PAPER PRESENTED BY

HON. JUSTICE NGOZIKA U. OKAISABOR, Ph.D., FCIArb, FICMC, FIDRI

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TOPIC:

THE SCOPE AND RELEVANCE OF ADR FOR AREA/SHARIA/CUSTOMARY COURTS

THE SCOPE AND RELEVANCE OF ADR FOR AREA/SHARIA/CUSTOMARY COURTS[1]

INTRODUCTION

I must express my profound appreciation to the Administrator of the National Judicial Institute, Hon. Justice R.P.I. Bozimo, OFR and the Institute in its entirety for the honor in according me the privilege to present this paper at the National Workshop for Area/Sharia/Customary Court Judges.

It is a common phenomenon that as we are human beings with different personality traits and background, disagreement is inescapable but the ability to settle amicably and live peaceably is encouraged and enjoined by the society.

Dispute resolution is at the core of the human fabric. The human being is the most complex character ever created and in order to live harmoniously, disputes must be resolved amongst one another. From the biblical age, judges were put in place to determine issues among the people of Israel and also established laws by which the people were to live in peace and obedience. It was also the duty of the King or pharaoh to resolve disputes among the people.[2]

Relatedly, prior to the colonial era in Africa, communities across the continent had systems for settlement of disputes in place and these systems were more akin to what is now known as alternative dispute resolution (ADR). Generally, the most common ADR mechanisms in place were negotiation, mediation and arbitration and these were already in practice in the indigenous pre-colonial communities. Historically, arbitration and other mechanisms are adopted in the process of dispute resolution in most ethnic groups in Nigeria, as in other communities in African countries.

The term Alternative Dispute Resolution (ADR) is used generally to describe the methods and procedures used in resolving disputes either as alternative to the traditional dispute resolution mechanism of the Court or in some cases supplementary to such mechanisms. It refers to any means of settling dispute outside the Court room. ADR typically includes Early Neutral Evaluation,

[1] Being a presentation by Hon. Justice Ngozika U. Okaisabor, Ph.D. at the National Workshop for Area/Sharia/Customary Court Judges organized by the National Judicial Institute 13-15 April, 2021.

[2] King Solomon, Joseph and King David are important examples of biblical leaders who were responsible for dispute resolution in their communities.

Negotiation, Conciliation, Mediation and Arbitration.[3] ADR is an interesting alternative to litigation. It complements the formal legal system. The scope and relevance of ADR for Area/Sharia/Customary Courts cannot be overemphasized.

This paper seeks to explore the scope and relevance of these ADR mechanisms in the Area, Sharia and Customary Courts in Nigeria. The concept of Customary Arbitration as well as the scope of ADR under Islamic law is also discussed in detail. The nature of the issues mostly determined via these alternative dispute resolution mechanisms will also be explored.

The relevance of ADR in Area/Customary Courts would also be discussed.

DIFFERENT CONCEPTS

NEGOTIATION is a natural recourse for two individuals seeking to settle differences through discussion. Should this fail, disputants might approach an independent third party. This independent party was usually the traditional authority or elder of the community such as the Obi, Eze, Oba or the Emir that have a recognized function in the community. Matters that were settled through this medium include family disputes, disputes related to land, property or general disagreements.

MEDIATION is a voluntary, non-binding and private dispute resolution process in which a neutral person helps the parties to reach a negotiated settlement. The process of mediation entails neutral third-party encouraging disputants to compromise in pursuit of a mutually agreed outcome. The participatory nature of the mediation process enables disputants to exercise a degree of control over the settlement, rather than having a decision imposed on them. In many cases, this makes for a "win-win" arrangement, and thus a durable resolution of the conflict.

In our indigenous Nigerian community, disputes relating to marriage and other family disputes were mostly settled through mediation. For example, under the Yoruba custom, Disputes at the family level, such as an argument between co-wives or between parents and a youth who has ran away, are generally brought before the '*mogaji'*, the lineage head, and the '*baale'*, an elderly head of the district. After the two sides must have stated their case, the elders ask questions and then try to work towards a compromise in which both sides accept some of

[3] https://www.law.cornell.edu

the blame. The elders have an arsenal of techniques for reaching a settlement: proverbs, persuasion, subtle blackmail, precedent, and even magic.[4]

ARBITRATION as a mechanism of settlement of dispute has been with us from time past. Referral of a dispute to one or more laymen for decision has deep roots in the customary law. Arbitration involves the third party conducting a simplified trial, hearing evidence presented by the disputants (or a family member representing them).

Traditionally, this procedure was inquisitorial, with questions posed by the arbitrator (usually the Head of the community or Clan), rather than accusatorial, whereby arguments are advanced by advocates of the Court as under English law. Considering our local customs and relevant precedents, the third party would withdraw to deliberate and issue a verdict. Thus, such method of dispute resolution was only reasonable, for the wise men or the Chiefs who were the only accessible judicial authorities. This tradition still persists in certain villages and communities, despite the centralized legal system and the attendant efforts at modernizing and reform of legal system.[5] In both Arbitration and Mediation, the neutral party was tasked to resolve the dispute over and above, punishing malfeasance.

Alternative Dispute Resolution is encouraged as it stems down the time consumed on litigation.

ADR UNDER SHARIA LAW/ISLAMIC LAW

ADR is not foreign to Islamic Law in Nigeria and is referred to as '***Sulh'*** (resolution or fixing generally a problem). It is a popular aspect of Islamic legal system which derives its origin like other Islamic principles of law from the Qur'an and supplemented by the hadith; traditions of the Prophet and ***Ijma***; the consensus of Muslim jurists.[6]

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[4] Barrett J. T. A History of Alternative Dispute Resolution, https://www.worldcat.org/wcpa/servlet/DCARead?standardNo=0787967963&standardNoType=1&excerpt=true

[5] Ezediaro, E. "Guarantee and Foreign Investment in Nigeria" (1971) 5 International Law 770 @ 775 qtd in Ibrahim Iman. The Legal Regime of Customary Arbitration in Nigeria. Unpublished Paper.

[6] Hon. Justice Idris Abdullahi Haroon, 'A Paper on the Use of ADR in Sharia Courts' <https://nji.gov.ng/images/Workshop_Papers/2017/Area_Sharia_Customary_Judges/s4.pdf>

Under Islamic Law, the forms of ADR include '***Sulh'*** which refers to Mediation, Conciliation or Negotiation. This occurs where parties to a dispute reach a compromise upon an issue negotiated by themselves or with the aid of a third party. '***Tahkim'*** which refers to Arbitration. The use of Ombudsmen and Expert Determination are also considered as ADR mechanisms. **Tahkim**: (Arbitration) In pre-Islamic Arabia, arbitration was practiced as a local means of settling disputes, somewhat similar to customary arbitration in the pre-colonial era of Nigeria. After the advent of Islam, arbitration was often employed to settle disputes. The Prophet Muhammad (S.A.W.) in a reported case (Ka'ba arbitration), advised parties to settle their disputes via arbitration.[7]

Muhtasib: Ombudsman. A public complaint system is now indispensable in any society, there is a similar concept under Islam known as *Muhstasib*. In this, the *Muhstasib* is an office with the duty of taking account of matters like, quality of commodities on sale in markets, honesty in trade and commerce, and observance of modesty in public etc.

Fatwa: is a non-binding legal opinion on a point of Islamic law given by a qualified Jury in response to a question posed by a private individual or Government. A jurist issuing Fatwa is called a Mufti. Fatwa of a Mufti is similar to Expert determination in which parties to a dispute refer their issue to an expert for evaluation with regard to the technical nature of the dispute. The verdict of such expert is only persuasive.

THE ISLAMIC LAW

Islamic law is an independent legal system distinct in body, structure and source from any other law, and the term 'Sharia Court' refers to Islamic law-based Courts. It is hierarchical in order. Sharia Courts are regulated by the extant Sharia Court rules and in line with Islamic Law provisions. These Rules contain reference to ADR in the resolution of conflict.[8]

Under Islamic Law, where there are disputes in marriage, representatives of both parties are called to meet with the parties to iron out their differences. Whatever

[7] El-Ahdab, A.H., Arbitration with the Arab Countries (2nd ed., Kluwer Law International, The Hague, 1999), p.17

[8] <https://nji.gov.ng/images/Workshop_Papers/2017/Area_Sharia_Customary_Judges/s4.pdf>

agreement reached is binding. However, in terms of marriage, it only works if parties want to continue with the marriage.

For example, the practice of 'Sulh' is placed on the provisions of Order 12 Rule 1 of the Katsina State Sharia Court of Appeal which states that '' a Court may, with the consent of the parties to any proceedings, order the proceedings to be referred for arbitration to such person or persons and in such manner and on such terms as it thinks is just and reasonable''. As pointed above, the above section serves as the legal basis for Sharia Courts on the application of *Sulh* (amicable settlement) also it indicates that parties are at liberty to have their disputes referred by the Court to a professional arbitrator to avail them the opportunity to settle the dispute out of Court. Under Islamic Law, there are certain matters under which '*Sulh'* is recommended and these include:

a) Where the case is complicated due to legal issues or intrigues involved therein;

b) Where the litigation is such that may likely strain blood relationship among disputants tied by kinship;

c) Where each of the parties to litigation is able to present his evidence but the evidence so presented are on equal weight or strength when put on a scale of justice, both appeared to be same in terms of proving claim and denial, then the judge may result to such settlement out of Court;

d) Where the parties to litigation happen to be influential, Sulh is advised to avoid breach of peace;

e) Where the litigants happen to be learned and respected men in the locality with large followers; and

f) Where the litigants who appear before the judge consist of an influential and a weak litigant who may not be able to derive the fruit of the judgment due to the influence of the other party, the judge may advise on peace-making but on the condition that the judge does not appreciate the nature of litigation or that the two parties' consent to making peace.

ADR UNDER CUSTOMARY/AREA COURTS

The lower Courts in Nigeria practice ADR in the settlement of disputes, particularly, mediation and Customary Arbitration. The Customary Courts are predominantly utilized in the Southern part of Nigeria while the Area Courts, in the Northern region. In the traditional setting, elders play prominent role in what you refer to as Alternative Dispute Resolution. This terminology that is being referenced has been in our system prior to establishment of the Common Law System of English Law. In Customary Law, we have our elderly women in Ibo land referred to as the "*Umuadas*".

ADR UNDER THE FCT CUSTOMARY COURT RULES

Order 11 Rule 1 & 2 of the FCT Customary Court (Civil Procedure) Rules, 2007 provides for Alternative Dispute Resolution as follows: -

Rule 1: A Court may, with the consent of the parties to any proceedings, order the proceedings to be referred for Alternative Dispute Resolution to such person or persons in such manner and on such terms as it thinks just and reasonable.

Rule 2: On consideration of the report or award of the Alternative Dispute Resolution Panel, the Court may

(a) Confirm any Award of the Alternative Dispute Resolution Panel and enter it as the judgment of the Court; or
(b) Set aside the Award and fix a date for the hearing of the case by the Court and proceed to the hearing of the case accordingly.

The Supreme Court in **EGESINBA Vs. ONUZURIKE (2002) LPELR 1043 (SC)** held that: -

> "The four ingredients usually accepted as constituting the essential characteristics of a binding customary arbitration are: (i) voluntary submission of the dispute to *the arbitration of the individual or body; (ii) agreement by the parties either expressly or by implication that the decision of the arbitrators will be accepted and binding; (iii) that the arbitration was in accordance with the custom of the parties and (iv) that the arbitrators reached a decision and published their award"*

The Supreme Court in **UME Vs. OKORONKWO & ANOR (1996) LPELR – 3361 (SC)** pronounced that: -

> *"One of the many methods of settling disputes under the Customary law is to refer the dispute to the family head or an elder or elders of the community for a compromise solution. When the dispute has been investigated at the meeting and in accordance with the law and a decision is given, it is binding on the parties."*

The Court of Appeal in **NWALEM NWEKE Vs. ENUCH NWUZI (2011) LPELR – 4641 (CA)** noted that: -

> *"In **AGU Vs. IKEWIBA supra** after citing with approval inter alia **ASSAMPONG Vs. KWEKU & ORS (1932) 1 WACA 192, PHILLIP NJOKU Vs. FELIX EKEOCHA (1972) 2 ECLR 199, MBAGBU Vs. AGOCHUKWU (1973) 3 EC SLR (Pt. 1) 90, IYANG Vs. ESSIEN (1957) 2 FSC 39** and **IDIKA Vs. ERISI (1988) 2 NWLR (Pt. 78) 573,** the Supreme Court, Per Karibi-Whyte, JSC held that: 'Nigerian law recognizes arbitration at customary law which is distinct and different from arbitrations under statutes, if the following conditions are satisfied: (a) if parties voluntarily submit their disputes to a non-Judicial body to wit, their elders or chiefs as the case may be for determination and (b) the indication of the willingness of the parties to be bound by the decision of the non-Judicial body or freedom to reject the decision where not satisfied – (c) That neither of the parties has resiled from the decisions so pronounced "**OHIAERI Vs. AKABEZE (supra)** is the other decision of the Supreme Court against which background the Appellants urged that the lower Court's decision should be considered. The decision which came subsequent to **AGU Vs. IKEWIBA supra** applied and consolidated the Apex Court's earlier decisions and at page 24 of the report Per Akpata, JSC*

> *dwelt on further that the decision or award was accepted at the time it was made…"*

In **NJOKU V FELIX OKOCHA**[9], arbitration was also illustrated to mean:

> *"Where a body of men, be they chiefs or otherwise, act as arbitrators over a dispute between the parties, their decision shall have a binding effect, if it is shown firstly that both parties submitted to the arbitration. Secondly, that the parties accepted the terms of the arbitration, and thirdly, that they agreed to be bound by the decision, such decision has the same authority as the judgement of a judicial body and will be binding on the parties and thus create an estoppel"*

Further to this, in **NWANKPA V NWOGU**[10], the Court laid down requirements a party relying on customary arbitration needs to prove in order to establish a plea of *estoppel per rem judicata*. It stated: (1) those who sat over his dispute were, under the customary law alleged, competent to adjudicate over that class of cases – in other words that they constituted a judicial tribunal under that law, (2) the decision of the arbitrators was final in the sense that it left nothing to be determined or ascertained thereafter in order to make it effective and capable of execution, (3) the decision was not under some other rule of customary law of the parties, subject to subsequent review or modification by the panel of chiefs or elders who pronounced it, (4) the peculiar incidents of the particular customary law (on which the parties rely) with regard to mediation or arbitration or the arbitral process or customary law arbitration.

The practice of dispute resolution often via community elders has been recognized under Nigerian jurisprudence. In **ASSAMPONG Vs. AMUAKU**[11], the WACA held that where matters in dispute between parties are, by mutual consent investigated by the arbitrators at a meeting held in accordance with native law and custom and a decision given, it is binding on the parties and the Supreme Court will enforce such decision.

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[9] [1972} 2 ECSLR 99
[10] (2006) 2 NWLR (Pt. 964) 251
[11] (1932) 1 WACA 192

Although subsequent case law denied the validity of customary arbitration, the Courts restated that Customary Arbitration is valid in the locus classicus case of **AGU V IKEWIBE**[12] The Supreme Court having recognized customary arbitration in **AGU Vs. IKEWIBE (supra)**[13] Wherein two parties agree to subject to indigenous settlement with an undertaking to abide by the decision under Customary Arbitration, such decision is endorsed to be binding on both parties and parties are bound by it. Similarly, the Customary Court can also recommend Customary Arbitration with the rider that such decision be registered in the Customary Court.

Given the judicial backing of Customary Arbitration reinforced in **AGU V IKEWIBE (supra),** it is now practiced widely in Nigeria. This is relevant particularly in non-urban areas of Nigeria where the traditions of the people are still in practice.

Section 16 of the Evidence Act, 2011 states that "a custom may only be adopted as part of the law governing a particular set of circumstances if it has been judicially noticed or it can be proven to exist by evidence". A judicially noticed fact is one which has become notorious by frequent proof in the Courts or has been frequently noticed by the Courts. By Courts we mean a Superior Court of Record in Nigeria. The burden of proving a Custom is on the person alleging its existence. The person has a duty not only to prove the existence of the Custom but also to show its relevance to the case at hand.

When a custom cannot be established as judicially noticed, it must be proven as a fact. One way by which the existence or nature of a custom can be proven is by giving in evidence, the opinion of persons who would likely know of its existence.[14] The Supreme Court has held that they must be "independent" witnesses.

With regards to the bindingness of decisions of customary arbitration, it was stated in **NDAH V CHIANUOKWU**[15] that:

> *"Where two parties to a dispute voluntarily submit the issue in controversy according to customary law and*

[12] (1991) 9 NWLR (Pt. 180) 385

[13] ibid

[14] See Section 17 of the Nigerian Evidence Act (2011) a custom may be judicially noticed if it is adjudicated upon once by a superior Court of record. Section 18 further provides that where a custom is not judicially noticed it has to be proved.

[15] (2006) 17 NWLR (Pt. 1007) 74

> *agree expressly or by implication that the decision of such arbitration would be accepted as final and binding, then once the arbitrators reach a decision it would no longer be open to either party to subsequently back out of or resile from the decision so pronounced".*

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 or resile from the decision of the arbitrators to which he had previously agreed. The binding effect of the decisions of customary arbitrators derives from the fact that parties who have the right to resort to Court for adjudication of their disputes have voluntarily, without any prompting, opted for a decision by a non-judicial body, the decision of which they have held themselves to be bound by neither of them can be allowed, both in law and equity, to resile from the position they have willingly created. No one must be allowed to approbate and reprobate at the same time. In the instant case, the decision of the arbitral panel operated as an estoppel'

In the case of **OKPURUWU VS. OKPOKAM**[16], the Honorable Justice Oguntade, JCA (as he then was) observed thus: -

> *"In the pre-colonial times and before the advent of the regular Courts, our people (Nigerians) certainly had a simple and inexpensive way of adjudicating over disputes between them. They referred them to elders or a body set up for that purpose. The practice has over the years become strongly embedded in the system that they survive today as custom".*

At the conclusion of a Mediation session the settlement reached would not be binding on the parties but would be morally unconscionable for parties to depart from it.

STATUTES ESTABLISHING AREA/SHARIA/CUSTOMARY COURTS

(A.) AREA COURTS

[16] (1988) 4 NWLR (Pt. 90) 554

Using the Federal Capital Territory as a point of reference, the Federal Capital Territory Area Court Act Cap 477 Laws of FCT Nigeria established the Area Courts and conferred them with Jurisdiction. (An Act to establish the Area Courts and confer them with Jurisdiction; and to provide other matters connected therewith).

Section 3(1) of the Area Courts Act (FCT) provides thus "The National Assembly may establish such Area Courts as it thinks fit for the Federal Capital Territory Abuja.

Section 4(1) – provides that an Area Court shall consist of the following

(a) An Area Court Judge sitting alone or
(b) An Area Court Judge sitting with one or more members.

Section 4(2) All questions of Islamic Personal Law shall be heard and determined by any member of an Area Court learned in Islamic Law sitting alone.

Section 18 – An Area Court shall have Jurisdiction and power to the extent set forth in the warrant establishing it, and subject to the provisions of this act and of the Criminal Procedure Code Act, in all civil and Criminal Causes in which all the parties are subject to the Jurisdiction of the Area Court.

Section 22 – In criminal causes an Area Court shall administer the provisions of (a) the Penal Code Act and any subsidiary legislation made there under.

Section 24 – The president may confer Jurisdiction to enforce written laws in Federal matters.

Area Courts in states without Customary Court treat both civil and criminal matters

In states like Sokoto, Zamfara, Borno where they do not have Customary Courts the Area Courts adjudicate over both Civil and Sharia Law.

Customary Court in Kaduna State have both Civil and Criminal Jurisdiction while Sharia Courts have both Civil and Criminal Jurisdiction. In Kaduna State, the criminal jurisdiction in sharia is limited to Moslems but the criminal jurisdiction in Customary Court in Kaduna State extends to Moslems who consent.

It is imperative that we look at the history of establishment of Area Courts. The Area Courts edict 1967 which came into operation on the 1st day of April, 1968 provides in section 3(1) "By warrant under his hand, the Chief Justice may establish such Area Courts as he shall think fit.

Section 17(1) provides for the different grades of the Area Court while section 18 provides for criminal and civil Jurisdiction of the Area Courts. Section 22(a) provides that in criminal Causes, an Area Court shall administer the provision of the Penal Code Law and any subsidiary legislation made thereunder.

Section 54 of the Edict provides that "any party aggrieved by a decision or order of an Upper Area Court may appeal to: -

(a) the Sharia Court of Appeal in cases regarding Moslem personal law
(b) the High Court

The Civil Jurisdiction of Area Courts to adjudicate on Customary Law have been absorbed by the Customary Courts by virtue of the establishment of the Customary Court in FCT.

The Area Court Civil Procedure Rules (made pursuant to Section 65 of the Area Courts Act, Cap 477 and commenced 1st April, 1971), Order 12 Rules 1 and 2 made provision for Arbitration thus: -

1) "A Court may, with the consent of the parties to any proceedings, order the proceedings to be referred for arbitration to such persons or persons and in such manner an on such terms as he thinks just and reasonable.
2) On consideration of the Report or Award of the arbitrator the Court may –
   a) Confirm any Award of the arbitrator and enter it as the judgment of the Court; or
   b) Set aside the Award and fix a date for the hearing of the case by the Court and proceed to the hearing of the case accordingly"

(B.) SHARIA COURT

In the Federal Capital Territory (FCT), **Section 4(2) of the Area Court Act** empowers the Area Court to adjudicate over Islamic personal law. There is no Sharia Court in the FCT.

Appeals from such decisions go to the Sharia Court of Appeal.

The FCT Sharia Court of Appeal is a Superior Court of Record established by Section **262 of the Constitution** and **Section 9 of the Sharia Court of Appeal Act**, CAP 550 LFN

Section 275(1) provides for the establishment of Sharia Court of Appeal of a state.

Section 260(1) provides thus "there shall be a Sharia Court of Appeal of the Federal Capital Territory, Abuja".

Section 277 of the Constitution of the Federal Republic of Nigeria provides for Sharia Court of Appeal of a State thus: - … shall in addition to such other jurisdiction as may be conferred upon it by the law of the state exercising such appellate and supervisory jurisdiction in civil proceedings involving questions of Islamic personal law which the Court is competent to decide in accordance with the provisions of subsection (2) of this section.

Sub section (2): for the purposes of sub section (1) of this section, the Sharia Court of Appeal shall be competent to decide-

(a) Any question of Islamic personal law regarding a marriage concluded in accordance with that law, including a question relating to the validity or dissolution of such a marriage or a question that depends on such a marriage and relating to family relationship or the guardianship of an infant;
(b) Where all the parties to the proceedings are Muslims, any question of Islamic personal law regarding a marriage, including the validity or dissolution of that marriage, or regarding family relationship, a foundling or the guardianship of an infant;
(c) Any question of Islamic personal law regarding a wakf, gift, Will or succession where the endower, donor, testator or deceased person is a Muslim;
(d) Any question of Islamic personal law regarding an infant, prodigal or person of unsound mind who is a Muslim or the Maintenance or the guardianship of a Muslim who is physically or mentally infirm; or

(e) Where all the parties to the proceedings, being Muslims, have requested the Court that hears the case in the first instance to determine that case in accordance with Islamic Personal Law, any other question.

SHARIA CRIMINAL LAW was enacted in states that implemented sharia law.

In Kaduna State, Area Courts were abolished, and in its place they created Sharia Court and Customary Court. The Edict that created those Courts made them exclusive. The Customary Courts were exclusively for Christians and the Sharia Court were for Moslems. In their various grades there is provision for consent of parties.

A Moslem can consent to take his matter to Customary Court in Kaduna State and vice versa and such consent must be in writing. If a Moslem wants to be tried by a Customary Court, he must consent in writing.

Sharia Court of Appeal has been in existence in most of the Northern States. However, in FCT there are no Sharia Courts but there is Sharia Court of Appeal. Cases from Area Courts on Islamic Personal law go to Sharia Court of Appeal in FCT.

In all the Northern States, Area Court rules have provision for out of Court settlement which is ADR. Most of the time friends and family intervene or traditional rulers. When the traditional rulers or friends or family settle, they come back to Court to announce that they have settled and adopt the terms in Court.

THE SHARIA COURT OF APPEAL FCT

The Sharia Court of Appeal in FCT have a structured ADR section.

In Sharia Court of Appeal FCT, two arbiters are appointed in cases of dispute between husband and wife one from the husband's side and another from the wife's side. The disputants present their case and the arbiters will respond. Both parties are thereafter settled amicably. Wherein the parties agree, the resolution can be reduced into writing and it becomes consent judgment.

The ADR Judge calls parties to the chambers and advices the parties as to the ADR Mechanism. Parties are then advised to bring their representatives.

In Sharia Court of Appeal, most of the cases handled under Sharia is on inheritance. Where some of the Estate is large, they advise the Area Court Judges in order not to run into problem to refer such cases to the Sharia Court of Appeal.

The Grand Kadi under his inherent powers to make Rules for the smooth running of the Sharia Court of Appeal came up with Rules for ADR. In FCT, they have Sharia Court of Appeal Center for Alternative Dispute Resolution with a director designated to the department with Staff. They have a specific form (CONSENT FORM) that they give out to the other parties to sign that they consented and are to abide by the Resolution of the Center. They have also a Confidentiality Form. There is a rider that parties are not to use submissions made in resolving the dispute in ADR in other fora or take another party by surprise out of mischief. ADR is also about WIN-WIN situation, parties make concession regarding their right and because of the atmosphere they concede and the submissions cannot be utilized elsewhere. Wherein the parties opt to go to Court before Panel resolution or giving Award on the issue, parties are not allowed to use the submissions made in ADR for litigation.

It is expressly stated that even in other fora for amicable resolution, parties cannot use whatever happened in the SHARIA COURT OF APPEAL CENTER FOR ALTERNATIVE DISPUTE RESOLUTION to gain advantage over the other party. Once the appropriate forms are filed, the Panel proceeds in resolving the dispute amicably. The center has Islamic scholars with two Panelists on Islamic jurisprudence. Parties are given an opportunity to nominate Panelists if they so wish and if they nominate they have conditions to satisfy such as (1) they are not related to the parties and have no interest either directly or indirectly. Prior to that, parties are informed about the two Panelists from the ADR Center of the Sharia Court of Appeal as well as their qualification.

Parties are asked if they have any objection to the Panelists presiding. Example of such questions are whether they are related to ‘A’ or ‘B’, they can be disqualified and another person is substituted. If they have no objection or they do not intend to bring any person to sit with the Panelists, the process commences.

(C.) CUSTOMARY COURT

The Customary Court in FCT was established by the enabling Act – “Federal Capital Territory Customary Court Act, 2007”. Section 1(1) provides “there is

established Grades of Customary Court for the Federal Capital Territory, Abuja, as specified in the Schedule to this Act".

Section 280(1) of the Constitution of the Federal Republic of Nigeria 1999 as amended provides for the establishment of Customary Court of Appeal of a state. It provides "There shall be for any state that requires it a Customary Court of Appeal for that state".

Section 265(1) of the 1999 Constitution provides thus "There shall be a Customary Court of Appeal of FCT".

Section 267 of the 1999 Constitution provides "The Customary Court of Appeal of the Federal Capital Territory Abuja shall, in addition to such other Jurisdiction as maybe conferred upon it by an Act of the National Assembly, exercise such appellate and supervisory Jurisdiction in civil proceedings involving questions of Customary Law.

In recognition of ADR, the Customary Court has in its Rules of Court in **ORDER 11 of the FCT Customary Court (Civil Procedure) Rules 2007** provide for ADR as follows: - *"A Court may, with the consent of the parties to any proceedings, ORDER the proceedings to be referred for Alternative Dispute Resolution to such person or persons in such manner and on such terms as it thinks just and reasonable".*

CUSTOMARY COURT OF APPEAL, FCT.

Although we do not have an ADR Center in the Customary Court of Appeal (FCT), the Customary Court of Appeal, FCT also encourages Alternative Dispute Resolution between parties. In the unreported case of **MR OBIOHA HERBERT IHEME V. MRS ANITA CECILIA IHEME** the Customary Court of Appeal invoked the powers therein to urge the parties to settle out of Court. This prompted the litigant to settle with the Respondent after the marriage had been dissolved at the trial Court.

we can say Nigerian law recognizes arbitrations at customary law which is distinct and different from arbitrations under statute wherein these conditions are satisfied thus: -

1) *If parties voluntarily submit their disputes to a non-judicial body to wit the elders or chiefs as the case may be for determination*
2) *The indication of the willingness of the parties to be bound by the decision of the non-judicial body or freedom to reject the decision where not satisfied*
3) *That neither of the parties have resiled from the decisions so pronounced. See* ***AGU Vs. IKEWIBE*** [17]*The Supreme Court in the case of* ***AGU Vs. IKEWIBE (supra)*** *held that where a body of men, be they chiefs or otherwise act as arbitrators over a dispute between two parties their decision shall have a binding effect, if it is shown firstly that both parties submitted to the arbitration. Secondly, that the parties accepted the terms of the arbitration and thirdly, that they agreed to be bound by the decision. Such decision has the same authority as the judgment of a judicial body and will be binding on the parties and thus creates an estoppel. Per Karibi-Whyte JSC (p. 26 Paras D-F)."*

Most of our traditions resonates ADR because ADR is referred to in some narratives the "new wine in old skin" because the concept is primordial. It is not a contemporary innovation. The African society has its traditional ways of resolving disputes and generally in most traditional climes the principal objective is for disputing parties to return to status quo ante. Unlike the western jurisprudence where the essence is to do justice no matter whose ox is gored. The traditional African setting underscores the restoration of relationships. In some Ibo tradition, the family of the convict must pay restitution to the family of the victim. Example, where the family of the accused are owners of streams, as part of restitution for the offences committed to the neighboring community, the neighboring community would be given fishing rights in the waterways that belong to the other party. In some cases, concession is given to fetching water for a period of time in their ponds and fishing rights as well for certain duration.

[17] (1991) 9 NWLR (Pt. 180) 385

Marriage in the traditional setting is marriage of both families not the respective individuals. In circumstances where there are disputes amongst the parties, both families are under an obligation to resolve the dispute. During the traditional marriage, there is always an admonition by the middle man and family members that it is a union for life. In some cultures where the bride goes on to marry another man, the family of the bride is obliged to return the bride price to the estranged husband family. In fact, so strong is the tradition that the marriage remains undissolved under some traditional custom. Where such a woman gives birth to children outside the traditional marriage the husband is deemed to be the father of such children until the dowry is returned. The whole essence is to assuage the party for a breach of contractual marital relationship.

Under traditional Yoruba custom. Public embarrassment is considered as punishment in some cases like theft. The accused is forced to go into the open market place sometimes with the stolen items and it has to be at the market place. This is to show the public that the act is reprehensible. It also is a form of deterrence to others.

In the traditional setting, a lot of empirical records of dispute were settled in the Emir's palace or King's palace by the council of elders, and in some communities, the disputing parties are made to swear by the gods to abide and honor the terms of settlement meted out by the elders. Such similar settlement forum also exists in the market place where the women-market-leader in council with other respectable women-traders receive complaints or disputes from amongst men. Some may be commercial dispute or as simple as debt recovery.

In Yoruba culture, we have IYA OLOJA (Mother of the marketing community – women leader). The commercial differences or allocation of spaces to trade or credit facility amongst fellow traders are presented to the Iya Oloja in council and they resolve the dispute between the parties. The Iya Oloja in council were highly respected and highly influential within the community and they veered into politics. They were also loved by politicians who saw them as veritable channels for grassroot mobilization.

EXAMPLES OF RESOLUTION OF DISPUTE IN DIFFERENT COMMUNITIES

In the communities in the South-South, South-East, South-West and North-Central, traditional institutions were observed to have well established mechanisms for the resolution of local conflicts in the Community.[18]

In OTORO CLAN in ABAK L.G.A. of Akwa Ibom State they maintain peace and order and settle minor disputes between the parties. In Ngwa Land, Abia State, traditional institutions are very revered that when parties run to Court to litigate a matter, one question the Courts would always ask is which traditional institution tried the matter before it was brought to Court. In land disputes in Ikot Odon, the first step is to plant the traditional injunction which is "Offo" warning the warring parties not to interfere with the land pending the resolution of dispute.

In Umuahia town, Abia State, the institution for dispute resolution is the "Okonkwo". The Okonkwo would put the "Oumu" (injunction) on the disputed property meaning the land is in dispute or on any economic tree pending the resolution and anyone who tampered with the disputed property was fined or sanctioned. The Eze-Akang and Eze-Mgboko were considered as the Panelists or Arbiters and parties went with their witnesses and relatives wherein they take an oath to speak the truth.

In Lagos, Ogun, Oyo and Osun States, disputes are resolved by reconciliatory means by family members and where it fails, the Oba-in-Council is seized of the matter. In Ondo and Ekiti State, dispute resolution starts with the family head, the traditional chief and the paramount ruler.

In Nkwere in Imo State, the Age Grade Heads will sit in the matter first and then take it to the Village Heads. Wherein there is a breakdown on the attempt made by the Age Grade, it goes to the Village Head. If the Village Head is able to settle the dispute, it stands disposed-off. However, if not, it is brought to the General Council i.e., **ESHI's Cabinet** (THE ESHI OF NKWERE). The Cabinet members and the Eshi arbitrate on it. In land matters or building in Owerri, there is a report to the family members, report to Onye Ishi Oha Owerri (Village Head) at **Umuororonjo**. If the decision at the level of the village head is not acceptable, parties can take the dispute on appeal to the **ALA ENYI OWERRI.** Wherein it is unresolved at that level it is reported to the Eze who takes a decision.

[18] Epiphany Azinge, *Restatement of Customary Law of Nigerian*, "Nigerian Institute of Advanced Legal Studies" (NIALS: 2013) p. 58

Similarly, in Mbieri and Mbano in Imo State, disputes are resolved by taking them to the elders in the kindred first. Wherein it is unresolved at that level it is reported to the Eze who summons the parties to give their own side of the story and tries to resolve the dispute.

In Ngwa land you have the "ISI OPARA" (that is the 1st sons in the Community), they also have the "UDO ALA" (that is persons appointed by the Community to make peace). Where there is a dispute, elderly people usually mediate the dispute and wherein they cannot, the matter is referred to the "Isi Opara" to submit the dispute or the "Amala", the village gathering of men or the Okonkwo. In Nnewi, the Igwe has a hand in the dispute Resolution. If the Umunna's cannot resolve the dispute, it is brought to the Igwe. The Obis' also play a role in dispute resolution. If the Obis' cannot resolve the dispute, the matter goes to the "Igwe" who sits as the final level of resolution of the dispute in the customary dispute resolution. Where the Umunna's are unable to resolve the dispute, the Igwe assists by constituting a Panel of Arbitrators to lessen the workload of the Igwe. However, parties must willingly submit for it to be effective. See **OPARAJI Vs. OHANU**[19] the Supreme Court observed that where traditional arbitration is resorted to and the parties agree to be bound by the decision and on the basis of the understanding that one party ask another to take an oath, the side that make the other to take the oath will not be allowed to resile from the understanding. In **NWANNEWUIHE Vs. NWANNEWUIHE**[20] the issue was on the Customary Arbitration decision by the community Traditional Chiefs between the parties. The Court held them bound by the decision of the Community Chiefs.

The whole essence of Customary Courts is to administer justice in its entirety without the strict adherence, to statutes and technicalities. The underlining principle is natural justice.

Application of Customary Law is ADR and foundation of Customary Law is ADR sitting as Courts in contemporary world and applying Customary Law which is built on ADR is commendable.

RECOMMENDATION/CONCLUSION

[19] (1999) 9 NWLR (Pt. 618) 290 at 304
[20] (2007) 16 NWLR (Pt. 1059) 1 at 7

Sharia Law operates in Sharia Courts while in Customary law, the Custom of the Area the litigants come from in particular for dissolution of Marriage, the Custom of the woman where the Marriage was celebrated.

Area, Sharia and Customary Courts have Alternative Dispute Resolution embedded in their systems. The essence of which is to have amicable settlement of dispute in a more refined way that sustained relationship in a communal cohesion. Alternative Dispute resolution leads to the win-win situation. Parties are able to sustain existing relationship.

In the criminal aspects, ADR is used in crimes committed in the community. In criminal law, once a crime is committed and a state takes over, nothing comes to the victim of the case. ADR encourages RESTITUTION and allows victims/offenders mediation.

RECOMMENDATION

1. It is my recommendation that more emphasis be placed on victim offender mediation.

2. More Civil and Criminal Cases be placed on ADR.

3. Not all cases should proceed to trial. Courts can cause parties to settle e.g., Land, Family Property, Dissolution of Marriages, as it fosters family cohesion and relationship. It is important to note that once a litigant pushes his/her matter to trial to sustain family cohesion is impossible.

4. Some cases affect relationships. ADR mechanism should be explored. Mediation is very useful in Area/Sharia and Customary Courts. Where Mediation is explored, the Customary Court Judges, the Area Court's Judges and Sharia Court's Judges wear the cap of a Mediator and brings Parties to arrive at a settlement. When the Area/Sharia/Customary Court Judges bring Parties to a resolution, the end is a win-win for Parties. Both Parties are winners and relationships are maintained.

5. Reduction of the Court docket. Cases that get to Area/Sharia/Customary Courts, Mediation should be encouraged so that the Court's Docket is not overloaded.

6. VICTIM/OFFENDER SETTLEMENT – in the context of QUASI-CRIMINAL CASES such as stealing of products rather than proceed to trial, the offender can return the product and punitive measures be meted out. Restitution should be encouraged such as the Farm produce going back to the owners and the owner is made whole.

7. As earlier mentioned in this paper, Customary Arbitration had existed before Commercial Arbitration. Customary Arbitration should be encouraged as it is less time consuming than Commercial Arbitration and it also takes some of the Cases off the Court's Docket. Customary Arbitration explores the different ways that leads to settlement that are amenable to both Parties. ADR leads to satisfaction and societal cohesion. Customary Arbitration is a recognized model for settling disputes as earlier mentioned in this Paper and has been upheld by the Supreme Court.

8. Training of Judges. Judges and Khadis from Customary, Area Courts and Sharia Courts should be trained on ADR Process, focus should be on how ADR could assist in adjudication of Cases.

9. For its practicability, Courts that do not have codified ADR Rules should be encouraged to enshrine ADR in their Rules as well as establishing GUIDING PRINCIPLES.

10. Establishment of ADR Rules is paramount to the process. At the point of filing cases, ADR Rules should encourage that some Cases be assigned to an ADR Judge or in Quorum Sitting, assigned to a Panel of ADR Judges and the ADR Judges should determine the case while some of the ones that are unrelated to ADR can go to the General Cause List.

11. If the Judges are not knowledgeable in ADR, there would not be quality of treatment in terms of decisions on the Mechanisms to adopt on ADR. Training and retraining of Judges on ADR is of paramount importance. When Cases are filed, it is at the point of filing that it is determined whether the Matter goes to the General Cause list or goes to ADR.

Let us take for instance, Matters relating shareholding is for settlement out of Court. In the Entity of Customary or Sharia law, it relates to cohesion in the Family, Victim Offender Mediation should be encouraged, possibility of

rehabilitation is high as offender moves from position of guilt. It also helps the victim in terms of reparation because victims is brought back to the position to being offended while the offender is rehabilitated when Restitution has been made, integration into the Community is high.

Example – Where A steals 10 tubers of yam and A is asked to add 5 tubers of yam in return or in addition to the ten tubers of yam, A is better integrated back into the system. Rehabilitation is better achieved when there is Restitution, Counselling, and Education, as opposed to where there is a custodial system. In conclusion, ADR reduces the Courts' Docket.

CONCLUSION

Given that disputes are inevitable within the interaction of men and women a means of settling such conflicts was essential to maintaining a peaceful society. The Sharia law which is in force in States addresses conflicts via several means of ADR which are somewhat similar to the current ADR spectrum we have today as earlier mentioned.

The Customary Courts encourage the use of ADR by enforcing the decisions reached in Customary Arbitration and settlements obtained via Mediation. It has been noted that Customary Arbitration, although not as popular as Commercial Arbitration, domestic/international arbitration, it is still quite relevant within our Community.

Similar to customary arbitration, mediation is also as frequently used for the settlement of disputes and forms an essential component in the amicable settlement of disputes.

The relevance of ADR cannot be overemphasized in our traditional setting as it has facilitated the speedy dispensation of Justice in our communities and our legal Jurisprudence. Rather than be subjected to litigation and its lengthy process, many disputes are speedily dispensed with.

The Customary Courts in their Rules recommend ADR to parties as well as the Sharia Courts in some states and Area Courts having used the FCT as a model.

It is imperative to reemphasize as earlier stated that much as it is defined as mediation, this is the traditional way of settling dispute and it comes in different

forms at the Kings palace, Emir, Obi, Chief, Family Heads, a King in Council with highly respectable traditional officers who will settle the dispute more often than not in an amicable manner that both sides will feel assuaged by the King in Council's intervention. In some societies, Kolanuts are exchanged and in some settings undertaking is made in the presence of gods e.g., god of Ogun.

I have also noted that in some customs, elders assuage parties by restitution. In this instance, where an offence is committed, the culprit is made to give the other party fishing rights or right to fetch water in their stream. Other examples include - People giving out a bride in return for an offence. Thus, assuaging the parties remain the essence of restitution. Marriage under Customary Law is considered as marriage of family. In some cases, even when the parties dissolve the marriage, the family members remain cordial and they attend social activities particularly where there are children of such a union.

In conclusion, the cardinal principle of ADR is embedded in natural justice. The various concepts of ADR – Negotiation, Mediation (sometimes conciliation is included as a category but for simplicity, it may be regarded as a form of mediation) and Arbitration in the traditional setting has been extensively discussed.

The scope and relevance of ADR cannot be overemphasized in Area, Sharia and Customary Courts.