Rethinking Alternative Dispute Resolution Mechanisms in the Collective Bargaining Process in Nigeria

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Abstract

This paper focuses primarily on conflict management process by appraising negotiation, mediation and arbitration as practiced by the industrial sector or trade unions in Nigeria today. First, the paper appraised the practice of collective bargaining process in Nigeria and argues that there is undue focus on the use of arbitration for settling industrial disputes, despite its obvious shortcomings. Second, the paper identifies some important values of collective bargaining shared with mediation. These core values include voluntariness, neutrality/ impartiality, confidentiality, empowerment, mutual respect, democracy and interdependence. Thus, it is advocated that mediation, a more flexible process should be properly integrated and mainstreamed as a preferred tool of collective bargaining processes in trade disputes. The paper further suggests the adoption of hybrid processes such as Med-Arb or Arb-Med as the situation may dictate in the collective search for stability, peace and harmony in the workplace and the society at large. The data collected for this paper were derived mainly from secondary sources. Hence, the paper relied more on books, journals, monographs, conference/seminars papers and official documents of the Federal Government on National Employment Policy. Internet sources and other materials that are relevant to the theme of the paper were equally utilised. The collected data were subsequently reviewed thoroughly and content analysed.

Keywords: Alternative dispute resolution, collective bargaining, industrial disputes

Introduction

Negotiation, mediation and arbitration are informal processes that have been widely acknowledged as the most cost-effective, user-friendly and satisfactory conflict management mechanisms. They are often subsumed under the popular notion of Alternative Dispute Resolution (ADR), which covers a wider range of conflict management processes including facilitation, early neutral evaluation, executive tribunal, ombudsman, med-arb, adjudication, mini-trial, among others (Akeredolu, 2018). The concept of ADR was introduced as a sharp response to the obvious challenges posed by the conventional legal or court system, which is characterised by the adversarial approach to justice. This approach is known to limit the involvement of the direct parties in the decision-making process, prolonged time of deciding cases, high or prohibitive cost, threats to existing relationships of parties and obvious insensitivity to the overall interests and needs of the disputing parties (ICMC, 2002). Interestingly, ADR is applicable to both civil and criminal matters. This provision has the force of the law as recognised by Section 17 of Federal High Court Act (that is, Reconciliation in Civil and Criminal Act), which empowers the court to resort to any other means to pursue amicable settlement of disputes in both civil and criminal matters in order to promote reconciliation among concerned parties.

Alternative Dispute Resolution has permeated every facet of human activities including labour, maritime, law, commerce, telecommunication, construction, religion, security, academia and the banking sectors, just to mention a few. Hence, the industrial/labour sector (the primary focus of this paper) represents a sub-unit of professional associations that have benefitted tremendously from the services and values offered by ADR. These activities take place in the industrial sector through the instrumentality of collective bargaining at various levels of the interactions with governments, workers' unions and management of corporate entities or employers of labour. The system of industrial relations has, over the years, produced hostile behavioural pattern that perpetually impair managements/employees' relationships. The situation becomes even more complex when the government, the major player in the labour market, stands as the official regulator in the industry.

According to Aderogba (1998:73), "the government tried to introduce an Income Policy with the view to achieving proper

equilibrium between prices and earnings. The government, therefore, plays a dual role as a big employer in addition to being the ruler." This paper focuses primarily on conflict management process by appraising negotiation, mediation and arbitration as practiced in the sector today. First, the article appraises the practice of collective bargaining process in Nigeria and argues that there is undue focus on the use of arbitration for settling industrial disputes, despite its obvious shortcomings. Second, the paper identifies important values collective bargaining shared with mediation. Hence, it is advocated that mediation, a more flexible process should be properly integrated and mainstreamed as a preferred tool of collective bargaining processes in trade disputes in the collective search for stability, peace and harmony in the workplace and the society at large. The data collected for this paper were derived mainly from secondary sources. Hence, the paper relies more on books, journals, monographs, conference/seminars papers and official documents of the Federal Government on National Employment Policy. Internet sources and other materials that are relevant to the theme of the paper were utilised. The collected data were subsequently reviewed thoroughly and content analysed.

Defining of Terms: Trade Disputes, Negotiation, Mediation, Arbitration and Collective Bargaining

Trade Disputes

These are issues arising between employers and workers or between workers and workers, which is connected with the employment or non-employment or terms of employment and physical condition of work. Thus, trade disputes are contentions over (a) employment and non-employment of an individual; (b) the terms of employment of a person; and (c) the physical condition of an individual (Umezulike, 1998). In this paper, trade disputes will be used interchangeably with industrial disputes and labour disputes.

Negotiation

This is a direct communication, trade-off or bargaining processes between two or more parties with the aim of reaching an agreement. It involves a back-and-forth communication strategy designed to

reach a consensus in order to obtain what a party wants from another person. It usually takes place between two parties, although there may be room for more parties in a situation of multi-lateral negotiation. Negotiation is a spontaneous process that immediately precedes the outbreak of a conflict where the direct parties attempt to settle their differences without the assistance of a third party. It is considered as the cheapest and most preferred option of conflict resolution in the sense that it best protects the parties' privacy and utilises the inner resources of the primary parties to achieve a mutual result. If the parties fail to reach an agreement, it may be necessary to seek the help of a third party, who has no direct benefit from the outcome of the process.

Mediation

Is a private and confidential conflict management process, where a neutral third party, referred to as the mediator, assists disputing parties to reach a negotiated agreement or an amicable settlement. A mediator is a go-between, a diplomat, a sage, an expert, a counsellor, a wise, an information gatherer, an effective listener, a communicator who helps the parties to track and unveil their interests and needs in order to attain a mutually satisfactory outcome. The mediator's role involves persuading the parties to agree to mediate, providing a conducive environment for parties' discussion, facilitating the flow of communication between them, focusing the parties on the main issues in the dispute and helping to draft a settlement agreement that is mutually acceptable to the parties. The mediator is, therefore, not a judge but one that adopts diplomatic gestures and persuasion as a strategy to make parties understand one another in a wide perspective. He does not impose the final decision on the parties but helps them to jointly decide the terms of the settlement agreement. The outcome of a mediation process is often described as a win-win because the final decision is jointly decided by the direct parties.

Arbitration

This is also a private third-party process of conflict resolution, where the arbitrator helps the parties clarify issues and pronounces the final decision on the parties' case. Arbitration, as being practised in many

parts of the globe, is an informal system of conflict management but it is to a very large extent less flexible than mediation. Even though it enjoys some procedural flexibility and the critical role the parties play in the appointment of the arbitrator, the arbitrator reserves the power to grant the award to the winning party. Unlike mediation, the outcome of an arbitration proceeding is a win-lose.

Collective Agreement

This refers to the negotiating process that often takes place between management and employee unions on the condition of service under which workers can perform their official duties. In this sense, joint problem-solving approaches become a unique attribute and a defining element of the system. By implication, all parties to the conflict are automatically brought into a forum or meeting to dialogue in order to chart a new course for the industry. Hence, American National Labour Relations (cited in Omole, 2002:60) described the process as:

> ...the performance of mutual obligations of the employer and the representative of the employee to meet at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party.

It basically involves the coming together of critical stakeholders in the industrial setting to jointly decide modalities or key policies that govern the sector. It must, however, be stressed that collective bargaining does not involve individual bargaining, unilateral decision-making by employers or unions and government regulation or any other issues that are not connected to wages or condition of service. It is a joint problem-solving tool employed by relevant actors for determining salaries, wages, responsibilities, duties, welfare of workers and other conditions of service leading to the collective agreement. Hence, Sonubi and Omole (1998) asserted that collective bargaining is one of the processes of rule-making or decision-making through the joint efforts of autonomous unions and management. The

cornerstones of collective bargaining include voluntariness, democracy, independence and mutual respect.

Understanding the Nature of Trade Disputes in Collective Bargaining in Nigeria

Conflicts are inherent in human nature and by extension human organisations are breeding ground for fierce conflicts. Wherever people are gathered in the pursuit of common goals, conflict is either imminent or it is bound to occur. In the industrial sector, disputes are natural and inevitable processes of human interactions. Various perspectives on conflict have been advanced to explain the common bickering and irreconcilable differences that are germane to the workplace, particularly between the major actors- the labour unions and their employers. This 'cat and mouse' relationship is premised on the fact that the workers will always demand high wages/salaries and better condition of service while their employers will always strive to maximise profits by cutting down or minimising their production cost. In this wise, workers' wages and other conditions of service are usually the prime targets. As Ibiatan (2013:202) succinctly captured the scenario:

> the widely held misconception that union-management interaction must be adversary and combative is anchored on the existence of dual interest groups (in organisations) with different goals and motivations. One group is represented by employers of labour or the management whose primary concern is profit maximisation or service delivery at any and all costs. The second group is made up of workers- their goal is to achieve improved welfare and better working condition.

The theoretical component of this argument is sufficiently captured in Marxian theory of historical materialism propounded after Karl Marx, the 18th Century's German Sociologist. It analyses the constant struggle between the bourgeoisie (that is, the owners of the means of production) and the proletariats (the working class) under a capitalist system. For Karl Marx, conflicts are common features of capitalist

societies because of the contradictions in the material interests of the working class and their minority ruling elite counterpart. He described the state or government as a super-structure and by-product of class irreconcilable antagonism, exhibiting the traits of coercion and exploitation of the working class (Kapur, 1981). In other words, instead of the state serving as a regulatory body, a neutral empire and an agent of distributive justice, it chooses to be an accomplice in the pauperisation and oppression of the working class.

According to Karl Marx, the dominant class will always strive to capture and control the instrument of the state machinery in order to further the exploitation of the hapless minority. In the words of Kapur (1981: 70), "Under capitalism, the state is in essence a committee of the bourgeoisie for the oppression and exploitation of the working class, the proletariat." Some of Karl Marx's postulations, especially his strong belief in the state breeding its seeds of destruction and its fizzling away appear unrealistic. The emergence of a classless society (socialist state) in Marx's postulation can also be described as a wishful thinking considering scheme of things today. Yet, his deep analysis of the dialectics and complex class struggle among the forces of production is unbeatable and remains a major reference point in revamping the industrial sector today.

Also, Austin's command theory of law further emphasizes that law is strictly a product of a command by the sovereign, enforced by a sanction (cited in Abiala, 2015). In other words, laws, including Trade Union Act are instruments of oppression of the working class. For instance, through Trade Union Act LFN (2004) under Section 7, workers are being conscripted and compulsorily (not voluntary) made to become members of trade unions. The direction of Austin's legal theory emphasises three important principles: One, the law is issued by the unquestionable sovereign; Two, the command of the sovereign is total and has the power to impose sanctions, the sovereign must be habitually obeyed.

Like Marxian theory, the implication of this thesis is that the society is divided into two major parallel groups- the sovereign (comprising of rulers) and the subjects (consisting the ruled). This shows that the state's control is total and absolute over its subjects. Ideally, the government should act and be seen as a neutral arbiter of

distributive justice; regulating the conduct of the collective bargaining process and ensuring that the players adhere to the set parameters or the rules of the game. The arbitrary manner in which the state exercises its absolute powers shows its biases and its incapacity to function well as a credible and reliable umpire. Hence, Austin's thesis is, again, a true reflection of the inherent contradictions in the Nigerian society. It is for this reason that a case is being made for mediation to play a deeper role in the collective bargaining processes in order to reposition the labour industry for enhance performance.

Historical Perspectives of Trade Unions and Collective Bargaining in Nigeria

The foundation of collective bargaining as a mechanism for tackling labour-related disputes was established as far back as the colonial period. Two important events marked this period. First, Okpanachi (cited in Paul *et. al*: 2013) observed that collective bargaining began with the official registration of labour unions. Many trade unions were formed during the colonial period to advance the interest of workers. For instance, in August 19, 1912, the Southern Nigerian Civil Service Union was established by a coalition of government workers. This union later metamorphosed into the Nigerian Union of Civil Servants (NUCS) in 1914 shortly after the amalgamation of Southern and Northern Protectorates (Ananaba, 1969). By 1931, the Nigerian Railway Workers Union and Nigerian Union of Teachers were formed, setting the stage for a dynamic and vibrant industrial sector. However, these unions were not given official recognition or legalised until 1938, when the British government encouraged and granted the establishment of unions to the colonies (Paul *et. al*., 2013). These platforms later became the rallying point for aggregating members' interest and seeking redress of their grievances.

The second event was the establishment of the Whitely Commission (named after its chairman, John Henry Whitely) which was instituted by the colonial government to produce a report on the relationships between employees and employers in 1917. The commission was later replaced by the National Public Negotiating Councils, charged with the responsibility of looking into the various

complaints of workers and recommending appropriate wage standard and other conditions of service of workers to the government.

The height of this official interference from government quarters was the promulgation of the Trade Disputes Act of 1968, amended as Trade Disputes (Emergency Provisions-Amendment) Act of 1969. The laws outrightly banned strikes and lockouts and further directed that approval must be sought from government on matters relating to wage increases by employers of labour. The government set up the Udoji Commission in 1972 to recommend to it the appropriate wage policy and other conditions of service to workers.

The application of arbitration proceedings is a significant development in the management of disputes that often arise within the industrial sector. For instance, the first machinery for the settlement of trade dispute (Trade Dispute Arbitration and Enquiry Act No. 32) was introduced in 1914. It was a temporary arrangement that gave parties the absolute freedom to decide whether or not to utilise the window of redress provided by the law. Also, the Trade Disputes Act of 1968 and 1969 established the Industrial Arbitration Tribunal and was further modified in 1976 and amended in 1977 (that is, the Trade Dispute Act 1976 and Trade Dispute Essential Services Act, 1976) to encourage and sustain economic activities after the Nigerian Civil War (Ibietan, 2012). However, the decision of these Tribunals is still, to a large extent, subject to the approval of the Commissioner (now the Minister of Labour) for it to become binding.

Collective Bargaining Through Negotiation, Mediation and Arbitration

Collective bargaining is a global practice. It thrives on informal procedures of conflict management in order to facilitate amicable settlement between or among contending parties. The current machinery (as contained in the Trade Disputes Decree No. 7 of 1976) for the settlement of trade disputes follows the phases itemised below:

(a) Use of Mediators
(b) Referral to Conciliators
(c) Industrial Arbitration Panel
(d) The National Industrial Court
(e) Board of Enquiry

The provisions of the Act recognised the use of internal mechanisms acceptable to the parties to settle their disputes. If the parties are unable to reach an agreement through direct negotiation within seven (7) days, mediation is recommended for possible settlement (Umezulike, 1998). The use of mediation at this level remains purely an internal affair of the management and the union concerned. In other words, the parties supervise the appointment of the mediator and the modalities for the conduct of the mediation process. The Commissioner or the Minister of Labour does not have a direct role to intervene in the matter. But if a settlement is not reached after 14 days, the matter is required to be reported to the Minister, who may decide to appoint a conciliator to intervene in the matter. Although there seem to be merits in not allowing the Minister to directly intervene in the processes of mediation under this Act, it could also suggest that the procedure has not been conferred with a form of official legitimacy.

Upon the failure to resolve the matter through conciliation proceedings, the matter will be referred to the Industrial Arbitration Panel (IAP) by the Minister. The Panel has 42 days to dispense with this case, after which the Minister of Labour can grant a leave of extension. If the Arbitration Panel grants an award to a party, the award is still subject to the confirmation of the Minister before it can be communicated to the concerned party. The Minister may either remit the award to the Panel for reconsideration or confirm the award if he deems fit. In the event of the two parties having objections over the award, the Minister may further refer the matter to the National Industrial Court (NIC) for determination. The decision reached by NIC is final and binding on all parties. In all of these, the government plays a lead role at every stage of the process. Consequently, one major challenge that constantly besets the practice of collective bargaining from inception is the over-bearing nature of government in the process.

There are three major ways collective bargaining seems to have been hampered or compromised by the current practice of conflict resolution in the industry. The first is the wage fixing role of the government; the second is the excessive involvement of the government in the arbitration proceedings and the third is the tortuous

process for seeking redress. This development made some scholars to conclude that the system of industrial relations in Nigeria remains largely undemocratic and unresponsive to the actual needs of the industry (Uvieghara, 2001; Fashoyin, 1999). According to Uvieghara (2001:389), "the phenomenon of the appointment, on almost a regular basis, of commissions to review and recommend wages and other conditions of employment of public servants is a clear manifestation of the absence of collective bargaining in the public sector." Also stressing state's intervention in wage fixing and dispute settlement, Okafor and Akinwale (2012:90) observed that:

> Unfortunately, the Nigerian government at all levels remain undaunted in ensuring that the organised Labour is tamed and as such various aspects of the Nigerian Labour Law have been amended to suit the state's interest. The amendments, largely occasioned by governments' implementation of their adopted neo-liberal policies such as deregulation, commercialisation and privatisation, have affected the collective bargaining environments in Nigeria.

The practice became even brazen under military regimes. For instance, during General Ibrahim Babangida regime, a 45% increase in workers' wages was unilaterally imposed by the military government (Ojo, 1989). For this, Fashoyin (1999) submitted that collective bargaining had always been under a serious threat as government routinely set up wage commission, comprising top government functionaries to review and recommend wages and other benefits accruing to public workers. He attributed the worrisome trend to the fact that collective bargaining started from the public sector, which is largely agrarian in nature and that the government has for a long time remained the largest employers of labour. This is a contradiction and a dangerous trend that needs to be properly interrogated.

The statutory arbitration proceedings that give so much influence to the government have also generated a lot of controversies and further incurred disenchantment from discerning observers. Girigiri (2002:16) for instance maintained that conflict resolution processes in the public sector 'amounts to the curtailment of the

collective bargaining because of the element of compulsion in them.' In other words, the act of compulsion, rigidity and insensitivity that are inherent in the current practice is tantamount to the spirit of voluntariness of collective bargaining. Abiala (2015:158) further stressed that, "the operation and efficacy of functions revolved around the Honourable Minister of Labour, Employment and Productivity. For instance, apart from the voluntary mechanism of mediation which parties were free to employ to resolve their disputes, all other processes were subject to referrals of the Honourable Minister."

From the above, it is clear that mediation has important values that can enhance the effective resolution of disputes in the industrial sector.

Mediation as Facilitator of Collective Bargaining Process in Nigeria

There are several ways mediation can serve as the promoter or harbinger of collective bargaining processes in Nigeria. First, considering the long chain of Alternative Dispute Resolution procedures that this paper earlier referred to, mediation is undoubtedly distinct. This is because mediation exhibits important values that can promote collective bargaining strategies, particularly with regard to facilitating a speedy and effective settlement of trade disputes. These core values include voluntariness, neutrality/impartiality, confidentiality, empowerment, mutual respect, democracy and interdependence. It should, therefore, be emphasised that mediation has a lot of positive attributes that naturally conform with the core values of collective bargaining processes.

Secondly, there is every reason to suspect that the insertion of mediation clause into the Trade Dispute Act was done in bad faith and indeed, a deliberate attempt to make the process fail or ineffective. This is because the modality for the conduct of the mediation process was rather scanty or not detailed enough compared to the undue attention given to conciliation and arbitration proceedings. For instance, the provision was silent on the role of the mediator and what qualifies him to serve as the mediator. As a matter of fact, the Industrial Arbitration Panel and the National Industrial Court, which are the statutory bodies saddled with the resolution of industrial disputes in the country only offer ADR services that are restricted to

just arbitration and conciliation. The position of this paper is not to outrightly discredit or call for the jettisoning of the existing framework but to canvass for main streaming mediation into the conflict resolution processes in a manner that gives transparency, confidence and equal opportunities for the participation of all parties. In other words, mediation has important values that could enhance the collective bargaining process unlike arbitration, which has continued to instigate and generate a lot of instability and tension within the sector.

Thirdly, arbitration and conciliation procedures as being practised currently do not support democratic governance. The excessive powers of the Minister of Labour and Productivity in deciding the outcome of the process suggest that the process is largely undemocratic. For instance, Girigiri (2002) clearly stated that the arbitration and conciliation procedure restrict the practice of collective bargaining due to what he described as the insertion of 'elements of compulsion' in the entire processes. For cases to be treated and heard at the various Industrial Courts, the Minister has to make a statutory referral and plays critical roles in deciding the outcome of such matters. Even at that, the Federal Government is usually a party to such trade disputes, especially when they have to do with fixing workers' salaries and other remunerations or welfare packages. With respect to the enormous power bequeathed to the Minister, Akanji (2005:241) unequivocally warned that:

> one can conclude that the phenomenon is related to power sharing between actors, to a large extent and that where power lies in favour of one to the advantage of the other, the use of power in such situation may be subjected to certain constraints. For instance, if the powerful party does not exercise restraint, the power may be used in a situation that the working relationship may disrupt the production of goods and services.

Apart from this, the situation further re-echoes the age-longed problem associated with strengthening institutions along democratic governance for optimal performance in Nigeria. Public institutions like the National Industrial Courts should be allowed to evolve and

grow in a manner that confers on them a high level of independence and transparency. A joint-problem solving approach like mediation can provide such leverage.

The question may then arise; how appropriate is the application mediation to trade related disputes? Olagunju (2002:9) responded by providing the general situations that may encourage the use of mediation:

- Parties are in conflict-prone industry;
- Predisposition of the parties for settlement;
- Existence of an important relationship;
- Desire for confidential resolution;
- The desire for control of the dispute process;
- Likelihood of adversarial process leading to a loss of face for one of the parties;
- Emotions have run so high that a forum is needed to fully express feelings;
- Parties desire speedy resolution;
- Both sides have good case.

All these elements apply to the resolution of trade disputes. In fact, in asserting the superiority of mediation in tackling trade disputes, Abiala (2015:179) specifically submitted that, "From the list of Alternative Dispute Resolution processes such as arbitration (governed in Nigeria by the Arbitration and Conciliation Act and other international laws and conventions) judicial appraisal, adjudication, Ombudsman among others…mediation and conciliation are most potent in Trade Dispute Resolution.

One important area that mediation has proven to be effective is the quick or timely settlement of disputes. Rather than expending a minimum of 72 days (over 2 months) to secure an award from the NIC, mediation is a more flexible process that could delivers a speedy settlement within few days or weeks. David Mundel (cited in ICMC, 2002:33) believes that:

> Mediation gives the parties a day in court in a way that litigation does not; giving them an opportunity to air their feelings and thus removing emotional blockages; leaving the way open to agreement between the parties. Before the mediation, people

> focus on the strengths and weaknesses of a case, but mediation helps to focus on a solution... mediation puts the parties back in control. We settle in one day's mediation a case that had been in the court for two years, thus drastically reducing cost and management of time– yet without risk of compromising our position by agreeing to mediation.

To further deepen the framework, discussions are on-going on how hybrid dispute resolution processes can deliver more effective services to disputants in Nigeria. Hybrid processes suggest the combination of different methods of settlement procedures in order to achieve a better result. A better result can be measured by speedy resolution of disputes, level of compliance to collective agreement and satisfaction of parties to the entire process. Hence, the new thinking in the field of ADR is how a blend of different approaches can enhance justice delivery system in different dispute settings. In the industrial sector, a combination of arbitration and mediation, otherwise referred to as Med-Arb or Arb-Med is further recommended, depending on the nature of the dispute and the dispositions of the parties. According to Riskin *et. al*. (2005), 'each dispute resolution process threatens or promotes different values or interests and within each process, we find many variations.' Despite the shortcomings of the adversarial systems, they have been known to be open and help set precedence for cases that need public updates. By infusing a higher dose of mediation process into the existing framework, the compliance rate is most likely to increase and there will be timely resolution of disputes. Of course, the constant incidence of strikes, lock-outs and other industrial unrests are likely to abate.

Concluding Remarks

This paper is an appraisal of dispute management processes as applied to trade disputes in Nigeria. The paper took a critical look at the processes of redress in the industrial sector and concluded that there is excessive application of rigid mechanisms through the instrumentality of the National Arbitration Court and the Industrial Arbitration Panel. The system does not only give too much influence to the Minister of Labour in the determination of Awards but also

subjects cases to unnecessary long process that defeats speedy resolution of disputes. Furthermore, the paper criticised the tangential or limited role the Trade Dispute Act accorded mediation in the whole tortuous processes of case management and, therefore, canvassed for mainstreaming mediation clauses into the entire scheme of industrial dispute resolution in Nigeria. Mediation and collective bargaining share important values that are complementary. These elements include voluntariness, democracy, confidentiality, inter-dependence, empowerment and mutual respect. This paper further recommended the adoption of hybrid conflict resolution processes, which will enable the combination of different approaches in dealing with complex problems. All these important attributes show mediation as dynamic, flexible and credible alternative for enhancing collective bargaining procedures in Nigeria.

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