

Alternative Dispute Resolution in Criminal Cases: A Reality or Myth– A Case Study Of The Nigerian Criminal Justice System

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Abstract

The challenges of the criminal justice system in Nigeria cannot be overlooked nor over-emphasized. There are many pending criminal cases and many more being filed each day as there is no society devoid of crime. Absence of witnesses, political interference, inadequate court facilities are some of the causes of delay in criminal trials. The criminal justice system can therefore be said to be in pressing need of alternative dispute resolution (ADR) which is a method of settling disputes without the rigorous process of litigation thereby saving time and cost.

The use of comparative and doctrinal methodology was applied in this paper as it discusses the role of ADR and the statutory provisions for ADR. It also focuses on the types of ADR and their suitability to certain criminal offences. The paper also discusses the rights and duties available to victims of crime and the defendant as well. It will also discuss and consider the role of restorative justice in criminal justice system. It will consider plea bargain as it applies in criminal matters. In conclusion, the paper will consider the effectiveness and way forward for the application and enforceability of ADR mechanisms in the criminal justice system of Nigeria mainly through plea bargaining.

Keywords: ADR, Criminal Justice, Disputes, Crimes, Litigation, Plea bargaining

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Introduction

As a result of the enormous cases before the court which more often than not lead to delay in arriving at a conclusion, ADR mechanisms are fast becoming options to be applied in resolving issues.¹ With the increase in disputes before the courts, the judiciary is overburdened, litigation could be expensive and time consuming therefore, it is a matter of necessity to establish or make use of already established ADR mechanisms which is effective enough to ensure speedy disposal of cases.² ADR is not new to the criminal justice system as its mechanisms have been applied under different names.³ Most of the literature that discusses ADR has little or no reference to its use in the criminal justice context and most criminal law materials do not include ADR terminology. ADR in criminal justice has been classified in form of restorative justice which comprises of community mediation programs, dispute resolution settlement programs, neighbourhood justice programs, victim offender mediation programs, family group conferencing and sentencing circles.⁴ Hence, mediation, negotiation and other related mechanisms are often used by criminal justice practitioners and others who may not know or who fail to recognise that their actions could be considered part of the dispute resolution context.⁵

The Concept of Alternative Dispute Resolution (ADR)

The United States Administrative Dispute Resolution Act of 1996 defines ADR as “any procedure that is used to resolve issues in controversy, including but not limited to, conciliation, facilitation, mediation, fact-finding, mini-trials, arbitration and use of ombudsman or any combination thereof.”⁶

¹ Joseph Nwazi, “Assessing the Efficacy of Alternative Dispute Resolution (ADR) in the Settlement of Environmental Disputes in the Niger Delta Region of Nigeria,” (2017) 9 *Academic Journal* 13.

² Bukola Faturoti, “Institutionalised ADR and Access to Justice: The Changing Faces of the Nigerian Judicial System,” (2014) 14 *JCLA* 1.

³ Maria Volpe, “Promises and Challenges: ADR in the Criminal Justice System,” (2000) 7 *Dispute Resolution Magazine*.

⁴ Ibid.

⁵ Chukwunweike A. Ogbuagor, Edith Nwosu, Edwin Ezike, “Mainstreaming ADR in Nigeria’s Criminal Justice System,” (2014) 45 *European Journal of Social Sciences* 1.

⁶ USNRC, “Alternative Dispute Resolution in the NRC’s Enforcement Program” available at <<https://www.nrc.gov/about-nrc/regulatory/enforcement/adr.html>> accessed 22 March 2022.

In the case of *Halsey v Milton Keynes General NHS Trust*, Justice Dyson defined ADR as “a collective descriptive method of resolving disputes otherwise than the normal trial process.”⁷

According to Ayinla, “ADR is a general term that is used to describe the method and procedure used in settling disputes either as alternatives to traditional disputes resolution mechanisms of the court or some cases supplemental to such mechanisms.”⁸ ADR depicts a variety of dispute resolution mechanisms through which disputes can be settled between parties with the involvement of a neutral party.⁹ It connotes any procedure as agreed to by the concerned parties to a dispute where they engage the service of a third party to help in settling the dispute outside litigation.¹⁰ It is the different ways by which people can resolve disputes without going to trial. ADR has gained a broad acceptance by the public and the legal profession. Any person that does not want to go to court may choose an ADR mechanism.

There are instances in some jurisdictions where the courts have encouraged and necessitated litigants to use ADR to settle their disputes. It has a variety of processes which may be applied by the parties depending on the process which is suitable to their matter. ADR has been used successfully to settle civil disputes and many countries are beginning to adopt ADR mechanisms to settle criminal cases,¹¹ which of course still sounds unfamiliar to some people when it comes to criminal matters. The use of ADR to settle disputes that involves crime is necessary in keeping close and steady relationships between members of the community.¹² ADR saves time, as a dispute that might take years in litigation is settled much sooner. ADR is cost effective and flexible.¹³ ADR also preserves relationships.¹⁴ It is a system that promotes satisfaction as it encourages a win-win solution.¹⁵ It also supports and complements court reform and increases access to justice for

⁷ (2004) EWCA Civ 576 <https://docentes.fd.unl.pt/docentes_docs/ma/JPF_MA_29940.pdf> accessed 22 March, 2022.

⁸ L.A. Ayinla, A.K. Adebayo, Bilikis Ayinla, “An Appraisal of the Nexus and Disparities Between Arbitration and Alternative Dispute Resolution,” (2017) 8 *NAUJILI* 2.

⁹ *Ibid.*

¹⁰ Chukwunweike A. Ogbuagor, Edith Nwosu, Edwin Ezike, “Mainstreaming ADR in Nigeria’s Criminal Justice System,” (2014) 45 *European Journal of Social Sciences* 1.

¹¹ Aduka Charles Emenogha and Marshal Umukoro Onome, “Alternative Dispute Resolution and Its Relevancy in Criminal Matters,” (2018) 6 *International Journal of Business & Law research* 1.

¹² *Ibid.*

¹³ *Ibid.*

¹⁴ Manjur Hossain Patoari, Amir Husin Mohd Nor, Muhammad Nizam Bin Awang, Abdul Hamid Chowdhury, Jaforullah Talukder, “Legal and Administrative Challenges of Alternative Dispute Resolution (ADR) as a Peaceful Means of Resolving the Land Dispute in the Rural Areas of Bangladesh,” (2020) 11 *Beijing Law Review* 2.

¹⁵ Michaelmas Chambers, *Alternative Dispute Resolution in Nigeria* (2020).

disadvantaged groups.¹⁶ It promotes privacy and it is less formal and more flexible than courtroom litigation.¹⁷

Statutory Provisions for ADR

Despite that there are no clear and specific binding legislations on ADR, there are a number of international human rights laws that promote and encourage the use of good culture.¹⁸ Article 27 of the Universal Declaration of Human Rights¹⁹ (UDHR) gives everyone the right to participate freely in the culture of the community. The International Covenant on Civil and Political Rights (ICCPR)²⁰ allows the establishment of ‘Ad hoc’ conciliation commission with a view to reach up on an amicable solution to the matter on the basis of respect for human rights enshrined therein. This directly or indirectly has shown that customary law is part of people’s culture.²¹ ADR encompassing cultural dispute settlement methods suggests that it could be said that international human rights instruments promote ADR mechanisms in criminal matters.²² There is also the United Nations (UN) Guideline on the Role of Prosecutors which makes provision that based on municipal laws, prosecutors are to consider waiving prosecution, discontinuing proceedings, conditionally or unconditionally or diverting criminal cases from the formal justice system with total regard being accorded to the rights of suspects and victims.²³ In this instance, it may be said that when a criminal case does not come under the formal justice system, it would imply that it has been diverted to ADR.²⁴ One of the primary duties of the prosecutor is to seek justice within the limits of law and

<<https://www.michaelmaschambers.com/insight-page.php?i=9&a=alternative-dispute-resolution-in-nigeria>> accessed 3 April 2022.

¹⁶ L.A. Ayinla, A.K. Adebayo, Bilikis Ayinla, “An Appraisal of the Nexus and Disparities Between Arbitration and Alternative Dispute Resolution,” (2017) 8 *NAUJILI* 12.

¹⁷ *Ibid.*

¹⁸ Awol Dana, “The Status of Alternative Dispute Resolution (ADR) in Criminal Justice System under the Legal Frameworks of Ethiopia & its Challenges,” (2017) 7 *Research on Humanities and Social Science* 23.

¹⁹ Universal Declaration of Human Rights, Adopted and Proclaimed by General Assembly Resolution 217 A (III) of 10 December 1948.

²⁰ International Covenant on Civil and Political Rights, General Assembly resolution 2200A (XXI), art 42.

²¹ Awol Dana, “The Status of Alternative Dispute Resolution (ADR) in Criminal Justice System under the Legal Frameworks of Ethiopia & its Challenges,” (2017) 7 *Research on Humanities and Social Science* 23.

²² *Ibid.*

²³ Eight United Nations Congress on the Prevention of Crime and Treatment of Offenders, (1990) United Nations Publication, Sales No E.91. IV.2, principle 18.

²⁴ Awol Dana, “The Status of Alternative Dispute Resolution (ADR) in Criminal Justice System under the Legal Frameworks of Ethiopia & its Challenges,” (2017) 7 *Research on Humanities and Social Science* 23.

not be a persecutor who merely seeks to convict at all cost.²⁵ The mechanisms should not only focus on reducing court loads, but also to avoid the taint that comes with pre-trial and awaiting trial detention, conviction and sentence and the impacts that imprisonment would have on the defendant.²⁶ States have the discretionary power vested in them to enact municipal statutes on how to implement ADR in their respective criminal justice system as there is no restriction on the right of States to prosecute alleged offenders.²⁷ All criminal cases cannot be subjected to ADR, rather, States can restrict through their statutes that ADR should not be used to acquit the defendant from criminal liability in cases of capital crimes. According to the UN Economic & Social Council, the outcome of criminal cases diverted to any ADR mechanism would lead to outcomes that may include restitution, community service etc. which would align to the needs and responsibilities of the parties and also help in the re-integration of the victim and the offender.²⁸ Even if there is no binding specific international instrument that prescribes the application of ADR to resolve disputes involving crime, the UN system in general and international human rights instruments encourage state parties to implement ADR in their respective criminal justice system. At the regional level, the African Union also encourages the use of mechanisms to prevent and resolve conflicts in order to promote peace and tolerance.²⁹ The Peace & Security Council (PSC) is placed with the responsibility of preventing, managing and resolving conflicts.³⁰

In Nigeria, section 19 of the 1999 constitution provides for the settlement of disputes by arbitration, mediation, conciliation, negotiation and adjudication.³¹ Order 19 of the Federal High Court (Civil Procedure) Rules provides for supportive court interventions in arbitral proceedings.³² The High

²⁵ Gloria Shajobi-Ibikunle, Mercy Emetejife Onoriode, “A Code for Public Prosecutors in the Nigerian Criminal Justice System: A Necessity or A Nuisance?” (2019) 19 *Global Journal of Human-Social Science: Interdisciplinary* 5.

²⁶ Awol Dana, “The Status of Alternative Dispute Resolution (ADR) in Criminal Justice System under the Legal Frameworks of Ethiopia & its Challenges” (2017) 7 *Research on Humanities and Social Science* 23.

²⁷ *Ibid.*

²⁸ United Nations Economic & Social Council Resolution 1997/2, para 7.

²⁹ African Union, “Conflict Resolution, Peace and Security” <<https://au.int/en/conflict-resolution-peace-security>> accessed 10 March 2022.

³⁰ *Ibid.*s

³¹ Constitution of the Federal republic of Nigeria 1999.

³² Federal High Court (Civil Procedure) Rules, 2019; The Federal High Court Act, s 7.

Court Civil Procedure Rules of various Nigerian states also provide for reference of cases to ADR.³³

ADR in Criminal Matters

A crime is an act or omission that the law makes punishable.³⁴ Whoever does an act or makes an omission that has been prohibited by law has committed an offence and such a person becomes liable to punishment as provided for in section 2 of the Criminal Code Act.³⁵ The major purpose of criminal law is to punish crime while other purposes are to protect, serve, help human conduct and limit human actions and ensure that justice is served accordingly.³⁶ In criminal acts, the state prosecutes and prescribes the punishment to be meted out on anyone that is criminally liable for an offence.³⁷ Back in the days, the society had its way of handling criminal issues. Offenders were punished and there were times the matters were resolved. Family heads, community heads did intervene in criminal matters. For example, a person that breaks into his neighbour's house to steal or enters his farm to steal yam or neighbours fighting in a public place. The heads intervene and the matters are resolved. Mostly, in simple offences, the family involved are called together, issues heard, blames are apportioned and of course punishments are meted out. There are instances when cases ended up getting settled amicably.

In present days as well, not all criminal matters get to the court. Some are settled by family members, some are settled by the community leaders and some are settled by the police themselves. There are many instances where people have gone to lodge complaints and the case reported gets resolved inside the DPO's office. The writer is not talking about bribery now but actual incidents where the parties are brought together, and the matter ironed out by the police. This can be classified as a mechanism under ADR.

³³ High Court Civil Procedure Rules of Lagos State, 2019; High Court of Ogun State Civil Procedure Rules 2014; High Court of Oyo State Civil Procedure Rules and High Court Procedure Rules of Rivers States.

³⁴ Criminal Code Act, Cap C38 2010, s.2.

³⁵ Ibid.

³⁶ Administration of Criminal Justice Act, 2015, s 1; Elena Maculan, Alicia Gil, "The Rational and Purpose of Criminal Law and Punishment in Transitional Contexts," (2020) 40 *Oxford Journal of Legal Studies* 1.

³⁷ Gloria Shajobi-Ibikunle, Mercy Emetejife Onoriode, "A Code for Public Prosecutors in the Nigerian Criminal Justice System: A Necessity or A Nuisance?" (2019) 19 *Global Journal of Human-Social Science: Interdisciplinary* 5.

Criminal cases are tried in court by using rules of evidence and procedures. The judge, prosecutors, defence counsel and a number of support staff are found in the courtroom during a criminal trial with a number of witnesses called and the defendant placed in a dock. The law is applied to determine the culpability or innocence of the defendant. No matter what, justice has to cut across to the defendant, the victim and the state,³⁸ which is also the purpose of criminal law justice to the defendant, state and victim.³⁹ However, the various mechanisms of ADR are not new to the criminal justice system. Criminal justice has a well-established history of using many ADR processes, practices and techniques unknowingly. These processes include family group conferencing, victim-impact panels, victim-offender mediation, circle sentencing, hostage negotiation, domestic violence intervention and traditional policing efforts. They are routinely included processes that include negotiation, mediation, facilitation even though they are not customarily called ADR, they form part of restorative justice.⁴⁰ Restorative justice is a mechanism applied in the criminal justice system either to resolve or intervene in criminal matters.⁴¹ Criminal justice goes beyond just punishing the offender. It involves reconciling the offender with the victim and reconciling the offender with the society.⁴²

Restorative Justice

It is a system of criminal justice that focuses on the rehabilitation of offenders through reconciliation with victims and the community.⁴³ Restorative justice seeks to right the wrong committed by the defendant, repair the damage the defendant has brought upon the victims and the community at large and also the damage sustained by defendant.⁴⁴ This is by way of discussion

³⁸ *Josiah v State* (1985) 1 NWLR Part II) Pg 125 at 141.

³⁹ Elena Maculan, Alicia Gil, "The Rational and Purpose of Criminal Law and Punishment in Transitional Contexts," (2020) 40 *Oxford Journal of Legal Studies* 1.

⁴⁰ Maria Volpe, "Promises and Challenges: ADR in the Criminal Justice System," (2000) 7 *Dispute Resolution Magazine*.

⁴¹ Julena Jumbe Gabagambi, "A Comparative Analysis of Restorative Justice Practices in Africa," (2018) *Hauser Global Law School Program*, NYU <https://www.nyulawglobal.org/globalex/Restorative_Justice_Africa.html> accessed 2 April 2022.

⁴² Nicola Lacey, Hanna Pickard, "To Blame or to Forgive? Reconciling Punishment and Forgiveness in Criminal Justice," (2015) 35 *Oxford Journal of Legal Studies* 4.

⁴³ *Ibid.*

⁴⁴ Sahuri Lasmadi, Ratna Kumala Sari, Hari Sutrsa Disemdi, "Restorative Justice Approach as an Alternative Companion of Criminal Justice System in Indonesia," (2020) 140 *Advances in Economic, Business and Management Research* 2.

on what can be done to repair the harm caused by the defendant. This process usually ends up helping the all parties to heal or get on a journey of healing.

Restorative justice is beginning to have its impact on justice systems all over the world. It is the way of responding to crime with focus mainly on repairing the damage done to those involved.⁴⁵ Resolving criminal matters is not about the case not getting to court, the case in many instances will get to court and that does not prevent restorative justice program.⁴⁶ The programs commonly associated with restorative justice include- mediation, conflict resolution programs, family group conferencing, victim-impact panels, victim-offender mediation, circle sentencing and community reparative boards.⁴⁷ Restorative justice can take place at any stage of the criminal justice process including after conviction. Section 43 of the Nigerian Correctional Service Act, 2019 provides for 4 stages at which restorative justice may be applied.⁴⁸

*The pre-trial stage:*⁴⁹ Here, criminal matters may be settled before trial commences. This might be before the defendant is charged or after he has been charged but trial is yet to commence.

*The trial stage:*⁵⁰ There are instances where criminal matters have been withdrawn from court despite the fact that criminal proceedings have commenced before the court. There are also times when witnesses have been called, and yet the victim comes forward to say that the matter has been resolved either for their own safety, the sake of peace, the intervention of the landlord association, they have to let go. Some people are ignorant of the fact that criminal matters are the business of the state. As any crime committed is against the state and they just come in as witnesses of the state. But then, as provided by the Nigerian correctional service Act, the state allows intervention and that is why the state may come before the court to withdraw the charge against the defendant. During imprisonment:⁵¹ The criminal justice system has different institutions connected to it. They are the police, the judiciary and the correctional service. Correctional officers also have a role they

⁴⁵ Ani Comfort Chinyere, "Restorative Justice: Victim Offender Mediation" <<https://legalpediaonline.com/restorative-justice/>> accessed 6 April, 2022.

⁴⁶ Yasmirah Mandasari Saragih, "Concept of Restorative Justice in Criminal Law Settlement Through the Approach of Local Wisdom," (2021) 7 *International Journal for Innovative research for Multidisciplinary Field* 7.

⁴⁷ UNODC, *Handbook on Restorative Justice Programmes* (2006) New York, United Nations Publication.

⁴⁸ Nigerian Correctional Service Act, 2019.

⁴⁹ Nigerian Correctional Service Act, 2019, s 43(3) (a).

⁵⁰ *Ibid.*

⁵¹ Nigerian Correctional Service Act, 2019, s 43(3) (c).

play in reconciling the convict with the victim and also the convict's family. They go to appeal to them and for the awaiting trials, many of them by that step taken end up not getting convicted. Post-imprisonment:⁵² This involves steps taken to reconcile the convict with the society after release into freedom.

Restorative Justice Mechanisms

Settlement/ Case Conferencing: The judge or his representative meets with the parties and their attorneys to settle some or all issues in disputes before going to trial. The judge or settlement officer does not decide the outcome but helps the parties evaluate the case and negotiate a settlement. A settlement conference may be voluntarily chosen by disagreeing parties who are not in litigation or it may sometimes be mandated by a court before a trial commences.⁵³

Community and Family Group Conferencing: This program was adopted in New Zealand in 1989. It is based on the Maori tradition of resolving disputes and it has now been modified into police-initiated diversion in South Australia, Lesotho, Ireland and also the United States. This involves the victim, the defendant, family members, friends of the victim and offender and community members who all come together to discuss the crime committed, the effect of the crime and the way forward.⁵⁴ This program is usually facilitated by an independent third party. It must be voluntary and the defendant must have admitted guilt of the offence. The program is to confront the defendant with the consequences of the crime, develop a reparative plan and in serious cases in Zealand, determine the need for more restrictive supervision or custody of the defendant.⁵⁵ In South Africa, community conferencing is also used as an alternative to criminal trial.⁵⁶ The program is managed by community groups or agencies with or without financial support from the government.⁵⁷ The outcome includes apologies, restitution and compensation. This is similar to some of the duties and ways by which disputes are also resolved by certain NGOs, associations

⁵² *ibid*, s 4 (3) (d).

⁵³ Aastha Aggarwal, "Should ADR be Applicable in Criminal Cases?" (2020) 17 *Supremo Amicus*.

⁵⁴ UNODC, *Handbook on Restorative Justice Programmes* (2006) New York, United Nations Publication 20.

⁵⁵ Gordon Bazemore, Mark Umbreit, "A Comparison of Four Restorative Conferencing Models" (2001) *Juvenile Justice Bulletin* <<https://www.ojp.gov/pdffiles1/ojdp/184738.pdf>> accessed 5 May 2022.

⁵⁶ Tarryn J. Roy and Marelize Schoeman, "Analysing the Applicability of Family Group Conferencing as a Youth Justice Intervention in South Africa," (2020) 16 *Vulnerable Children and Youth Studies* 3.

⁵⁷ GHA Spijker and M de Jong, "Family Conferencing: Responsibility at Grassroots Level- A Comparative Analysis Between the Netherlands and South Africa," (2021) 24 *Potchefstroom Electronic Law Journal* 1.

such as International Federation of Women Lawyers (FIDA) and even the police. There are instances where people go to report crimes at the police station, and the matter gets resolved there and then without the offender being charged.

Circle Sentencing: This is similar to conferencing, the difference is that it involves more family members, more community members, government representatives, police officers and other necessary people who all come together to discuss the underlying causes and impacts of crime to the victim and the community at large.⁵⁸ This program is available to defendants who have pleaded guilty. This program is conducted in many aboriginal communities in Canada.⁵⁹

Victim-Offender Mediation: This is when the offender and the victim of the crime meet face to face in the presence of a trained mediator/facilitator. It provides the interested victim the opportunity to meet the offender in a safe and structured setting. The goal is to hold the offender directly accountable while at the same time providing necessary support and help to victims.⁶⁰ The parties involved are not disputants. One party has committed a crime and admitted to same while the other has been victimized and for that the issue of guilt and innocence is not mediated. Rather, it focuses on dialogue and places emphasis on victim empowerment, offender's accountability and restoration of losses.⁶¹ In Bangladesh Criminal Procedure Code, compromise is adopted to resolve some types of crimes.⁶² In Ethiopia criminal justice system, even though ADR is not clearly defined, the Criminal Procedure Code of Ethiopia provides for the court to reconcile the crime victim and the defendant in simple offences such as insult, assault, petty damage to property or petty theft that do not exceed certain amount of money through compromise.⁶³ The issue with that provision of law is that it does not provide for the manner in which the reconciliation or

⁵⁸ Yasmirah Mandasari Saragih, "Concept of Restorative Justice in Criminal Law Settlement Through the Approach of Local Wisdom" (2021) 7 *International journal for Innovative research for Multidisciplinary Field* 7.

⁵⁹ Gordon Bazemore, Mark Umbreit, "A Comparison of Four Restorative Conferencing Models," (2001) *Juvenile Justice Bulletin* <<https://www.ojp.gov/pdffiles1/ojdp/184738.pdf>> accessed 23 June 2022.

⁶⁰ Mark S. Umbreit, *Family Group Conferencing: Implications for Crime Victims* (2000) Center for restorative Justice & Peacemaking, University of Minnesota.

⁶¹ Stephanie Chikwauzor Emebo, "A Simple Guide to Understanding Restorative Justice" (2020) <<https://thenigerialawyer.com/a-simple-guide-to-understanding-restorative-justice/>> accessed 30 July 2022.

⁶² Ridoan Karim, "Introduction of Alternative Dispute Resolution in Criminal Justice System of Bangladesh" (2015) 1 *Journal of Asian and African Social Science and Humanities* 2.

⁶³ Awol Dana, "The Status of Alternative Dispute Resolution (ADR) in Criminal Justice System under the Legal Frameworks of Ethiopia & its Challenges" (2017) 7 *Research on Humanities and Social Science* 23.

compromise will be applied or conducted.⁶⁴ It does not state the parties that will be involved; it does not state the responsibility of the victim, defendant and the role of the community is not provided for.

Challenges of ADR in Criminal Justice System in Nigeria

Despite the challenges and criticisms that may occur, ADR mechanisms continue to evolve and multiply in criminal justice system globally.⁶⁵ The use of ADR in resolving criminal cases is limited in Nigeria. While mediation is easily sought for in civil litigation, it is not the same in criminal litigation. The belief of the society in due process and criminal justice raises questions about the suitability of ADR in criminal matters. Some lawyers also have a negative perception and attitude toward ADR as they see litigation as generating surplus income and for this discourage settlement out of court simply because it is not exactly beneficial to them.⁶⁶ In addition, the lack of transparency and public accountability of ADR erodes public law.⁶⁷ Not only may the private third-party exert inappropriate control over parties in ADR processes but parties themselves may feel compelled to accept less than their full legal entitlement because they feel pressure to be agreeable to prioritize harmony over justice.⁶⁸ However, it is not ADR processes themselves that are unjust; it is the introduction of these ADR mechanisms into new institutions with pre-existing constellation that can lead to injustice like any other human innovation.⁶⁹ ADR mechanisms would have to be continually adjusted to respond to the new problems, needs and wants that they uncover. ADR in criminal matters is yet to assume a significant status within the Nigerian legal system as its applicability in criminal matters is still vague. However, the closest and commonest form of ADR in Nigeria is Plea bargain.

⁶⁴ Ibid.

⁶⁵ Joseph Nwazi, "Assessing the Efficacy of Alternative Dispute Resolution (ADR) in the Settlement of Environmental Disputes in the Niger Delta Region of Nigeria," (2017) 9 *Academic Journal* 13.

⁶⁶ Ngozi E. Nwafor, and Onyeka Christiana Aduma, "Problems of the Administration of Criminal Justice System in Nigeria and the Applicability of Alternative Dispute Resolution," (2020) 7 *NAU.JCPL* 2.

⁶⁷ Fernandez Obiene, "ADR and Nigeria Criminal Justice System," <file:///C:/Users/hp/Downloads/ADR_AND_NIGERIA_CRIMINAL_JUSTICE_SYSTEM.pdf> accessed 5 August 2022.

⁶⁸ B.E. Ewulum, "Alternative Dispute Resolution Mechanism, Plea bargain and Criminal Justice System in Nigeria," (2017) 8 *Nnamdi Azikiwe University Journal of International Law and Jurisprudence* 2.

⁶⁹ Lydia Nussbraum, "ADR, Dynamic (IN) Justice, and Achieving Access: A Foreclosure Crisis Case Study," (2020) 88 *Fordham L Rev* 2337.

Plea Bargain as a Mechanism of ADR

The concept of plea bargain can be traced to the American jurisprudence where it was constitutionally established in the case of *Brady v United States*⁷⁰ in 1970 and since then different countries including Nigeria has introduced it into their legal system.⁷¹ A plea bargain is a negotiation that takes place between the prosecutor and the defendant subject to the approval of the court. The process of plea bargain is for the defendant to plead guilty to the charge against him for an offer of a lesser charge or to plead guilty to the charge so as to get a lighter sentence. In either way, the purpose is for the defendant to get a lesser sanction than the one prescribed by the law. This application and approval for plea bargain is subject to the judge who could turn it down.⁷² The various legal systems across the globe have varying views regarding plea bargain. In the United States of America, plea bargain fully forms part of their justice system.⁷³ England has also embraced the concept of plea bargain. India has laid down provisions to be considered before a plea bargain can be negotiated; plea bargain is allowed for cases where the maximum punishment is seven (7) years imprisonment, where the offence does not affect the socio-economic situations of the nation and where the offence committed is not against a woman or a child below fourteen (14) years.⁷⁴

Why Plea Bargain?

Plea bargain is a win-win process as it is beneficial to the parties including the court that has the final say. Aside the fact that plea bargain reduces penalty for a defendant, it also provides a clear and certain outcome that he can rely on.⁷⁵ (It is general knowledge that the outcome of a criminal trial is usually not certain). Plea bargain saves time and cost especially in a protracted criminal

⁷⁰ *Brady v United States* (1970) 397 U.S. 742.

⁷¹ Crespo A, "The Hidden Law of Plea Bargaining," (2018) 118 *Columbia Law Review* 1303-1424; See also United States Federal Rules of Criminal Procedure, r 11.

⁷² P. Burke, "Take Advantage of Surprise in Criminal Cases," (2015) <<https://www.jstor.org/stable/26401864>> accessed November 22, 2022.

⁷³ Imolemen Ugberaese, "Comparative Analysis of ADR, Plea Bargain and its Effect on criminal Justice System in Nigeria," (2018) <<https://www.manifieldsolicitors.com/2018/09/03/comparative-analysis-of-adr-plea-bargain-and-its-effect-on-criminal-justice-system-in-nigeria/>> accessed 3 August 2022.

⁷⁴ Imolemen Ugberaese, "Comparative Analysis of ADR, Plea Bargain and its Effect on criminal Justice System in Nigeria" (2018) <<https://www.manifieldsolicitors.com/2018/09/03/comparative-analysis-of-adr-plea-bargain-and-its-effect-on-criminal-justice-system-in-nigeria/>> accessed 3 August 2022.

⁷⁵ Chinwe Mordi, "The use of Plea Bargain in Nigerian Criminal Law," (2018) 9 *Beijing Law Review* 153-161.

trial as is common to our administration of Criminal Justice system.⁷⁶ Plea bargain also provides an opportunity to a famous defendant to avoid the adverse publicity that a long public trial may attract.⁷⁷ It is also a device for a defendant that wants to protect other persons from criminal prosecution.⁷⁸ (His plea bargain and summary conviction prevent a full trial in the course of which evidence may be adduced that can incriminate another person.)

For the prosecutor, plea bargain saves time, saves money and eases pressure on facilities available to the prosecutor for trial.⁷⁹ It reduces the enormous work of the prosecutor. It ensures conviction for the prosecution irrespective of the quality of evidence available for trial.⁸⁰ (The prosecutor is never certain of securing a conviction on a crime even if there is overwhelming evidence against the defendant.) It affords the prosecution the advantage of protecting the victims of crimes especially crimes that stigmatizes such as rape. The prosecutor is able to protect the identity of his informants and witnesses. For the court, plea bargain facilitates the speedy disposal of cases. It gives the judge the opportunity to decongest the court of pending criminal cases. It also reduces the number of awaiting trial inmates in correctional facilities. In the general sense of it, it has helped the government recover some stolen money.

Plea Bargain in Nigeria

Plea bargain is not a traditional concept of the Nigerian legal system. It is a process that was made popular by the provisions of Section 14(2) of the Economic and Finance Crimes Act, 2004 which provides that

Subject to the provisions of Section 174⁸¹ of the Nigerian Constitution the Commission may compound any offence punishable under this Act by accepting such sums of money as it thinks fit, not exceeding the maximum amount to which that person would have been liable if he had been convicted of that offence.

⁷⁶ Onyebuchi Matthew Ezech, "Plea Bargain in Nigeria: Legal Safeguards Against Abuse" (2019) <file:///C:/Users/hp/Downloads/SSRN-id3469724.pdf> accessed 30 July 2022.

⁷⁷ B.E. Ewulum, "Alternative Dispute Resolution Mechanism, Plea bargain and Criminal Justice System in Nigeria," (2017) 8 *Nnamdi Azikiwe University Journal of International Law and Jurisprudence* 2.

⁷⁸ Onyebuchi Matthew Ezech, "Plea Bargain in Nigeria: Legal Safeguards Against Abuse," (2019) <file:///C:/Users/hp/Downloads/SSRN-id3469724.pdf> accessed 30 July 2022.

⁷⁹ Chukwunweike A. Ogbuagbor, Edith Nwosu, and Edwin Obimma Ezike, "Mainstreaming ADR in Criminal Justice System," (2014) 45 *European Journal of Social Sciences* 1.

⁸⁰ *Ibid.*

⁸¹ Constitution of the Federal Republic of Nigeria 1999.

Plea bargain is also provided for in Section 75 of the Administration of Criminal Justice Law of Lagos State where it provides that;

Notwithstanding anything in this law or any other law, the Attorney-General of the State shall have power to consider and accept a plea bargain from a person charged with any offence where the Attorney-General is of the view that the acceptance of such plea bargain is in public interest, the interest of justice and the need to prevent abuse of legal process.

Part 28, Section 270 (1)-(18) of the Administration of Criminal Justice Act (ACJA) makes provision for plea bargain and what it entails. The process is that the defendant and the prosecutor will negotiate on an acceptable disposition of the case which includes the plea of the defendant to a lesser offence than what he is charged for including other conditions made by the prosecutor, in return for a lower sentence than the sentence that is provided for in law for the charge initially against defendant and the court has to give its approval. The applicability of plea bargain in Nigeria has been criticized by many, one reason being that its applicability except within the provision of the EFCC Act is contrary to the provisions of the Nigerian Constitution as plea bargain in Nigeria has been limited only to financial crimes prosecuted by the laws which is discriminatory against other criminal offences under the purview of Section 270(1) of ACJA⁸² which provides that;

Notwithstanding anything in this Act or in any other law, the prosecution may (a) receive and consider a plea bargain from a defendant charged with an offence either directly from that defendant or on his behalf.

In addition, Section 75 of the ACJL applicable in Lagos state, gives power to the Attorney General to consider and accept a plea bargain from a person charged with any offence as long as he is of the view that the acceptance of such plea is in the interest of justice, interest of the public and it will prevent abuse of legal process.⁸³ This implies that the offence could be a simple offence or even a capital offence. The provision of the law did not limit plea bargain to just financial crime offences. It extends it to other forms of offences.

⁸² The Administration of Criminal Act, 2015.

⁸³ Lagos State Administration of Criminal Justice Law, 2011.

The Challenges of Plea Bargain in the Criminal Justice System in Nigeria

There are some people who are of the opinion that plea bargain is a method that would be of immense benefit in aiding the Nigerian criminal justice system to be better. It is a known fact that in Nigeria, there is need for speedy trials and decongestion of correctional centers.⁸⁴ It also introduces lighter sentences and, in some cases, may lead to a reduced charge against the defendant.⁸⁵ For the defendant, the expenses of trial are also reduced.⁸⁶ It has also been opined that without the application of plea bargain in financial crimes, it may be impossible to recover monies that have been embezzled by corrupt persons as the fine the court might impose would not be sufficient to recoup as much as would be recovered if plea bargain was applied.⁸⁷ However, the general system of law is that a crime is not just committed against a victim but against the state and as such, crime is subject to public policy.⁸⁸ This is why there have been criticisms against plea bargain in Nigeria. One of the criticisms to the applicability of plea bargain is that it mocks the seriousness of criminal justice.⁸⁹ The main purpose of criminal law is to punish offenders accordingly. A lot of risk could also be attached to it as an innocent person could be sentenced especially when the prosecution has no sufficient evidence against them, the defendant not knowing this and for fear of a capital punishment, may agree to “involuntary plea”⁹⁰ in the name of plea bargain.⁹¹ Another challenge is that the defendants are not adequately punished for the crime committed as plea bargain hinders adequate punishment being meted out on the defendants for crimes committed by them.⁹²

⁸⁴ Akintunde Adebayo, “A Review of Plea Bargain Concept in the Anti- Corruption War in Nigeria,” (2018) <<file:///C:/Users/hp/Downloads/105-546-2-PB.pdf>> accessed 30 October 2020.

⁸⁵ HG.org *Advantages and Disadvantages of Accepting a Plea Bargain* <<https://www.hg.org/legal-articles/what-are-the-advantages-and-disadvantages-of-accepting-a-plea-bargain-338811>> accessed 1 November 2020.

⁸⁶ Andrew Manuel Crespo, “The Hidden Law of Plea Bargaining,” (2018) 118 *Columbia Law Review* 1303-1424.

⁸⁷ Tope Adebayo, “The Legality of The Use of Plea Bargain in The Nigerian Criminal Justice System,” <<https://www.topeadebayollp.org/insight/the-legality-of-the-use-of-plea-bargain-in-the-nigerian-criminal-justice-system/>> accessed 1 August 2022.

⁸⁸ Imolemen Ugberaese, “Comparative Analysis of ADR, Plea Bargain and its Effect on Criminal Justice System in Nigeria,” (2018) <<https://www.manifieldsolicitors.com/2018/09/03/comparative-analysis-of-adr-plea-bargain-and-its-effect-on-criminal-justice-system-in-nigeria/>> accessed 3 August 2022.

⁸⁹ Andrew Manuel Crespo, “The Hidden Law of Plea Bargaining,” (2018) 118 *Columbia Law Review* 1303-1424.

⁹⁰ Ibid.

⁹¹ Tim Lynch, “Americans are bargaining away their innocence,” (2016) <<https://www.washingtonpost.com/news/in-theory/wp/2016/01/20/americans-are-bargaining-away-their-innocence/>> accessed June 1, 2022.

⁹² Ani Comfort Chinyere, “Plea Bargain: Immunity from Punishment,” (2020) <<https://legalpediaonline.com/plea-bargain/>> accessed June 1, 2022.

In Nigeria, as a result of the level of financial corruption, it is commonly known that only very few are actually punished. Most times, abuse of the power or position may occur as many especially the influential personalities would rather opt for plea bargain than allow the prescribed sanction of law be meted out on them.⁹³ The purpose of introducing plea bargain into the criminal justice system is to serve purpose for other common offenders. But this is not the case as plea bargain in Nigeria is only limited to financial crimes under the EFCC Act even though its applicability is supposed to cut across.⁹⁴ More often than not especially as regards financial crimes prosecuted by EFCC, the defendants are made to avoid punishment of the law which makes the aspect of sanctions undermined.⁹⁵ The applicability of plea bargain may also lead to abuse of power of the Attorney-General who has been vested with the power to consider and accept plea bargain. The prosecutors too are able to wedge their prosecuting power as they like as they mainly dictate the tune of the plea bargain agreement.

The legality of plea bargain has also been up for discussion. Sometime in November 2011, the former Chief Justice of Nigeria, Honourable Justice Dahiru Musdapher strongly criticized plea bargain and referred to it as “a novel concept of dubious origin. It has no place in our law-substantive or procedural.”⁹⁶ This criticism of the former CJN was opposed to by some others⁹⁷ who stated that he was not being fair in his criticism as the law made provision for plea bargain in Section 180(1) CPA⁹⁸ and Section 14 (2) EFCC Act.⁹⁹ Even before the enactment of ACJA and ACJL, plea bargain has been provided for. If we consider the case against Tafa Balogun, Lucky Igbinedion, Cecilia Ibru and a host of others, their cases would have dragged on if plea bargain had not been agreed to and at the end, might even be quashed. However, it should be noted that it

⁹³ The Nigerian Tribune of 16th November, 2011.

⁹⁴ Kehinde Adegbite, “Plea Bargaining in Nigeria: Any Legal Foundation?” | *The Lawyers Chronicle* <<https://www.thelawyerschronicle.com/plea-bargaining-in-nigeria-any-legal-foundation/>> accessed 1 November 2022; The use of plea bargaining was limited to crimes charged under the EFCC Act.

⁹⁵ Ani Comfort Chinyere, “Plea Bargain: Immunity from Punishment” (2020) <<https://legalpediaonline.com/plea-bargain/>> accessed June 2022.

⁹⁶ The Nigerian Tribune of 16th November, 2011.

⁹⁷ Peter Sule, “Plea Bargaining and the Administration of Criminal Justice in Nigeria: A Moral Critique,” (2017) 3 *IAFOR J. Ethics, Religion & Phil* 2; See also Vanguard Newspaper of March 6, 2012 for the opinions of Dr Chidi Anslem Odinkalu and Mr. Ibrahim Lamorde.

⁹⁸ Criminal Procedure Act (Nigeria), Cap C41 LFN 2004.

⁹⁹ Economic & Financial Crimes Commission (Establishment) Act 2004.

is wrong and unconstitutional to unduly impose on a person to admit to a crime he did not commit in the name of plea bargain. The law provides that no person shall be held to be guilty of a criminal offence on account of any act or omission that did not, at the time take place nor constitute such offence.¹⁰⁰ Additionally, whoever commits an offence and is found guilty of same should be adequately punished within the confines of the law so as to deter others from committing same.¹⁰¹

Conclusion

The many historic uses of ADR mechanisms continue to co-exist with newer developments. Many innovative sentencing efforts such as restitution and community sentencing also involve negotiation among large numbers of people including victims, government agencies, court officials, offenders and their legal representatives.¹⁰² Practitioners who work in probation, parole, corrections use mediation and other informal processes on a daily basis to manage their work with offenders, convicts, victims and the community. It has been suggested that ADR mechanisms applied in criminal context have yielded positive results as parties seem satisfied, victims feel heard, offenders/defendants comply with agreements and communities are given an opportunity to heal. Crime is more than a violation against the State. Everyone is hurt by crime. Hence, offenders are accountable to everyone who has been wronged and must take responsibility for their actions. The restorative justice efforts provide victims with a voice and enables offenders to make amends.

ADR in criminal justice is not limited to the mechanisms of restorative justice, it also includes plea bargain in some jurisdictions. In Nigeria there is no express provision of law that states that criminal matters should be resolved by ADR except the provisions of Section 270 of ACJA and Section 14(2) of EFCC Act that allows for plea bargain which is a form of negotiation under ADR mechanism. It is a known fact that there are many people awaiting trial and kept in both police custody and correctional centers as a result of delay in their trial which is usually due to delay or overwork of prosecutors assigned to them. For this, it is high time plea bargain is not limited to financial crimes but it should cover simple offences in Nigeria. This will reduce the workload of

¹⁰⁰ Constitution of the Federal Republic of Nigeria 1999, s 36(11); Constitution of the Federal Republic of Nigeria 1999, s 35(2).

¹⁰¹ Criminal Code Act 2010, s 2.

¹⁰² Maria Volpe, "Promises and Challenges: ADR in the Criminal Justice System," (2000) 7 *Dispute Resolution Magazine*.

prosecutors by promoting speedy trial. It will also reduce congestion in correctional centers. Many of the awaiting trial inmates in correctional centers are there for simple offences and some of them have been remanded for years which has exceeded the number of years they would have ordinarily been convicted for if found guilty. It is of note that one of the purposes of enacting the ACJA is to ensure speedy trial of defendants so as to decongest correctional centers.¹⁰³

Recommendations

ADR should be adequately defined and provided for under the criminal justice system. Just as the Criminal Procedure Code of Ethiopia provides, the types of crime to be settled by applying ADR should be indicated and provided for in Nigerian legislations. The law should make provision for the stages at which disputes involving crime shall be referred to ADR. The rights and duties of the parties during ADR should be provided for. The Nigerian justice system should set a proper tested guideline for ADR procedures in criminal matters wherein plea bargain should be applied strictly with fair, just and speedy determination of guilt of any offender in order to avoid impunity. The applicability of plea bargain in Nigeria should not be limited to the offence of corruption. As provided for in India, the types of crimes that can be plea bargained should be stated and clearly provided for in Nigeria. Majorly, restorative justice should be fully embraced and provided for within the Nigerian criminal justice system.

¹⁰³ Administration of Criminal Justice Act, s 10.