justice initiatives should be considered from a system-wide perspective rather than on an institutional basis.

All elements of the justice system should be directed towards the prevention and resolution of disputes, delivering fair and appropriate outcomes, and maintaining and supporting the rule of law.

Methodology:

The guiding principles should be implemented by providing:

Information: ***Enabling people to understand their position, the options they have and deciding what to do.***

Provision of information about the law or legal rights, including Government services and benefits is a central means of influencing access to justice. An effective information strategy needs to ensure not only that the information is available, but that people can reach that information when they need it.

Early Action: ***Intervening early to prevent legal problems from occurring and escalating.***

Early intervention will prevent legal problems from occurring and escalating. In many situations, early action can resolve a matter or identify the best course of action. However, if a person does nothing—which often happens when there is not enough assistance available or it is not clear to a person where to turn to for help—it can be much harder and costlier to rectify the problem.

Appropriate classification: ***Enabling matters to be directed to the most appropriate destination for resolution, irrespective of how people make contact with the system.***

All elements of the justice system need to have an inbuilt capacity to direct people to the most appropriate form of resolution. Without such classification, people's attempts to approach the justice system may be unsuccessful and they may be rejected; or the pathway through the justice system may not be the most appropriate pathway.

Outcomes: ***Providing a pathway to fair and equitable outcomes:***

- ***resolving disputes without going to court***
- ***when court is necessary, ensuring processes are accessible, fair, affordable and simple.***

A good justice system should provide a pathway to fair and equitable outcomes. Where possible, the justice system should focus on resolving disputes without going to court. Where court is necessary, it should be accessible, fair, affordable and simple. The traditional adversarial system is no sustainable for most disputes.

Non court	Court
Dispute prevention	Industry Culture change—focus on resolving the dispute
Ombudsmen	Better and earlier identification of the real issues
ADR	Active case management
	Greater use of ADR

Proportionate Cost: ***Ensuring that the cost of and method of resolving disputes is proportionate to the issues.***

Cost can be a significant barrier to justice. The cost to disputants and the cost to Government of resolving disputes should be proportionate to the issue in dispute.

Adequate information about costs is essential in assessing proportionality. The provision of greater information regarding the costs of the justice system allows better identification of the most appropriate pathway to resolution and, in particular, whether litigation is the most appropriate course.

Case management of litigation will help to ensure that costs incurred are directed to resolving the dispute, and limit costs from collateral actions.

Resilience: ***Building resilience in individuals, the community and the justice system.***

The focus on helping to build resilience in individuals, the community and the justice system by reinforcing access to information and supporting the cultural changes necessary to ensure improvements in access to justice are continuing. This includes equipping people with the basic skills necessary to resolve their own issues (including by accessing appropriate information and support services).

Inclusion: ***Directing attention to the real issues that people who experience legal events have.***

Legal issues are often symptomatic of broader problems in people's lives. The justice system needs to have the capacity to direct attention to the real issues that people might be facing, and what they need to do to address them.

ACCESS TO JUSTICE AND ALTERNATIVE DISPUTE RESOLUTION (ADR)

Access to justice, in the widest sense of the effective resolution of disputes - whether through court-based litigation or alternative dispute resolution processes, is an essential aspect of ensuring the realisation of the fundamental rights recognised and given protection by the 1999 Constitution. It is also recognised in Article 7 of the African Charter on Human and Peoples Rights (the African Charter).

As suggested earlier, in promoting access to justice, a modern civil justice system should offer a variety of approaches and options to dispute resolution. Citizens should be empowered to find a satisfactory solution to their problem, which includes the option of court-based litigation - but as part of a wider menu of choices.

Justice may sometimes require a decision from a Judge or Magistrate who has heard and considered evidence and legal arguments from both sides after an adversarial hearing. This is why the courts will always remain central and indispensable to our civil justice system. In other cases, of course, justice might mean an apology and change of administrative process in response to a particular problem. It is clear that in that sense there are circumstances in which ADR can provide resolutions and individualised justice for parties which a court cannot. Indeed, the court-based process cannot be expected to provide an optimal solution to all conflicts in society.

ADR refers to those processes, outside of a court hearing, where an impartial person helps the parties to resolve their dispute. It is a means of settling a dispute without a formal trial. ADR options include conciliation, mediation, negotiation, conferencing and neutral evaluation.

The potential benefits of ADR include:

- early resolution of disputes and identification of the real issues in dispute
- less adversarial processes for matters that involve ongoing relationships
- ownership of outcomes by parties who have participated in ADR, and
- proportionate cost in cases of early resolution.

The cost of access to justice for citizens is an important issue to consider. As noted by Winkler CJ (Chief Justice of Ontario):

> "**If litigants of modest means cannot afford to seek their remedies in the traditional court system, they will be forced to find other means to obtain relief. Some may simply give up out of frustration. Should this come to pass, the civil justice system as we know it will become irrelevant for the majority of the population. Our courts and the legal**

profession must adapt to the changing needs of the society that we serve."[9]

Brief Overview of ADR Processes

Negotiation

Negotiation is the most flexible and informal of the dispute resolution methods. Parties attempt to reach agreement on matters in dispute without the assistance of a third party. It can save the costs and time associated with assisted dispute resolution processes. It is a private dispute resolution option. Therefore, reputations and relationships can remain intact.

Discussions usually proceed on a without prejudice basis. If the negotiations do not succeed to settle the matter, the parties' rights are not prejudiced.

Mediation

Mediation is the process in which parties, with the assistance of neutral third party (the mediator), identify the issues in dispute, explore the options for resolution and attempt to reach agreement. It is a voluntary, non-binding and private form of dispute resolution. The parties retain control of the decision on whether or not to settle and on what terms.

Mediation allows more creativity and flexibility over settlement options than litigating in the court or arbitration.

Conciliation

Conciliation is similar to mediation except that, usually, the third party will actively assist the parties to settle the dispute (for example, by making suggestions regarding settlement options).

[9] Speech delivered by The Hon. Warren Winkler Chief Justice of Ontario —Access to Justice, Mediation: Panacea or Pariah? (2007). Available at http://www.ontariocourts.on.ca/coa/en/ps/speeches/access.htm.

- ***What is the difference between mediation and conciliation?***

I am mindful that the difference between mediation and conciliation is not very clear and the terms are sometimes used interchangeably. But there are important distinctions between the two processes.

In its Consultation Paper on Alternative Dispute Resolution (LRC CP 50-2008), the Law Commission of Ireland provisionally recommended that mediation should be defined as:

> "a ***facilitative***, consensual and confidential process, in which parties to the dispute select a neutral and independent third party to assist them in reaching a mutually acceptable negotiated agreement."

In contrast, the Commission provisionally recommended that conciliation should be defined as:

> "an ***advisory***, consensual and confidential process, in which parties to the dispute select a neutral and independent third party to assist them in reaching a mutually acceptable negotiated agreement."

It is evident from the Commission's provisional recommendations that the fundamental difference between mediation and conciliation is the degree of involvement by the neutral and independent third party in the respective processes. While both processes incorporate the principle of self-determination, conciliation allows the third party (the conciliator) to ***advise*** on substantive matters through the issuing of formal recommendations and settlement proposals. In contrast, mediation requires that the third party (the mediator) address process issues only and ***facilitate*** the parties in reaching a mutually acceptable negotiated agreement.

Early Neutral Evaluation (ENE)

The parties appoint an independent person to provide a non-binding opinion on the merits which evaluates the facts, evidence and law relating to a particular issue, or the whole case. The rationale is that, once armed with the opinion, the parties will be able to negotiate an outcome, with or without the assistance of a third party.

Alternatively, the parties are free to settle the dispute on the basis of the evaluation provided.

In England and Wales, both the Technology and Construction Court (TCC) and the Commercial Court advocate the use of ENE in certain circumstances.

- ***ENE Procedure in the TCC***

  ENE is dealt with by section 7.5 of the TCC guide.[10] Features of ENE in the TCC include the following:

  - A TCC judge may provide an ENE of either the full case or particular issues within it.
  - All the parties must agree to the judge providing the ENE.
  - If the parties would like an ENE to be carried out by the court, they should seek an appropriate order from the assigned judge.
  - If the assigned judge deals with the ENE, he takes no further part in the proceedings (unless the parties expressly agree otherwise).
  - The assigned judge may select another available TCC judge to undertake the ENE.
  - The ENE will be produced in writing, with conclusions and brief reasons, unless the parties agree otherwise.
  - There may be an oral hearing before the judge (of no more than one day), with dates for the exchange of submissions, witness and expert evidence.
  - The parties may agree a statement of the effect of the ENE, that is whether the ENE will be:
    - binding on the parties;
    - binding in certain circumstances; or
    - temporarily binding (subject to a final decision by a court, arbitrator or the parties' agreement).

[10] The document provides detailed guidance for lawyers on how to bring a complex technical case to the Technology and Construction Court. It is read alongside the Civil Procedure Rules and the Practice Directions for the Court.

- ***ENE Procedure in the Commercial Court***

  The procedure in the Commercial Court is less specific than in the TCC. Paragraph G2 of the Commercial Court Guide[11] provides that the court may, if all the parties agree, provide a non-binding without prejudice ENE. The approval of the judge in charge of the list must be obtained, who will then nominate a judge to conduct the ENE. The judge conducting the ENE will give appropriate directions for its conduct but will take no further part in the case, unless the parties agree otherwise.

Arbitration

Arbitration is a private forum in which an independent arbitrator makes an award, acting in a judicial fashion, to finalise the dispute. It is based on the parties' agreement: all parties must agree to submit the dispute in question to arbitration. The outcome (the award) is final and binding on the parties. The arbitrator focuses on the issues (fact or law) presented by the parties. An agreement to arbitrate is usually contractual. Applications to a court are limited in order to support the process or to set aside an award on limited grounds.

- ***Does Arbitration fall within the bounds of ADR?***

  In its *Green paper on alternative dispute resolution in civil and commercial law,*[12] the European Commission defined alternative methods of dispute resolution as out-of-court dispute resolution processes conducted by a neutral third party, excluding arbitration. It suggested that arbitration is closer to a quasi-judicial procedure than to an ADR as arbitrators' awards replace judicial decisions.

Med-Arb (a hybrid process)

Med-arb (or arb-med) is when ***mediation*** is combined with ***arbitration*** to resolve a dispute.

[11] The Guide is intended to promote the efficient conduct of litigation in the Admiralty and Commercial Courts. It is read alongside the Civil Procedure Rules and the Practice Directions for the Court.

[12] Green Paper on alternative dispute resolution in civil and commercial matters COM/2002/0196 Final at 29. Available at http://eurlex.europa.eu/.

In med-arb, if mediation fails in whole or on any issue, the parties may agree that the mediator becomes an arbitrator and issues a final and binding award on the outstanding matters. There is concern about the process, as the prospect of the mediator becoming an arbitrator may prevent frank discussion in the private sessions in the mediation. A way around that issue is for parties during a mediation to refer any outstanding issues to arbitration, adjudication, expert determination or early neutral evaluation conducted by another, independent, neutral. The mediation process is entirely flexible and can accommodate other processes being used as an adjunct.

Arb-med is where the appointed arbitrator attempts to mediate the dispute, but if a settlement is not reached, returns to his role as arbitrator.

The Appropriateness of ADR

While ADR processes, such as mediation and conciliation, have an important role to play in providing greater access to justice, ADR is not a panacea for all disputes. It has its limitations and it is not always appropriate. The potential benefits of mediation and conciliation, including the cost and time effectiveness of the processes, must be balanced against the reality that mediation and conciliation can also be seen as an additional layer on civil litigation where it does not lead to a settlement and that every step along the way drives up the costs of litigation.

Furthermore, there are a number of cases which do not lend themselves well to ADR processes. One such category, for instance, would include those disputes involving allegations of illegality or impropriety. Cases based on allegations of fraudulent conduct or illegal behaviour are not conducive to mediation because the polarized positions that characterise these disputes inhibit discussion. Moreover, they often place the mediator in an impossible ethical position.

Likewise, certain categories of disputes are not arbitrable under Nigerian Law. In ***KSUDB v. Fanz Const. Ltd.*** **(1990) 4 NWLR (Pt. 142) 1 at 32-33**[H-A,] the Supreme

Court agreed that the following matters cannot be the subject of an arbitration agreement and cannot therefore be referred to arbitration:

a. an indictment for an offence of a public nature;
b. disputes arising out of an illegal contract;
c. disputes arising under agreements void as being by way of gaming or wagering;
d. disputes leading to a change of status, such as a divorce petition;
e. any agreement purporting to give an arbitrator the right to give judgment in *rem.*

Recently, in ***Statoil (Nig.) Ltd. v. FIRS*** **(2014) LPELR-23144 (CA)** the Court of Appeal agreed that disputes pertaining to taxation are not arbitrable under Nigerian Law.

ADR may not be appropriate in some cases where power imbalances may exist, which put the parties on an unequal footing, allowing one party to place undue pressure on the other. The result may be that one party may impose their solution on the other side. In other cases, there may be uncertainties in the law which need to be clarified, either because there is a lot at stake in a particular case, or because its outcome could affect a number of other cases. Sometimes legal precedents need to be relied on, or to be established for future cases. There are cases in which public interest dictates that a public hearing should take place and a public decision be made.

The corollary to the general rule that some types of cases ought not to be resolved through ADR processes is that parties to specific types of disputes should nearly always be encouraged to consider mediation or conciliation. The Commission considers that disputes which are most amenable to resolution through mediation and conciliation include: appropriate family law disputes; appropriate employment law disputes; property disputes and, in particular, boundary disputes; probate disputes; appropriate medical negligence claims; and commercial and consumer disputes.

While it is difficult to set out general categories of cases which are appropriate for resolution through mediation or conciliation, it can be suggested that features of appropriate cases include: where the parties wish to restore or maintain their relationship with the other party (parents, business partners, siblings); claims where the monetary and non-monetary costs of litigation are disproportionately high in comparison to the issues in dispute; claims where one or both parties are seeking remedies which are not available through the traditional court system (such remedies may include: an apology, an explanation; flexibility in relation to financial repayments; changes in administrative procedures); and where the parties wish to resolve the dispute in a confidential and private manner.

While ADR processes, such as mediation and conciliation, must form an integral part of a modern civil justice system in providing greater access to justice, these processes should only be used in appropriate cases. The decision to use ADR should be made on the basis of the framework identified earlier in this paper.

ADR in Judicial Proceedings

An initial distinction must be drawn between:

- ADR that is conducted by the Court or entrusted by the Court to a third party (ADRs in the context of judicial proceedings), and
- ADR used by the parties to a dispute through an out-of-court procedure (conventional ADR).

Given the audience to whom this paper is addressed, the ensuing discussion is concerned with ADR in the context of judicial proceedings.

In the quality of judicial decisions, and in the conduct and management of actions brought before them, Courts have a central role in ensuring fair, simple, affordable and accessible justice.

The essential judicial function is to declare (and enforce, where required) the state of the law in disputes between parties who have standing to bring the issue before the Court, in so doing creating or altering legal rights. However, the impact of the Courts on access to justice goes beyond the processes that take place in the courtroom after filing. The Court process can also frame parties' decisions about dispute resolution pathways through:

- Court expectations of parties' behaviour (both before and after filing);
- the cost and time risks inherent in proceeding with litigation if other dispute resolution options fail;
- Court procedures prior to final hearing (for example discovery, pleadings), and
- the courts' power to issue binding final decisions in the absence of agreement between parties to a dispute (as a barrier to obstructive or bad faith behaviour).

Improving access to justice in the Courts requires changing the culture of the Courts, parties and lawyers from an adversarial system to one where effort and resources are directed to resolving disputes at the earliest opportunity and at a proportionate cost. Better dispute resolution will require:

- early and substantive attempts to resolve disputes being built into the court process, including an increased emphasis on the right pathway to resolution;
- early and proportionate exchange of information and evidence, and early evaluation of the real issues in dispute by parties and the court;
- changing court processes to ensure that all steps in the process are aimed at resolving the dispute, including:

    - amending the legislation and legislative instruments relating to court procedure to reflect the fact that most civil disputes, including the majority of those filed with the Courts, do not require final adjudication, and

- an explicit expectation that judicial officers will actively manage matters to resolution, supported by specific powers for Judges and Magistrates to control matters before them.

Courts can resolve disputes better by deploying the following methods:

Early and proportionate exchange of information and evidence

Pre-action protocols and pre-trial examinations

The opportunity to resolve disputes will be improved by identification of the real issues in dispute as early and as cost effectively as possible.

In the UK, Lord Woolf's 1996 report on Access to Justice led to the introduction of pre-action protocols in the courts of England and Wales, setting out procedures that parties must undertake prior to commencing an action in court. Pre-action protocols can contribute to changing the culture of courts and lawyers by entrenching an expectation of early cooperation in resolving disputes. The broad objectives of the Pre-Action Protocols are:

- To encourage the exchange of early and full information about a prospective claim.
- To enable parties to avoid litigation by agreeing a settlement of a claim before the commencement of proceedings.
- To support the efficient management of proceedings where litigation cannot be avoided.

They do so by encouraging early action to:

- identify what the dispute is actually about, so that parties may address what the concerns are directly,
- obtain information that may assist to limit the scope of a dispute, or

- obtain information that is necessary before parties are able to make informed attempts to settle the dispute.

Pre-action protocols and similar processes have since been implemented in several jurisdictions, particularly in personal injury, transport accident and workers' compensation claims. In Nigeria, pre-action protocols now form part of the High Court of Lagos State Civil Procedure Rules.

In December 2012 the Lagos State Judiciary issued the 2012 Civil Procedure Rules. Order 3 Rules 2 and 8 require that before matters cases were accepted for filing, counsel must provide a sworn Pre-Action Protocol Form 01, indicating their attempts (and providing evidence of the said attempts) to settle the dispute through ADR. By Order 5 Rule, failure to file the Pre-Action protocol nullifies the action.

The term 'pre-action protocol' has been used to describe a wide range of processes, from mandatory pre-action mediation through to targeted or expansive information and evidentiary exchange. Consequently, introduction of pre-action protocols will need to be specific as to what is and is not envisaged.

The design of pre-action protocols needs to take into account some of the challenges identified through the UK experience, including:

a. to ensure proper participation in the pre-action procedures by parties, effective enforcement mechanisms and/or sanctions are crucial,
b. to avoid excessive front-loading of costs, as has been reported in England and Wales, pre-action requirements should not be excessively detailed and should only require action that is reasonable and proportionate in the circumstances, and
c. safeguards to avoid the misuse of pre-action protocols as a litigation strategy, to inconvenience or intimidate the other party.

Currently, in the UK, Pre-action Protocols are in force for disputes involving:

- Construction and engineering.
- Defamation.
- Personal injury.
- Clinical negligence.
- Professional negligence.
- Judicial review.
- Disease and illness.
- Housing disrepair.
- Possession claims based on rent arrears.
- Possession claims based on mortgage or Home Purchase Plan arrears in respect of residential property.
- Low value personal injury claims from road traffic accidents.
- Dilapidations in commercial property, that is, claims for damages relating to the physical state of property at the end of a commercial tenancy.
- Low value personal injury claims based on employers' liability and public liability.

In cases not covered by the protocols (for example, a contract dispute), parties should aim to comply with the Practice Direction on Pre-Action Conduct and Protocols (the Pre-action PD or PDPACP).

The essence of the Pre-action PD is that the court will expect the parties to exchange information and make appropriate attempts to resolve the claim without issuing proceedings. It must not be used by a party as a tactical device to secure an unfair advantage over another party. When seeking to identify, narrow and resolve the legal, factual or expert issues, parties are required to take only those steps that are reasonable and proportionate (*paragraph 4, Pre-action PD*).

In particular, the court will expect the parties to exchange sufficient information to:

- Understand each other's position.
- Make decisions about how to proceed.
- Try to settle the issues without proceedings.
- Consider a form of alternative dispute resolution (ADR) to assist with settlement.
- Support the efficient management of those proceedings.
- Reduce the costs of resolving the dispute.

From experience, disputes between landlords and tenants are common before the Magistrates Courts. I have therefore set out the UK Pre-Action Protocols for Possession Claims based on arrears of rent. I am mindful that some of the provisions are inapplicable to Nigeria. It is nevertheless useful to observe how the Protocol encourages the early exchange of information, with a view to settling the dispute without a formal trial.

UK Pre-Action Protocols for Possession Claims based on arrears of rent

Initial contact

The Possession Protocol states that:

- A landlord should contact the tenant as soon as reasonably possible if the tenant falls into arrears. This initial contact is an opportunity for the landlord and tenant to discuss:
  - the reason for the arrears;
  - the tenant's financial circumstances;
  - the tenant's entitlement to benefits; and
  - repayment of the arrears.

  (Paragraph 2.1.)
- A landlord and tenant should try to agree affordable repayment schedule for the tenant to pay towards arrears, based on the tenant's income and expenditure (where this information has been provided to the landlord) (paragraph 2.2).

- A landlord should clearly set out in pre-action correspondence any time limits with which the tenant should comply (paragraph 2.2).
- A landlord should provide, on a quarterly basis, rent statements in a form that can be easily understood showing the rent due and sums received for the past 13 weeks (paragraph 2.3).
- A landlord should, on request, provide the tenant with copies of rent statements from the date that the arrears first arose showing:
  - all amounts of rent due;
  - the dates and amounts of all payments made, whether through housing benefit, discretionary housing payments or by the tenant; and
  - a running total of the arrears.

  (Paragraph 2.3.)

After Service of Statutory Notices

A landlord must take further specified steps to try to reach agreement with the tenant before starting litigation (paragraphs 2.8 and 2.9, Possession Protocol).

Before service of proceedings

After a landlord has served a statutory notice requiring possession of the property, but before issuing proceedings, he should make reasonable attempts to contact the tenant to discuss:

- The amount of the rent arrears.
- The reason for the rent arrears.
- Repayment of the rent arrears.
- The housing benefit or universal credit (housing element) position.

  (Paragraph 2.8.)

The landlord should also send a copy of the Possession Protocol to the tenant.

Postponement of proceedings

If the tenant complies with an agreement with their landlord to pay the current rent and agrees to pay a reasonable amount towards arrears, the landlord must agree to

postpone court proceedings, provided the tenant complies with the agreement. If the tenant does not comply with the agreement, the landlord should warn the tenant of the intention to bring proceedings and give him clear time limits within which to comply (paragraph 2.9).

Alternative dispute resolution

As with all the case specific protocols and the Pre-action PD, the Possession Protocol requires the parties to consider whether Alternative Dispute Resolution (ADR) would be more suitable than litigation (paragraph 2.10). Parties may be required to prove that ADR was considered and should only begin litigation as a last resort once settlement has been fully explored.

Court proceedings

If the matter does proceed to court, the Possession Protocol sets out a standard of behaviour once proceedings have started.

Before the hearing date

At least ten days before the date set for the hearing, the landlord should:

- Provide the tenant with up-to-date rent statements.
- Disclose what knowledge it possesses in relation to the tenant's housing benefit or universal credit (housing element) position to the tenant.

  (Paragraph 2.11.)

A landlord should inform their tenant of:

- The date and time of the court hearing.
- Their current rent statement.
- The order applied for.
- The importance of the tenant attending the hearing, as the tenant's home is at risk. A record should be kept of any advice given.

  (Paragraph 2.12.)

Stay of proceedings

If, the tenant enters into an agreement to pay the current rent and a reasonable amount towards arrears after the issue of proceedings, the landlord should agree to postpone court proceedings, provided the tenant keeps to the agreement (paragraph 2.12(b)). If the tenant does not comply with the agreement, the landlord should warn the tenant of its intention to restore the proceedings and give the tenant clear time limits within which to comply (paragraph 2.12(c)).

Sanctions for non-compliance with the Possession Protocol

If a landlord unreasonably fails to comply with the terms of the Possession Protocol, the court may:

- Make an order for costs.
- Adjourn, strike out or dismiss the claim (in cases other than those brought on mandatory grounds) (see Practice note, Strike out: an overview).

(Paragraph 2.13.)

If a tenant unreasonably fails to comply with the terms of the Possession Protocol, a court may take that failure into account when considering whether it is reasonable to make a possession order (paragraph 2.14).

Redesigning court procedures to ensure all steps in the process are aimed at resolution

Active case management

Successful case management is crucial to achieving the resolution of matters quickly and at a proportionate cost. The management of a matter by a judicial officer is one of the most powerful tools available to direct parties towards the most appropriate path for resolution. The reason is simple. The efficient conduct of proceedings cannot be left to the Parties.

It is not the case that all the parties to litigation are concerned, or equally concerned, that their litigation be conducted efficiently. A consideration often mentioned in this

context is that relatively well-resourced parties may seek to exploit that advantage. While this may occur, more commonplace factors are likely to be at least as important: a case that is vital for one party may be of less moment for the other on account of wider business ramifications, reputational issues or the size of the claim relative to the party's assets. A well-resourced party will feel free to spend more on any dispute; and respondents are typically less concerned by delay than claimants. Even where one party exerts pressure on its lawyers for the process to be efficient, they are to a significant extent at the mercy of the other party.

Judicial case management involves a departure from the model of the Judge as merely an umpire. The departure is nevertheless consistent with the judicial role. As the American jurist Learned Hand said many years ago: *"… a Judge is more than a moderator; he is charged to see that the law is properly administered, and it is a duty which he cannot discharge by remaining inert."*

Observations to the same effect have been made in foreign and Nigerian Courts. In the Australian case of ***EI Du Pont De Nemours & Co v Commissioner of Patents* (1987) 16 FCR 423**, Sheppard J held:

> ***"The days when parties were left at leisure to pursue private litigation in the way that they thought best suited their purposes have long gone. Courts have an overriding obligation to see to it that those using their facilities are proceeding in a way best calculated to bring litigation to an end at the earliest possible moment so long as the primary goal of achieving justice is not lost sight of."***

In ***Fagbule v. Rodrigues* (2002) 7 NWLR (Pt. 765) 188 at 207**[E-F], the Court of Appeal, through I.T. Muhammad, JCA (as he then was) held:

> ***"From the series of events unleashes in the record, I am bound to agree with learned trial Judge that the counsel for the appellant was making all "ploy" to make it impossible for the case to be determined. Where***

a party or his counsel orchestrates a designed plan to foist a position of helplessness or naivety upon a court, it is the duty of that court to assert its control over the proceeding before it."

Likewise, in ***Awure v. Iledu* (2008) 12 NWLR (Pt. 1098) 249 at 295-296**[H-A], the Court of Appeal, through Sankey JCA, admonished:

"***A Judge must at all times be in control of the proceedings of her court. It will be abdicating in her responsibility to allow counsel on one side to take over the court, bestride the court like a colossus and dictate the pace. May that day never come! With due respect to the learned counsel for the appellants, I am of the firm view that the trial Judge exercised her discretion judiciously in refusing to grant the further application of the plaintiffs to reopen their case for the purpose stated … It was too late in the day. Ample opportunity had been given to the appellants but they failed to utilise it. Like my learned sister has stated in the lead judgment, justice is indeed a three was street; justice to the plaintiff, justice to the defendant and justice the society. A court which loses sight of this truism will end up failing in its duty to be impartial to all the parties appearing before it.***"

The court has wide powers to achieve the objective of efficiency in the administration of justice. But perhaps the most important power of the Judge and Magistrates is the power to question. That is, the power to require practitioners and parties to account for the positions they have taken. For instance, whether a claim adds materially to the prospects of success and, if not, why it is pressed? Why facts not seriously in dispute are not admitted? Whether proof sought expensively (e.g., by discovery) might be more cheaply obtained (e.g., by an interrogatory or two). Deployed wisely, but vigorously, this power can be a major contribution to efficiency.

Ensuring Judicial Efficiency:

***Black & Decker (Australasia) Pty. Ltd. v GMCA Pty. Ltd* [2007] FCA 623**

Finkelstein J: (emphases added)

1. *It is common for parties to do little more than pay lip service to timetables fixed to regulate when steps should be taken to get a case on for trial.* Seemingly it makes no difference whether the timetable is fixed with the consent of the parties or following argument. The view that has taken hold in many quarters is that a party is only required to keep an eye on the timetable and, if it cannot be met, it will be extended. The assumption is that the wronged party will be fully compensated by an award of costs.

…

4. *It is time that this approach is revisited*, especially when the case involves significant commercial litigation. One of the primary objects of a commercial court is to bring the litigants' dispute on for trial as soon as can reasonably and fairly be done. *If, in some instances, the preparation of the case is not perfect so be it. A case that is reasonably well prepared is just as likely to be decided correctly as a perfectly prepared case.*

5. I am of the firm view that parties should not be treated as leniently as they have been in the past. Commercial parties expect this approach from the courts and their expectation should be met. A useful rule to adopt is to allow an extension only if the failure to meet the existing timetable is the result of excusable non-compliance. In deciding whether there is excusable non-compliance the court should take into account, among other factors: (a) the direct and indirect prejudice to the opposing party; (b) the impact of the delay on the proceedings; (c) the reasons for the delay; (d) good faith or lack of good faith on the part of the party seeking to be excused; and (e) the effect of putting off a trial both on other litigants and generally on the court's ability to efficiently manage its cases.

It should not be forgotten that Judges and Magistrates require practitioners to account for their cases in an environment in which, to a significant degree,

practitioners depend on the court retaining confidence in them. This is certainly true of those who practise regularly in a particular court or area of law.

A corollary of the foregoing is that cost and delay are most likely to be reduced by an early, and continuing process of 'narrowing' so that there are:

a. fewer issues in contest;
b. in relation to those issues, no greater factual investigation than justice requires; and
c. as few interlocutory applications as are necessary for the just disposition of the matter.

A further corollary is that this process is unlikely to occur without active judicial engagement.

There are risks of course. Encouraging (or requiring) parties to meet and confer, or to mediate, in the hope that the need for judicial resolution of an interlocutory dispute may be avoided, will inevitably increase costs and delay if agreement is not reached.

One risk deserves to be addressed specifically: risk of appearance of bias or pre-judgment of the issues in a particular proceeding. It has been suggested that trial Judges and Magistrates might require statutory protection if they were to engage in active case management. The concern is that such engagement might involve the frank expression of views which would create the risk of an appearance of bias or pre-judgment, and so a ground for disqualification of the Judge or Magistrate from the case.

This concern is legitimate but may be overstated. An example can be taken from decision of the High Court of Australia (equivalent to the Supreme Court of Nigeria) in *Johnson v Johnson*, which has indicated that trial Judges have enough latitude to do what is necessary in cases before them:

> *"**At the trial level, modern Judges, responding to a need for more active case management, intervene in the conduct of cases to an extent that may surprise a person who came to court expecting a Judge to remain, until the moment of pronouncement of judgment, as inscrutable as the Sphinx. ... Judges are not expected to wait until the end of a case before they start thinking about the issues, or to sit mute while evidence is advanced and arguments are presented. On the contrary, they will often form tentative opinions on matters in issue, and counsel are usually assisted by hearing those opinions, and being given an opportunity to deal with them.**"*

A similar position has been taken in Nigeria. In ***Dapianlong v. Dariye No. 1*** **(2007) All FWLR (Pt. 373) 1 at 38**, the Court of Appeal, through Bulkachuwa JCA (now the President, Court of Appeal) held:

> *"**A court cannot be expected to remain static, rather for the case to progress from day to day for a just conclusion of the matter before it, there must be orders. A Judge is the master of his court and so long as there is no miscarriage of justice against any of the parties, a court can make such orders as are necessary to bring the matter to a just conclusion within the rules of court and according to law.**"*

In ***Oteju v. Olugana*** **(1992) 8 NWLR (Pt. 262) 752 at 766-767**, the Court of Appeal, through Tobi JCA (as he then was) succinctly held:

> ***"Let me take the issue that the trial judge asked questions which the appellants think were damaging to their case. So much has been said about the role of the Judge as an unbiased umpire in the judicial process. Tied to this tole is the issue of asking questions from the bench. Normally, the asking of questions is the main function of the parties and their counsel, but it is not their exclusive domain or province to do so.***

> ***While in our adversary system, the parties must prove the difference cases they have presented to court, a trial Judge is bound to ask questions in very deserved and deserving instances in the trial process. As long as he does so with all the caution and precaution, and only with a view to clearing ambiguities and make his notes consistent and intelligible, a court of appeal cannot or should not interfere. Insofar as the trial Judge does not lose his balance as the independent arbitrator in the course of asking questions, and appellate court will not interfere.****"*

The question, then is one of degree. Whilst the judicial officer may ask questions and make orders for the efficient ***conduct*** of the proceedings, he should not take a pre-emptive step to determine the ***substantive issues*** between the parties.

Court procedures and the obligations imposed on parties should be directed to:

- identifying the real issues in dispute
- planning a pathway to resolution of the dispute, including consideration of the most appropriate course of disposition—be it mediation or other ADR options or judicial determination
- emphasising resolution as early as possible, before positions are entrenched, and
- ensuring that costs incurred are necessary to progress toward resolution, and are proportionate to the issues in dispute.

Case management and dispute resolution should be considered central judicial functions and crucial to ensuring fair, cheap and effective access to justice. The National Judicial Institute should work with the Courts to ensure that judicial education includes measures aimed at enhancing the understanding and use of ADR, dispute resolution and case management techniques. Likewise, the Heads of Courts may consider it necessary to formulate a procedural model for robust judicial engagement in proceedings.

Resolving disputes at the lowest appropriate level

Lower level courts, and lower divisions within courts, generally have more streamlined and simpler procedures, and are set up to deal with a high volume of less complex matters. Extension of jurisdiction to the lower level courts wherever appropriate will ensure that matters are dealt with at the most suitable level, and that less complex matters are dealt with by courts using the simplest and most cost effective procedures.

CONCLUSIONS AND RECOMMENDATIONS

A properly functioning justice system is of fundamental importance to Nigeria's society and economy. There are a huge number of legal issues arising across society. Given the vast number of people affected by legal issues, options for dispute prevention will form a critical aspect of improving access to justice.

In many cases, people are capable of resolving disputes themselves or with limited assistance. Timely access to good information can provide significant benefits in allowing people to resolve disputes early and effectively. Recent technological advances have, and will continue to, significantly change the information and dispute resolution landscape.

Central Recommendation – An Access to Justice Framework

Policy makers should take a system-wide approach to access to justice issues by applying a strategic framework to all decisions affecting access to justice in the civil justice system.

The strategic framework should comprise:

a. **Principles** for access to justice policy-making, and

b. Methodology for achieving the principles in practice.

Application of a strategic framework will ensure that new initiatives and reforms to the justice system best target available resources to improving access to justice.

Pre-Action Protocols

The Bar and Bench should collaborate to determine the types of matters suitable for pre-action protocols. Pre-action protocols should set out requirements for action prior to commencing proceedings, particularly exchange of information between the parties, and should be supplemented by effective sanction or enforcement mechanisms. To ensure costs of compliance with a protocol do not exceed the benefits, the obligations of a protocol should be reasonable and proportionate, and directed to identifying the real issues in dispute and appropriate pathways for resolution.

Active Case Management

The Heads of Court should explore the feasibility of amending relevant rules to provide legislative guidance to the effect that the expression by a judicial officer of a preliminary view on an issue does not amount to apprehended bias unless couched in such emphatic terms that it is clear that the judge is irresistibly drawn to that view.

This may also require an amendment of the same effect to the relevant legislation establishing the various courts.

Case management and dispute resolution should be considered central judicial functions and crucial to ensuring fair, cheap and effective access to justice. National Judicial Institute should work with the courts to ensure that judicial education includes measures aimed at enhancing the understanding and use of ADR, dispute resolution and case management techniques.

In considering possible candidates for judicial appointments, the appointing authorities should have regard to the importance of case management and the use of ADR in achieving just, fair and equitable outcomes.

Appropriate Resolution of Disputes

Disputes should be resolved at the lowest appropriate level. The Government should confer jurisdiction for specific types of disputes on the lowest level of court available and appropriate to hear the matter. This jurisdiction will usually be in addition to jurisdiction conferred on higher courts.

Changing the Legal culture from adversarial to collaborative

Lawyers being admitted to practise should be equipped with the skills to guide a client through a dispute resolution process and understand the major ADR processes.

The Heads of Courts should write to the Council of Legal Education to ensure that the importance of a practical knowledge of ADR is recognised.

Thank you very much for your time and attention this morning.