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The Use Of Alternative Disputes Resolution (ADR) Mechanisms In Resolving Labour Disputes In Nigeria

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ABSTRACT

This study examined the theoretical framework for industrial conflict generally. The study conceptualizes labour matters and, seldom, inevitable disputes. It emphasized the mechanisms, flagging the settlement of labour dispute resolution mechanisms while appreciating the effective application of alternative dispute resolution mechanisms to such matters, particularly as provided under the Trade Disputes Act. Overall, the study queried the undue statutory ministerial interference with labour dispute resolution processes and decisions. The study submitted, and accordingly recommended, inter alia, that although there may be a need eventually to supervise or, otherwise, regulate the settlement processes, like the general rules guiding arbitration and conciliation processes under the Arbitration and Conciliation Act, conferring the Minister with powers to interfere, as in the extant Trade Disputes Act, stands completely out of the mark.

Keywords: Conflict**,** Alternative Disputes Resolution, Industrial Conflict, Settlement

INTRODUCTION

Conflict is an unavoidable part of any society's existence. Clashes of interests in the home, religious, political, tribal, or labour arenas may culminate in the outbreak of violence. Despite the fact that conflict is typically associated with a negative connotation, its presence can be crucial in the drastic development of a civilization. When it does occur, though, it is necessary to find a remedy. If this conflict or dispute is not adequately managed, it could result in anarchy and instability, which would ultimately have a negative impact on the whole economic structure of a country or region. According to the findings of this study, a labour-related disagreement may emerge as a result of late payment of salaries, redundancy, and inadequate welfare benefits for employees, among other factors. As a result, workers are compelled to engage in industrial action in order to make their demands known to their employers' management. These actions are taken in anticipation of a legally recognized labour conflict. As a result, the goal of labour law is to address these issues as quickly as possible whenever they arise. Every labour dispute, no matter what the nature of the competing interests are, is bound to have problems. These problems are coordinated by the operational and regulatory architecture of the dispute settlement system.

A settlement mechanism must be in place in order to suspend the right to strike and provide any appropriate and timely methods of resolving a conflict or dispute, which is one of labour legislation's primary goals. However, the Trade Disputes Act, which established a variety of mechanisms for the resolution of labour disputes in Nigeria, has its own set of difficulties and hinders the voluntary participation of parties to labour disputes. With the Trade Disputes Act, the Minister of Labour and Productivity has a lot of power to look into and solve any trade disputes that might happen.

Once again, the Trade Disputes Act prohibits disputing parties from bringing their grievances directly before any arbitral body without first consulting with the Minister of Trade and Industry. It is humbly claimed that the parties' rights to due process of law and freedom of access to justice have been violated, it is humbly claimed, by these legislative provisions. Furthermore, the Minister has the authority to send

labour disputes to an arbitration panel, and the award of such a panel is not binding unless and until it has received the Minister's approval in writing. The situation is thus reversed in Nigeria when it comes to alternative dispute resolution procedures in labour relations, which are in direct opposition to their intended purpose. In addition, under the Act, disputing parties in labour matters are required to explore various stages of settlement up to and including the National Industrial Court (NIC), which serves as the final arbiter in labour matters, with the exception of issues involving fundamental rights, which may be the basis for an appeal to the Supreme Court of Appeal. Is it a violation of the parties' right to an impartial hearing if the above is done?

When one conducts a critical review of the available literature in this area, it becomes clear that there is an abundance of academic works attempting to examine various aspects of industrial conflicts, general concepts of labour, alternative dispute resolution mechanisms, and so on and so forth. However, one issue that has yet to be resolved is the use of alternative dispute resolution processes for labour conflicts in Nigeria, or, more specifically, the applicability of such methods in Nigeria. The Trade Disputes Act, in particular, provides for a vicious cycle resolution method, which is particularly relevant here. This is the most important finding of this research.

In light of the foregoing, this study makes an attempt to identify the Minister's undue interferences in labour dispute resolution through the Trade Disputes Act, noting that, in order to facilitate settlement processes between disputing parties in labour matters, it is necessary to review the Trade Disputes Act in order to obviate the Minister's undue influences in this regard.

Furthermore, the finality of the NIC's rulings is yet another factor that emphasizes the significance of this study in a different context. According to the findings of this study, reserving the right to make final decisions on labour problems to the National Industrial Court (NIC) except on the basis of fundamental rights is, to say the least, an abysmal mockery of the entire Nigerian judicial system. It is contrary to the basic objective of an appeal, as well as to the principles of fair hearing and just treatment. As a result, this study recommends that the right of appeal in labour disputes be reviewed in order to alleviate the bottleneck that has developed.

As a result of the Trade Disputes Act, 2004, which gives the Minister of Labour and Productivity extensive powers, including the authority to apprehend a labour dispute between parties involved in an industrial dispute and to take necessary steps in order to resolve the apprehended dispute or to prevent the occurrence of a dispute in Nigeria, It is the legal requirement of the parties to such a trade dispute to report to the Minister at the conclusion of the disagreement, even if the resolution is achieved voluntarily by the parties themselves. According to the Act, parties are required to deposit at least three (3) copies of the collective agreement with the Minister within a set period of time, after which the Minister will assess whether the agreement will be binding on the parties in its entirety or in part. Also under his control is the appointment of a conciliator, members of the Industrial Arbitration Panel, and members of the Board of Inquiry. All of these people must be approved by the Minister before they can be hired.

Because of the vast powers granted to the Minister by the Trade Disputes Act, the doctrine and principle of voluntarism have been violated, and the theory and principle of voluntarism have been negated. This is because, in the absence of any evidence of the elements of fraud, misrepresentation, or fraudulent inducement in a collective agreement or contract, the parties to the agreement or contract should be bound by the terms and workings of the agreement or contract in question. In each case, when the minister is involved in a dispute involving the government, there is a high chance of bias on his or her part. The Trade Claims Act, on the other hand, does not permit disputing parties to bring their disputes directly before an arbitral panel without first consulting the Minister of Trade and Industry. This amounts to a violation of the rights to access justice and the protection of due process of law in the United States. It demonstrates that the Minister has the ability to withdraw his discretion, particularly because there is no provision for the procedures to be followed in the event that the Minister withholds his discretion.

It is necessary to point out that the Trade Disputes Act grants the Minister the authority to refer disputes to the Industrial Arbitration Panel (IAP). This means that the panel will only be able to deal with instances that have been referred to it by the Minister. In the meantime, any award made by the panel is not legally binding unless and until it has been confirmed by the Minister of Labour.

The purpose of alternative dispute resolution methods is to develop a quick and efficient alternative method of resolving industrial-related problems. The goal is to temporarily suspend the right to strike and to provide an independent and timely adjudication of disagreements between parties. According to the Trade Disputes Act, lockouts and strikes are not permitted until all other options for dispute resolution have been exhausted first.

However, if the parties are dissatisfied with the award made by the National Industrial Court ('NIC'), the Act requires them to go through the entire process of dispute resolution again from the beginning. As a result, the Trade Disputes Act has effectively created a vicious circle of compulsory settlement mechanisms from which employees and their employers are powerless to escape.

Also, it is too rigid to allow disputing parties to pass through the complete stages of out-of- court dispute settlement processes before lastly arriving before the NIC. This is so because all the days to be spent at various stages of the out-of-court dispute resolution process put together, amount to 92 days before the dispute gets to the NIC. This rigid dispute settlement means is contrary to international best practices in this regard. Again, the decisions of the NIC on trade disputes are final. Appeals do not lie against its decision to the Court of Appeal except on issues of fundamental rights contained in Chapter IV of the Constitution of the Federal Republic of Nigeria, 1999 (as amended). In the main, limiting the right of appeal from the decisions of the NIC contravenes and infringes the rights to fair trial of the parties.

CONCEPTUAL FRAMEWORK

Trade Dispute/Labour Dispute

A precise definition of trade disputes has become increasingly difficult to come up with in today's world because the grounds on which they are based are so broad. The term "trade dispute," on the other hand, has been defined as "a disagreement between a company and employees over wages, working conditions, or other employment-related problems." In the case of a labour dispute, the definition is "a conflict between an employer and its employees over the association or representation of those who negotiate or attempt to negotiate the terms and conditions of employment.[i]

A dispute is defined as any significant difference between the parties to a dispute. For example, a conflict could emerge as a result of workplace punishment, as a result of complaints or grievances lodged by employees, or as a result of terminations. Wages and other working conditions may sometimes be the subject of disagreements.

Trade dispute is defined by section 48(1) of the Trade Disputes Act as, “any dispute, between employers and workers or between workers and workers, which is connected with the employment or non-employment, or the terms of employment and the physical conditions of work of any person.”[1]

From the foregoing definitions of Trade Dispute and Labour Dispute, it is evident that some elements are central, to wit:

a. The subject matter of the dispute;
b. The parties to the dispute;
c. The purpose of the dispute.

To this extent, both the concepts of trade and labour disputes are the same coin with different sides and can be used interchangeably. Another concept similar in use is "industrial conflict". However, the latter concept varies in terms of broadness. For the purpose of this study, these concepts are used interchangeably.

These definitions limit trade/labour disputes to disputes between employers or employers' associations and workers or worker unions, or amongst employees and employees. These categories of people are usually parties to disputes. Such a dispute is essential to being associated with employment or non-employment or terms and conditions of employment. [1[ii]] A trade dispute may also arise over an agreement of workers to belong to a certain trade union or the interpretation of the wording of a collective agreement. [2] Anything less than the foregoing, therefore, cannot be considered a trade dispute.[[iii]] Most importantly, it is vital to state here that the meaning of "trade dispute" has gone beyond these to the extent that it can now arise from any issue that the workers think may affect their interests and should strive for. [4]

A trade dispute may arise with a view to establishing new rights, for example, workers desirous of getting higher wages or the employer introducing a new pension fund scheme and making it incumbent on workers to join. All these disputes are known as "disputes of interest," whereby workers

[1]Cap T8 LFN 2004; Trade Union Act, Cap T14 LFN 2004, s 54.

and employers have different interests. Most of the time, they are handled by a union and are the subject of negotiations and maybe even industrial action.

This is particularly so in Nigeria these days since the workers fellowship beyond workers' rights but to interest which they may have in some socio-economic issues in declaring trade disputes and strikes. This has been showcased in the labour demand against increases in fuel prices, demand against Nigeria taking World Bank loans demands against privatisation of certain public enterprises.[2]

Therefore in the main, any acceptable definitions of trade dispute must cover disputes over rights and interest of individual and collective rights. Dispute can arise over rights that are already in reality in an agreement or under custom and practice. This kind of dispute is known as dispute of right. They usually include partial labour practice like racial or sexual discrimination in the workplace, sexual harassment and so on, or an unfair dismissal. Wrongful or unfair dismissal occurs whenever a contract of employment has been ended in violation of the contractual procedure, which must be complied with in order to validly determine the contract. The category of which the contract belongs determines the relevant procedure for its termination.[3] Unfortunately, the Nigerian labour statutes are yet to effectively embrace these developments in industrial and labour relations.[4]

In *NWL Ltd. v Woods*[5] the Court held that any dispute that arose as a matter of safety and physical comfort of a worker during the pendency of his employment is a dispute that emanated from his physical condition of employment. The content of trade dispute was illustrated in the case of *Taiwo Oluruntoba-Oju & Ors. v Prof P.A. Dapamu & 6 Ors.*[6] In this case the issue was over the appointment and removal of the Faculty Dean and Heads of Department of some faculty in the University of Ilorin and the 4th Defendant unilateral appointment of acting Dean and Heads of Department in replacement of the Plaintiff/Appellants. This made the Plaintiffs/Appellants to file an action in court. The Defendants/Respondents then file an application asking the trial court to strike out the suit for want of jurisdiction because the matter involved trade disputes which the National Industrial Court (NIC) has jurisdiction to hear. On appeal to the Supreme Court, it was held that the subject matter of the case does not relate to trade dispute but was rather on the arbitrary, impolite and unconstitutional manner the employers were running the University of Ilorin which does not relate to trade dispute.

While on the other hand, "Alternative Dispute Resolution (ADR)" is a new method to dispute dispensation. It simply means a variety of mechanisms put up to aid parties to disputes to resolve their differences without taking through the rigor of formal judicial proceedings.[7] Put it differently, ADR are those machineries used in determining disputes quicker and fairer without destroying on-going relationships. The alternative mechanisms are therefore supplement to court adjudication and not supplants to adjudication. ADR is a logical expansion of established practice, thus not a new idea. They are referred to as the "Participatory" and the "Adjudicatory" Alternatives to dispute resolution. "Participatory" alternative in the sense, that the disputants are included directly in the effort to find a common acceptable resolution. Examples of the participatory alternatives are negotiation, mediation and conciliation where the disputing parties are in charge of the processes and substantially the result thereof. In the other vein, "Adjudicatory" alternatives are those where the intervening third party makes the decisions for the disputing parties. Examples of the Adjudicatory alternatives are arbitration, administrative hearing and trial.[8]

The parties to a labour dispute could either be between the workers and the employer or between two or more workers union or employers association or between the workers and its members relating to the condition of their employment. The disagreement must be among workers and workers or employers and employees.[9] Labour dispute could be inter or intra dispute. It becomes inter union

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[2]Worugii (n 9) 3.

[3]A N Nwazuobe, 'Job Security in Nigeria: Wrongful Dismissal and Unfair Dismissal, A Comparative Analysis'[2005] (2)(1) *Unijos J.L.D.*, 24.

[4]Worugii (n 9) 4; B B Kanyip, 'Trade Unions and Industrial Harmony: The Role of the National Industrial Court and the Industrial Arbitration Panel' N.B.A. Annual National Conference, Calabar, 2001, 15.

[5]*NWL Ltd. v Woods* [1979] 3 All E.R. 914 at 624.

[6][2008] 34 NSCQR (Pt. 1) 176.

[7]K Aina, 'Alternative Dispute Resolution' [1998] (2)(1) *Nigerian Law and Practice Journal,* 167-170.

[8]*Ibid*.

[9]*Apena v National Union of Printing Publishing and Paper Products* (2003) 8 NWLR (Pt. 837) 382.

dispute when it occurs between a union and/or members, and another union and/or its members. While on the hand it becomes intra union dispute when it occurs among members of one union on the one hand and the union itself on the other hand; or among members of the one union.

Trade dispute includes the disagreement between two or more unions in an establishment over whether some workers should be member to one of them, with each of the unions threatening to withdraw its labour if the workers in issue do not belong to it. On the other hand, if the workers failed to belong to it, each of the unions may ask that those workers be sacked from their employment,[10] as was demonstrated by the court in the case of *Udoh & Ors. v Orthopedic Hospital Management & Anor*.[11] A dispute could be said to be a labour dispute if the purpose is;

a. Legitimate
b. In furtherance of the lawful interest of workers; and
c. The dispute must be present one; not contemplated or anticipated one.[12]

Furthermore, since trade unions can act on behalf of their members, they are also a proper party to a trade disputes.[13] Again, the dismissal of an employee is not a rationale to refuse to recognise the said worker so dismissed as an employee.[14] This is so because the reinstatement of the worker may be the reason for a legitimate trade dispute since trade unions have the capacity to act on behalf of their members.[15] It is pertinent to point out that trade/labour disputes must be between the proper parties and it must also be on an appropriate subject-matter that workers can embark on a genuine industrial action. Therefore, from the foregoing any dispute in relation to political or nonindustrial subject-matter is not in the class of a legitimate trade dispute. Thus, political strikes are not legitimate trade dispute in Nigeria.[16]

However, since political and economic issues are interwoven it becomes difficult to draw the difference between them. The reason is that workers may go on strike to force the government to cancel a policy if the government embarks on any economic policy that would be against the well-being of the workers.[17] It is suggested that a distinction line drawn between political strikes and the strikes that have political under tone but is linked to workers' welfare within their employment circle.[18]

Alternative Dispute Resolution (ADR)

The word "Alternative" means one or the other two things giving an option or choice, allowing a choice between two or more things or acts to be done.[19] Alternate Dispute Resolution (ADR) encompasses all legally permitted processes of dispute resolution other than litigation. These include Arbitration, conciliation, mediation, negotiation, etc. These Alternative Dispute Resolution processes evolved as a result of the increased commercial activities and then the excesses of litigation in Nigeria. The term "Alternative Dispute Resolution" is generally used to describe the methods and procedures used to resolve disputes either as alternatives to the traditional disputes resolution mechanism of the court or in some cases as supplementary to such mechanism. The best known methods of alternative dispute resolution (Alternative Dispute Resolution) apart from Arbitration are conciliation and mediation, Mini-Trial (known in Britain as Executive Tribunal) and Med-Arb[20]

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[10]G O S Amadi, *Legal Guide to Trade Unions* (Nsukka: Afro-Orbis Publishing Ltd. 1990) 45.

[11][1990] 4 NWLR (Pt. 142) 52.

[12]B Bankole, *Employment Law* (Lagos: Libri Service Ltd. 2003) 20.

[13]Lord Wright in *N.A.L.G.O. v Bolton* (1943) AC. 166 at 189 said: "It would be strangely out of date to hold as was argued, that a Trade Union cannot act on behalf of its members in a Trade Dispute or that a difference between a Trade Union acting for its members and their employer cannot be a Trade Dispute…"

[14]O V C Okene, *Labour Law in Nigeria: The Law of Work* (3rd edn, Port Harcourt: Claxton and Derrick Publications 2012) 292.

[15]Trade Unions Act, 2004, s 44(1)(c); *Taiwo Oloruntoba-Oju & 4 Ors. v Prof. Shuaibu O Abdek-Raheem & 3 Ors.* (2009) 39 NSCQR 105.

[16]E Chianu, *Employment Law* (Ondo State: Bemicov Publishers Nigeria Ltd., 2004) 286.

[17]G O S Amadi, *A Legal Guide to Trade Unions* (Enugu: Afro-Orbis, 2001) 76.

[18]Chianu (n 27) 294.

[19]R A Onuoha, 'A Legal Framework for Land as Security in Nigeria, Reform and Alternative'A Work Submitted to the School of Postgraduate Studies University of Lagos in Partial Fulfillment of the Requirements for the Award of the Degree of Doctor of Philosophy (Ph.D) in Property Law, June 2007, 22.

[20]Onuoha (n 44)

Alternative Dispute Resolution (Alternative Dispute Resolution) is the procedure for settling disputes without litigation, such as arbitration, mediation or negotiation.[21] Alternative Dispute Resolution procedures are usually less costly and more expeditious. They are increasingly being utilized in disputes that would otherwise result in litigation, including high-profile labour disputes, divorce actions, and personal injury claims.[22] One of the primary reasons parties may prefer Alternative Dispute Resolution proceedings is that, unlike adversarial litigation, Alternative Dispute Resolution procedures are often collaborative and allow parties to understand each other's position. Alternative Dispute Resolution also allows the parties to come up with more creative solutions that a court may not be legally allowed to impose.[23]

While arbitration developed as a result of the apparent inability of the courts to satisfy some of the expectations of people in the resolution of disputes, Alternative Dispute Resolution arose largely because the process in litigation was becoming unduly expensive and long because the gradual creeping in of judicial technicalities of dispute resolution.[24] Thus, there began a gradual shift of emphasis from the use of arbitration in commercial dispute resolution to a culture of systematic use of mediation and conciliation which are a formalized form of the age-long use of negotiation in the settlement of disputes.[25] The settlement is consensual. The conciliator or mediator only helps the parties to come to a consensus. He does not do adjudication.

The gradual emergence and prominence of Alternative Dispute Resolution is caused by the dissatisfaction with the adversaries arbitration process; the negative impact of dispute management in court litigation and later in arbitration which sees disputes only in terms of "right" or "wrong" and in which disputants are either "winners" or "losers" and the mounting costs of arbitration; all these go to enhance the status of Alternative Dispute Resolution as a better option for resolving disputes of whatever nature.[26] While disputants are increasingly showing a preference for Alternative Dispute Resolution, the legal profession as the major service provider in this area is also responding positively to the market demands The acronym "Alternative Dispute Resolution" means Alternative Dispute Resolution It is a term usually associated with a variety of specific and flexible dispute resolution options such as Negotiation, Mediation, 'Conciliation, Arbitration, Mini-trial, Case Evaluation and a lot more hybrid mechanism.[27] Some scholars have defined Alternative Dispute Resolution more broadly to mean finding better ways to resolve disputes, including those that have not reached and may never reach the courts or other official for a. Others place emphasis on the need for ways to alleviate the burden on the courts.[28]

Alternative Dispute Resolution processes are increasingly being accepted in Nigeria as appropriate mechanisms for resolving disputes. While some jurisdictions have institutionalized Alternative Dispute Resolution through the concept of a Multi-door Courthouse, many others are at different stages of formally introducing Alternative Dispute Resolution into their court systems. In recognition of the pivotal role of Alternative Dispute Resolution in justice delivery, the Legal Practitioners' Privileges Committee recently reviewed the regulations for the award of the distinguished rank, of Senior Advocate of Nigeria (SAN) to include Arbitration Practice.[29]

There have been controversies as to the correctness of interpreting Alternative Dispute Resolution as "Alternative Dispute Resolution". Some scholars of the alternative movement have posited that the "A" in the acronym actually means "Appropriate" rather than "Alternative". Another school of thought argues that the use of the word "Alternative" in the acronym actually means "one of many options including litigation". It was suggested that instead of "Alternative Dispute Resolution", a better and perhaps more acceptable acronym

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[21]R John, 'What is Alternative Dispute Resolution?' <http://www.hirelawyer.findlaw.com> accessed 17 August 2017

[22]*Ibid*.

[23]*Ibid*.

[24]J O Orojo and M A Ajomo, *Law and Practice of Arbitration and Constitution in Nigeria* (Mbeyi & Associates Nigeria Ltd. 1999) 6.

[25]Orojo and Ajomo (n 49)

[26]Orojo and Ajomo (n 49)

[27]S B Goldbers and Others, *Dispute Resolution: Negotiation, Mediation and Other Processes* (2nd edn, Boston: Little Brown & Co. 1992) 356.

[28]L Kanowitz, *Cases and Materials on Alternative Dispute Resolution: American Casebook Series* (St. Paul, Minn: West Publishing Co. 1985) 27.

[29]K N Nwosu, 'ADR and Restorative Justice: Panacea for Delay in Dispensation of Justice', Paper delivered at the Refresher Course for Judges and Kadis, Organized by the National Judicial Institute at Abuja, 12 – 16, March, 2007.

should be "Alternative Method of Dispute Resolution".[30] Laden further held the view that Alternative Dispute Resolution is a useful shorthand expression which refers to a system of multi-option justice system in which a wide range of dispute resolution processes are available to parties in the public justice system.[31]

In his own contribution, Dele Peters submitted that Alternative Dispute Resolution could better be understood when viewed as "African Dispute Resolution". This will rhyme with diverse friendly, cost-effective and non-adversarial methods of dispute settlement in the traditional African setting, as opposed to litigation – centered approach of the west. These diverse African Dispute Resolution methods such as Negotiation, Conciliation, Mediation, help to maintain peace and create an enabling environment for good relationship and neighbor lines and maintain on-going relationships.[32]

Although Alternative Dispute Resolution is now predominately used in civil matters, the anticipated reform in our Criminal Justice System, particularly the practice of "Plea Bargain" and the concept of "Restorative Justice" will certainly necessitate the use of Alternative Dispute Resolution principles in criminal cases. Alternative Dispute Resolution is neither a new ideology nor is it a new philosophy. Rather, it is an old wine in a new wine skin. This is because the whole concept of Alternative Dispute Resolution has been with and is synonymous with indigenous African Society though now redefined, fine-tuned and packaged under a new name entirely.

Furthermore, Alternative Dispute Resolution mechanisms are no new concepts to judiciary. Some jurisdictions in the United States for instance, encourage and utilize "Diversion Programs" which remove less serious criminal matters from the formal administration of justice system. In these jurisdictions also, most cases are settled before going to trial about voluntary settlement including pre-trial settlement conferences, mediation by magistrates and at times, mediation by judge.[33] One of the early proponents of modern Alternative Dispute Resolution was Professor Frank L.A. Sander, who proffered a radically different vision of the American Justice System in the name and style of the "Multi-Door Court House". Professor Sander's Multi-Door court House concept is a court-connected Alternative Dispute Resolution programme which provides a comprehensive approach to dispute resolution. The concept posits that the deal court-house is a multifaceted dispute resolution centre, which offers disputants a number of options or "doors" leading to the courtroom. Such a comprehensive justice centre would have many "doors" through which disputants might pass to get the appropriate dispute resolution process.[34]

In the United States especially, the use of Alternative Dispute Resolution has found an increasing favour. There are a number of reasons for this trend. The level of litigation in the country has grown to enormous proportions and the courts are so full, that very long delays in obtaining trial date are common; the costs of litigation are high and are not ordinarily recoverable; and very high awards are often granted, making litigation an extreme hazardous exercise.[35]

THEORETICAL FRAMEWORK

A theory is set of reasoned ideas intended to explain facts or events, theory therefore determines what we can observe.[36] Thus, for the purpose of this work, Positivist Theory of Law and other thematic theories are used to shed valuable light on the subject matter of this work.

Positivist Theory of Law

This theory of law is spearheaded by John Austin.[37] He proposed the 'command theory of law' in his book "The Province of Jurisprudence Determined" where he defined law as "a command set by a

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[30]M T Ladan, 'Alternative Dispute Resolution in Nigeria: Benefits, Processes and Enforcement Current Theme in Nigeria Law', Paper delivered at the NIALS Government Legal Advisers Workshop, August, 1998.

[31]*Ibid*, 249.

[32]D Peters, 'Fundamentals of Alternative Dispute Resolution (ADR)', Paper Presented at the Induction Course for Newly appointed Judges and Kadis organized by the National Judicial Institute, Abuja and held from 7th to 18 June, 2004.

[33] Konowitz (n 53) 27.

[34]Peters (n 57) 6.

[35]Peters (n 57) 6.

[36] C Kivunja, 'Distinguishing between Theory, Theoretical Framework, and Conceptual Framework: A Systematic Review of Lessons from the Field' [2018] (7)(6) *International Journal of Higher Education*, 45.

[37] J Austin, *The Province of Jurisprudence Determined* (Cambridge University Press 1995) 157.

superior being to inferior being and enforced by sanctions."[38] It is submitted with respect, that by this definition, it means that the only thing that can be regarded as laws are those that are enacted as such by the person or body authorized to do so. From this definition, there is the existence of a definite sovereign, the sovereign is without legal limitations in the exercise of his power and the subjects (the people) must be in the habit of obeying him because of his coercive power to impose sanctions.[39]

The Positivist Theory of Law is also called 'Imperative or Analysts Law Theory'. For emphasis it refers to the law that is actually laid down by separating "is" from the law, which is "ought" to be. Thus, it has the belief that law is the rule made and enforced by the sovereign body of the State and there is no need to use reason, morality, or justice to determine the validity of law. According to this theory, rule made by the sovereign are laws irrespective of any other considerations. These laws, therefore, vary from place to place and from time to time. Apart from John Austin, other followers of this theory include Bentham Jeremy and H.L.A. Hart. For these philosophers and their followers law is a command of the sovereign to his subjects and there are three elements in it: command, sovereign and sanction. Command is the rule given by the sovereign to the subjects or people under the rule of the sovereign.

Sovereign refers to a person or a group of persons demanding obedience in the State, while sanction is the penalty that follows violations of the rule. Applying this theory to our topic: 'Administration of estates for Revenue Generation in Nigeria: Need for Legal Reform', it is the responsibility of the National Assembly and the States House of Assembly to make Jaws in Nigeria.

They derive their powers from S.4 of the 1999 Constitution of the Federal Republic of Nigeria (as amended).[40] In Nigeria, the power to make laws includes the power to raise revenue and authorize expenditure. No revenue can be raised by way of a tax (of whatever description) including property tax or the imposition of license fees, customs dues and indeed other changes without the authorization of Parliament.

For example the Lagos State Land Use Charge Law 2001 was passed by the Lagos State House of Assembly pursuant to its constitutional powers under section 4(7) and Item 9 of Schedule 2 to the Constitution, which provides that "A House of Assembly may, subject to such conditions as it may prescribe, make provisions for the collection of any tax, fee or rate or for the administration of the law providing for such collection by local government council". This provision makes it clear that it is the duty of the State Legislature (in this context the Sovereign; having derived their power from the Constitution) to enact any law which would impose a property tax, fee or rate within the State and prescribe the condition under which such tax, fee or rate could be collected. The command is the imposition of tax to generate revenue by the appropriate Government authority to assess and collect property tax from the people of Lagos State of Nigeria,[41] while the penalty for not obeying the law enacted by the Government/Legislature is the sanction or punishment meted against offenders. It should be emphasized that the powers of the legislature is derived from the Constitution which is the Grundnorm.[42]

The enactment of the Lagos State Land Use Charge Law 2001 (as amended) by the Lagos State House of Assembly has fulfilled the theories behind the Positive Theory of Law as postulated by Austin, Hart, Bentham and their followers. From the LUC, we have in existence a definite sovereign (the Lagos State Government! Legislature), the sovereign is without legal limitation in the exercise of their power and subject or people must be in the habit of obeying the law because of the coercive power to impose sanctions, or punishment.

The positivist theory of law has been criticized on numerous grounds. First, not all laws are couched as commands. For example, the provisions contained in Chapter II of the 1999 Constitution of the Federal Republic of Nigeria (as amended) which deals with the Fundamental and Directive Principles of State policy is not binding on the government of the Nation. This is in view of S.6 (6)(c) of the said constitution which made such provisions not justiciable. Again, Nnabue[43] submits that Austin has

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[38] L Fuller, 'Positivism and Fidelity of Law: A Reply to Hart' [1958] (71) *Harvard Law Review*, 630.

[39] J Bentham, *Of Laws in General* (Athione Press) 1970.

[40] Constitution of the Federal Republic of Nigeria 1999 (as amended) s 4(1).

[41] The Land Use Charge Law 2018, s 2(2).

[42] H Kelsen, *General Theory of Law and State* (Trans Anders Wedberg 1945) 56; H Kelsen, *The Pure Theory of Law* (California: University of California, 1967) 1.

[43] U S F Nnabue, *Understanding Jurisprudence and Legal Theory* (Bon Publications 2016) 141-142.

been criticized for using the word "command" in his theory. According to the learned scholar "command ordinarily implies an instructive statement by one human person in contemplation of a specific conduct from the commanded". According to him, Kelsen cannot locate this sole commander within the confines of a State law. He argued that if a law emanates from the legislature or from an ever-changing multitude which comprise the state political machinery; it becomes difficult to ascribe such command to one commander. The learned Professor of Law finally queried: "However, if law is a Command of one illimitable sovereign, how come that law continues to be in force, even after the death of the so-called sovereign commander'. It is submitted[44] that another criticism of positive theory of law is that it is only concerned with the sovereign enacting laws. It is not concerned with whether or not the law is moral or acceptable to the society. Again, the idea of a "commander" who has no legal limitations would not be applicable in today's world. Per Kayode Eso, "even if it is a military regime, the military is still bound by the provisions of the laws."[45] Finally, not all human beings obey the law because of the sanctions attached to it. Some people just don't contravene the law because it is their nature. For example, some people abstain from murder not just because of its punishment but because they find the killing of a fellow human being repulsive.[46]

Sociological Theory of Law

Among the social sciences, sociological theories stand out among the most developed analytical perspectives that contemplate the role of law in society. Not only is sociology unique in offering theoretical perspectives on the place and transformation of the institution of law relative to the whole of society, it is also the case that sociologists have offered many of the important intellectual building blocks or other social theories of law.[47] The sociological theory of law gained prominence from the mid nineteenth century to the twentieth century.

The two most central founders of sociological theory of law are Max Weber (1864-1920) and Emile Durkheim (1858-1917). Some of the most prominent supporters were Eugene Ehrlich (1862-1922), Nicholas Timasheff (1886-1970) and Georges Gurritch. This theory of law is based on what could be called the "facts of laws", how people acted or reacted when laws are enacted; and the way the society acts determines the kinds of laws that would be laid down. If the society by its actions fails to acknowledge a particular law, that law is doomed to fail as a means of social engineering or social control. Relating this theory to our study, it is submitted with respect that since its introduction in June 2018, the Land Use Charge Law of Lagos State has generated intense controversy,[48] and the controversy has been aptly analysed by Osibanjo.[49]

Many years after the enactment of LUC, the controversy lingers; there has been some demonstration against the law by some people or group of people who want the law to fail because they do not want to acknowledge the law as it is.[50] For example the NBA Ikeja Branch protested the excessive and arbitrary property tax regime in Lagos State and noted that the Land Use Charge was undemocratic.

According to Ehrlich,[51] the Sociological Theory of Law depends not on state authority but on social compulsion. Law, he said, differs little from other forms of social compulsion, and the state is merely one among many associations, though admittedly it possesses certain characteristic means of compulsion. The real source of law is therefore not statutes or reported cases but the activities of society itself.[52] He thus minimizes the place of legislation as a formative factor in law, and in some ways may be regarded as a Savigny denuded of Hegelian mystique. But there is far more in his approach than this, for he emphasized how law is distilled out of the interplay of social forces. That

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[44]K Fuesser, 'Farewell to Legal Positivism: "The Separation Work Unraveling"', in G P Robert, *Autonomy of Law:* Essays on Legal Positivism (Clarendon Press 1999) 119-162.

[45]*The Military Governor of Lagos State v Chief Chukwuemeka Odumegwu Ojukwu* (1986) 1 NWLR 16, 621.

[46] R Dwokin, *Taking Right, Seriously* (Harvard University Press 1978) 130-137.

[47]M Deflem, *Sociological Theory of Law: In Encyclopedia of Law and Society, American and Global Perspectives* (Sage Publications 2007)1410-1413.

[48]R Adelulu, 'Real Estate Developers Oppose Land Use Charge' *The Sun Newspaper* (Lagos April 6, 2018) 36.

[49] Y Osibanjo, 'Property Taxation As Catalyst For Development: Land Use Charge Law of Lagos State, (No. 11 of 2001)' <https://ng.andersen.com/a-review-of-the-lagos-state-land-use-charge-law-2018/> accessed 18 April 2018.

[50] J Titilope, 'Land Use Charge: NBA Gives Ambode Ultimatum To Reverse Policy' *The Daily Independent Newspaper* (Lagos March 8, 2018) A9.

[51]E Ehrlich, 'Sociological Jurisprudence and the Sociological Theory of Law' in *Lloyd's Introduction to Jurisprudence* (5th edn, The Bath Press 1985) 562.

[52]D Lloyd, *Current Legal Problems* (3rd edn, Sweet and Maxwell 1980) 36.

there is much truth in this viewpoint can hardly be denied, because the law is made for the people and indeed it must be people-oriented.

Thus the practices of the commercial world are often found to be gradually embodied in commercial law. Ehrlich recognized, however, that a legal system has an impetus of its own, a professional tradition which may operate for good or ill, and accordingly stressed the need for lawyers and judges to understand the social foundations of legal rules and thereby develop them on the right lines. So, too, by insisting on the fact that law was not a unique phenomenon, he enabled us to attain a better grasp of those large spheres of activity which are becoming increasingly widespread in the modern state, where autonomous associations apply private "legal systems" of their own almost independently of the ordinary legal process of the courts, as, for instance, in the case of trade or professional associations or trade unions exercising disciplinary powers. The current about LUC by groups and associations in Lagos State is indeed in tandem with the philosophy behind the Sociological Theory of Law and in particular Ehrlich's belief on social forces. But Ehrlich might be criticized for failing to appreciate the significant influence that state law has on the shaping and development of living law. Associations are not completely free to generate spontaneous living law. Their actions always take place in the shadow of the law.[53] With respect that Ehrlich unduly belittled the primary role of legislation in creating new law. He also failed to realize that a grasp of underlying social phenomena may not in itself point the way to appropriate legislative or judicial solutions. The legal process may need to be invoked to play the role of social change but with the integration *ab initio* of other elements, groups or associations so that the law so enacted would be accepted by at least the majority. The Sociological Theory of Law also has its own share of criticisms. First, it is not all the time that conduct influences the law. There are situations in which the law influences the conduct of members of the society. For example, some property owners (on their own) pay their property tax because of the law mandating them to do so.

Another criticism is the fact that it is quite risky to generalize the behavior of a group or some associations; and consider their actions or conduct as not acknowledging the law. Thus, just because every other person is disobeying the law would not excuse an offender who is caught and being made escape goat. The full wrath of the law would be used or applied against the culprit, notwithstanding that every other person is disobeying the law, so it would not be a valid excuse not to punish offenders.

There is another variant of the sociological theory propounded by Roscoe Pound, former Dean of Harvard Law School. According to him, there are limited resources in the society and thus, numerous competing claims to those resources. It is then the aim of the law to balance these competing claims in such a way that it would cause the least harm and this is done through government policy or reform.

Pluralist Theory

Pluralist theory sees the workplace as an aspect of the society having social interest, values, social group and beliefs which causes conflict. To the proponents of pluralist theory conflict of interests is sure in workplaces as well as the society.[54] For example, where the workers are desirous of being autonomous, increase in payment, leisure and work flexibility which may infringe on the desire of the employer to make more gains through cutting cost and to reduce the allowances of the workers. According to Kornha user conflict brings about unity of a group and solution to problems in the society. He opines that the society would be static if the relationships are governed by laws and that there would be anarchy if relationships are sympathetic in nature.[55]

To pluralism trade unions are the appropriate means the employees' interests could be tabled before the employers. Pluralism sees collective bargaining as pertinent and further bent on resolving and

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[53] R Mnookin and L Kornhauser, 'Differences and Developments in Legal Theory' [1979] (88)(5) *Yale Law Journal,* 50.

[54]A Fox, *Industrial Sociology and Industrial Relations,* Donovan Commission Research Paper No. 3 (London: HMSO, 1966) 4; H A Clegg, 'Pluralism and Industrial Relations' [1975] (13) *British Journal of Industrial Relations,* 309 – 16.

[55]O V C Okene, *Labour Law in Nigeria: The Law of Work* (3rd edn, Port Harcourt: Claxton and Derrick, 2012) 226.

reconciling conflicts. The pluralists believe that industrial conflict is inevitable and that it could be settled through collective bargaining. Pluralist recognizes the existence of conflict between employers and employees and further suggests that the relationship between management and employees should be democratised.[56]The pluralism theory seems to be suitable for Nigerian industrial relations system since it is the same conflicting party that takes industrial and political decisions. To the pluralists state and workers supports trade unions in Nigeria which enables them to come to a bargaining table with employers. Trade unions are acceptable to both government and employers, thus they could resolve industrial dispute through collective bargaining.

However, this pluralist theory has been criticised by some scholars. Scholar like Gahan, criticized the pluralists view based on its failure to consider and account for the theoretical implications oscillating between analysis at the level of the firm and the level of society.[57] Again, pluralism has also been criticized by Hyman who argues that it is not convincing to believe that all parties to a conflict have equal influence. He further revealed the inconsistency in believing in legitimacy of conflicting interest on one side and the general public interest on the other side.[58] Further criticism against Pluralism is that it is vague and did not explain the inequalities as regards the distribution of power.[59] However, it is pertinent to state categorically that inspite of these various criticisms pluralist theory is commended since it made available the theoretical view for the great majority of recent academic work in industrial relations.[60]

Unitary Theory

This perspective postulate that there should be possibility to bring labour and management under a unified system, which may require the recognition of only one trade union to go into collective bargaining on behalf of the employees with the management. The unitary theory believe in the existence of conflicts in labour relations and further sees them as reconcilable since both management and labour have similar interests. According to unitary theory, single centre of loyalty, authority, interests, common values and common objectives are all embedded in a workplace.[61] To the unitary theory 'industry is a harmony of cooperation which only fools or knaves choose to disrupt'.[62] While conflict is caused by agitators and trouble makers, misunderstanding as well as personality clash.[63] Unitary theory sees trade unions as an obstruction and not required to manage an industry properly, or even as a means of communication with workers. However, unitary theory has been criticized on ground of its incompatibility with reality and useless for the purpose of analysis.[64] Despite criticisms against the unitary theory, Edwards still finds advantages in it. He observed that if workers oppose management there is bound to be break up in relationship at workplace.

Maxist Theory

The Maxist theory sees the relationships in existence between the employers and employees as being exploitative. According to the Maxist the society is classified into two (2), that is the owners of means of production and those that don't have (i.e. Capitalist and Labour). While the former is targeted at making their profits maximally, they see those working for them during production as those to be exploited. The capitalists seek to minimise the salaries of labours, since to them it cost on their side.[65] The Maxist opined that;

> These two interests are irreconcilable. They are engaged in a perpetual conflict over the distribution of revenue. It might be stated that the interests have common purpose increasing total revenue and so they have. But the conflict over distribution is in no sense lessened by this for the actual distribution of additional increments of revenue is determined by the power situation. Employees with no power may

[56]O V C Okene, *Labour Law in Nigeria: The Law of Work* (3rd edn, Port Harcourt: Claxton and Derrick, 2012) 226.
[57]P Gahan, *The Future of Industrial Relations* (Sydney: Federation Press, 1990) 63.
[58]R Hyman, 'Pluralism, Procedural Consensus and Collective Bargaining' [1978] (16)(1) *British Journal of Industrial Relations,* 17 – 18.
[59]B Y Imbun, *Industrial and Employment Relations in the Mining Industry* (New Guinea: UPNG Press, 2000), 11.
[60]S Deery and Others, *Industrial Relations: A Comparative Analysis* (London: McGraw Hill, 1997) 18.
[61]F Burchill, *Labour Relations* (London: Macmillan 1997) 7.
[62]A Fox, *Industrial Sociology and Industrial Relations, Donovan Commission Research Paper No. 3* (London: HMSO, 1966) 5.
[63] Burchill (n 346).
[64]Fox (n 347).
[65]R Hyman, *Strikes* (London: Macmillan, 1989) 92.

> get nothing. There is no automatic distribution based on a sense of fairness or equity. Shares have to be fought for sometimes bitterly.[66]

Concerning the balance of power between employers and employees, Fox postulates that trade unions are more than a permanent opposition that neither seeks nor is able to be an alternative management.[67] The Maxist observed that the state creates legal framework and engages unions in collective bargaining is to dominance and legitimacy. Hyman maintains that collective bargaining cannot remove causes of conflict and to this extend, Maxist theory is pessimistic about the role of trade unions to represent employees.

A cursory review of the above literatures reveal that there is plethora of scholarly write ups attempting to generally examine the various means of alternative disputes resolution mechanisms in domestic, industrial disputes and so on. They further expressed the importance of strike to collective bargaining which should not exchange with compulsory arbitration. However, what remains pending is the applicability of the alternative disputes resolution mechanisms to labour disputes in Nigeria. Especially, the enormous powers vested in the Minister of Labour to apprehend and refer labour disputes, the vicious cycle resolution procedure as well as the clog on the right of the disputing parties to appeal against the judgments of the National Industrial Court (NIC) to Court of Appeal save on issues of fundamental rights as provided for in Chapter IV of the 1999 Constitution of Nigeria (as amended) and so on contained in the Trade Disputes Act.

CONCLUSION

The work dealt on critical evaluation of the application of alternative dispute resolution as a means of settling industrial dispute in Nigeria. It examined the respective meaning of key terms, which are dispute, industrial dispute and alternative dispute resolution. The views of other erudite scholars on the subject matter were reviewed. Consequently, some theories of law were analyzed and linked up with and/or applied to the subject of research, to wit; the positivist school of legal theory, the maxist and the sociological school respectively.

It is observed from the legal instruments that there exist some provisions of international, regional and domestic legal instruments which provides for the settlement of trade or industrial dispute by the application of alternative dispute resolution mechanisms, though not without challenges of applicability, details and compelling terms under the Nigerian labour jurisprudence. Amongst which are; Articles 23 and 24 of UDHR and Articles 13 and 15 of ACHPR. Section 254 of CFRN, and TDA.

It has been argued that ADR mechanisms are to be applied under the TDA on the strict supervision of the Minister in charge of labour and employment matters. However, in practice compliance has been very difficult as most of the institutions like Industrial Arbitration Panel (lAP) under the TDA are not in place. Rather what is on ground and operational is office of the labour officers, Directors of labour, zonal Directors of labour in some state with zonal office and Director of trade union service and industrial relations department. The director of trade union services and industrial relation department receives the final objection on the communique (settlement agreement) before the Minister will finally refer the matter for adjudication at the NIC. Under NICA and NIC ADRCI, the President of the National Industrial Court of Nigeria superintend over the administration of ADR procedures like the Minister of labour under the TDA. The ADR Centre is not only unpopular, it is not also available and/or easily accessible to states, which have high density of labour, related disputes, like Lagos State and Rivers State. This is because, the infrastructure provided for are only for zonal offices and are not at the grass root to benefit the common man. The effect of all these are that the institutional weakness and lacunae are now identifiable, particularly in our national legal instruments.

The need for creating awareness of the existence and advantages of ADR mechanisms in settling industrial/trade conflicts is inevitable. Amendment of existing legal instruments to strengthen the institutions and give room to educate the citizens on the subject matter from schools and colleges is pivotal and quite imperative. Hence, the knowledge of the gains of applying AD mechanisms in trade disputes settlements

[66]V L Allen, *The Sociology of Industrial Relations* (London: Longman 1971).

[67]A Fox, 'Industrial Relations: A Social Critique of Pluralist Ideology'in J Child (eds.), *Man and Organisation* (London: Allen & Unwin, 1973) 194.

will eliminate many adverse economic effects arising from industrial and/or trade conflicts on our nations' economy and citizens' wellbeing.

RECOMMENDATIONS

The work offers some suggested recommendations that Law makers, Government authorities, Educators, Pressure groups, Investors, Employment organizations and Workers union should embark on or introduce by way of amendment to existing legal instruments or policies to ensure efficient and peaceful industrial atmosphere and its attendant economic impacts, when the use of alternative dispute resolution mechanisms is holistically inculcated into our justice system.

1. International community under the umbrella of the United Nations should ensure the security of employment and good working conditions rights as provided for in Article 23 of the UDHR. This right is essential for enjoyment by all humans, such as right to choice of employment, rest, holiday and leisure as provided for in Article 24 of the UDHR. In the present, the UDHR has not offered sufficient protection for the rights to good working condition in employment, whereas this right is synonymous with the right to life. It needs to critically re-examine and elabourate on the status of the right to good working condition and to form and join trade union under the International law. Remedies and sanctions for violation should be incorporated.
2. Sections 8,9,17 and 33 of the Trade Dispute Act, Cap.T8 LFN, 2004 should be amended to relief the Minister in charge of labour and employment from superintending over the application of ADR techniques provided for under the Act. This is because the continues superintendence of the process by the Minister pre-supposes that the, practice and procedures is still attached to and/or controlled by the executive arm of the government, who are also employers of labour and by extension party to industrial dispute. That being the case, achieving substantial justice in such atmosphere without compromise is arguably unrealistic.
3. A new law should be enacted to repeal the existing National Industrial Court of Nigeria Alternative Dispute Resolution (ADR) Centre Instrument, 201 5. This is to ensure an independent body, devoid of total control by any arm of the government, especially, the judiciary. Or a reverse of' Article 2 Rules (4)(5) and (6) which vested power and privilege on the President of the National Industrial Court of Nigeria to direct and control the activities of the NIC ADR Centre, up to the appointment of and posting of staffers and designate who becomes the Director of the Centre, make rules and practice direction from time to time. Upholding the existing norms will mean that the Centre is not independent and can barely do substantial justice as required by the principles of equity upon which ADR mechanisms are fund, without interference, especially in any dispute where the government is involved.
4. Revision of Articles 4(6),(8),(16) and (27) of the National Industrial Court of Nigeria Alternative Dispute Resolution Centre Instruments, 2015, to ensure that the values and rules of equity which ADR propagates will not be altered by submerging the later with the common law rigidity, when annexed to a court. In alternative, a brand new ADR Act should be enacted to allow for effective and efficient functionality and promotion of the core ADR values.
5. Revision of the Trade Dispute Act Cap. T8 LFN, 2004 is necessary to include a section compelling both private and public employers to compulsorily adopt and respect the ADR process. Also respect the outcome of any negotiated or concluded settlement in order to achieve peace in the economy. A huge sanction should be introduced as punishment for non-compliance.
6. Section 25(2) of the Trade Unions Act, Cap. T14 LFN, 2004 should be amended to require that the sanction meant for the refusal by both private employers and government to recognize trade unions for bargaining purposes be determined based on the financial strength of each organization as well as adopt ADR techniques in settlement of all conflicts. An independent agency which shall monitor whether or not the employers including government are compliant should be established. The section should grant such independent body or agency power to issue and/or enforce sanction against any non-complying employer.

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[i] [2] Section 6 (d) of the Trade Union (Amendment) Act 2005.

[ii] Adegbite, L. Enforcement of Arbitration Award (Lagos: Continuing Legal Education Association 1990) 3.

[iii] Ajonumah, J.A. and Ehie,O.E. 'The Applicability of Alternative Dispute Resolution Mechanisms to Labour Disputes in Nigeria' [2019]