CRIMINAL JUSTICE REFORMS IN NIGERIA: THE IMPERATIVE OF FAST TRACK TRIALS; PLEA BARGAINS; NON-CUSTODIAL OPTIONS AND RESTORATIVE JUSTICE.

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INTRODUCTION.

One of the greatest challenges to economic development and democratic stability in the country presently is the deteriorating state of the criminal justice system leading to high state of insecurity and poor investor confidence. That Nigerian courts and prisons are congested and in highly deplorable condition is a fact that both the government and its critics seem to be in agreement. Realising the magnitude of this problem, successive governments at various levels (local, state and federal) have initiated programmes and projects aimed at improving the state of criminal justice delivery and access to justice generally. Regrettably, most of these efforts have failed to yield the needed results either because they were poorly conceived / implemented or as a result of the fact they largely ignore the need for innovative reforms that combines the current retributive justice system with a restorative / reparative approach.

The current situation no doubt calls for closer scrutiny of other options and measures for criminal justice administration. These options include; Fats Track Trials; Non Custodial Options; Plea Bargains and Restorative Justice. For convenience of reference in this paper, these measures and practices are referred to as Alternative Dispute Resolution (ADR) mechanisms.

SCOPE AND CONTENT OF THIS PAPER

Apart from a conceptual analysis of alternative dispute resolution (ADR), there is also the need to fully chart the path for their effective adoption and mainstreaming in the criminal justice system in Nigeria. This paper essentially aims to explore the extent to which the new alternative dispute resolution mechanisms and restorative / reparative justice principles can contribute to

current efforts at criminal justice reforms in Nigeria. In addition to highlighting the jurisprudential basis for use of the new measures in criminal justice, we shall also highlight and consider suitable approaches for unlocking the potential of these concepts and practices in the criminal justice system. To achieve the set goals the paper shall cover the following key areas / issues.

- Nigerian Criminal Law and Procedure in Perspective – with statistical data of time frame for disposal of criminal cases, prison population and awaiting trial inmates.
- ADR in Perspective.
- Avenues for Use of ADR in Criminal Justice
- Designing the appropriate Legal and Institutional Framework for Mainstreaming ADR in Criminal Justice in Nigeria.
- Legal Practitioners' Remuneration in ADR

NIGERIAN CRIMINAL LAW AND PROCEDURE IN PERSPECTIVE

Nigeria operates a federal constitutional democracy, with a dual criminal justice system.[1] Regrettably, the primary laws on crime at both federal and states levels in the country are outdated, imprecise and largely incompatible with the culture and environment of the people, leading to overall inadequacy of the laws to enthrone law and order[2]. In criminal trials, the Nigerian legal system provides for right of appeal from the lowest courts – Magistrates – to the highest courts of the land – the Supreme Court. Presently, it takes average minimum of between 3 – 10 years for a case to be tried and disposed of in the courts[3]. Usually, the time frame increases where the parties exhaust their right

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

[2]The substantive laws on crime at the federal level and states of the southern region date back to a colonial ordinance of 1915 while the while the northern states operate penal codes whose origin dates back to 1945. Only Lagos state is known to have embarked on a reasonable reform and update of its substantive and procedural criminal laws with the enactment of the Administration of Criminal Justice Law, 2007 and recently the Criminal Law of Lagos 2011.

[3] Accurate official data on this issue is hard to find. In addition to the writers sample survey, estimates from works done by others in this area support the position. See Anthony Nwapa "Building and Sustaining Change: Pretrial Detention in Nigeria" in Justice Initiatives: Pretrial Detention (New York: Open Society Institute, 2008) 86. The Socioeconomic Impact of Pretrial Detention – A Global Campaign for Pretrial Justice Report (New York: Open Society Foundations: 2011) 15.

of appeal up to the Supreme Court. A current case that underscores the rate of intolerable delays in the criminal justice system is the trial of the former Chief Security Officer (CSO) to the Late Head of State General Sani Abacha, over his alleged involvement in the murder of Alhaja Khudirat Abiola, wife of the presumed winner of the 1993 presidential elections in Nigeria, Chief Moshood Abiola. While the accused has spent ten years in prison custody awaiting trial the case at the moment (July 2011) is still at the stage of presentation of the case for the defence.

Nigerian prisons are congested and in highly deplorable condition. Current official statistics (see below) show that of the about 48,408 total prison inmates, 33,552 are awaiting trial detainees, while 14,856 are actual convicts[4]. Most of the prisons, especially in urban and semi-urban areas, hold population of detainees far in excess of their capacity. Realising the magnitude of the problem the federal government has in the past 12 years undertaken several programmes and spent billions of Naira on prison decongestion. Regrettably, these programmes have yielded little dividend as the problem still persists.

Another major feature of the Nigerian criminal justice system is the fact that most criminal defendants whether on bail or in pre-trial detention are poor citizens who are hardly able to afford the resources necessary for mobilising effective defence to the criminal charge. The socioeconomic conditions in the country not only creates a situation where the poor is more likely to breach the penal laws, but also limits their capacity to escape the law either legitimately by marshalling effective defence or illegitimately through bribe.

NIGERIAN PRISON POPULATION AND INMATES POPULATION AS AT 31ST MARCH 2011

STATE	CAPACITY	CONVICTED	UNCONVICTED	TOTAL
LAGOS	2,796	749	3,862	4,611
OGUN	1,536	340	1,537	1,877
KADUNA	2,702	1,762	724	2,486
KATSINA	1,328	551	1,094	1,645
JIGAWA	1,464	397	226	623

[4] Official statistics obtained from Nigerian Prisons Service Headquarters, Abuja as at March 31, 2011.

KANO	1,840	897	1,527	2,424
BAUCHI	1,468	784	712	1,496
GOMBE	638	388	324	712
ADAMAWA	2,580	1,096	778	1,874
BORNO	3,422	851	556	1,407
TARABA	1,650	421	580	1,001
YOBE	1,180	417	208	625
NIGER	1,450	521	898	1,419
KWARA	516	300	294	594
KEBBI	1,526	537	590	1,127
ZAMFARA	1,178	131	594	725
SOKOTO	934	316	667	983
FCT	720	383	578	961
ABIA	1,080	192	1,153	1,345
AKWA-IBOM	1,568	207	735	942
IMO	1,188	250	1,679	1,929
CROSS RIVER	1,228	198	704	902
RIVERS	1,354	474	2,885	3,359
BAYELSA				
OYO	386	162	699	861
OSUN	906	134	406	540
ONDO	646	173	623	796
EKITI	200	70	262	332
ANAMBRA	564	73	1,374	1,447
EDO	2,092	342	1,480	1,822
DELTA	1,098	294	1,292	1,586
EBONYI	588	86	926	1,012
ENUGU	1,394	258	1,720	1,978
BENUE	1,408	216	603	819
NASSARAWA	602	329	507	836
PLATEAU	1,926	410	509	919
KOGI	530	128	245	373
GRAND TOTAL	46,698	14,856	33,552	48,408

SOURCE: NIGERIAN PRISONS SERVICE HEADQUATERS, ABUJA.

ADR IN PERSPECTIVE

Alternative Dispute Resolution (ADR), generally refers to processes of resolving dispute outside courtroom litigation. Major ADR processes include Negotiation, Mediation, Conciliation, Arbitration, Early Neutral Evaluation (ENE) and other Hybrids. In the context of criminal justice, ADR principles and practices are in the form of Plea Bargains, Non-Custodial Options and Restorative Justice. Some measure of Fast Track can also be achieved in a criminal case through the use ADR principles.

While there is no doubt about the general categorization of ADR processes, much controversy still exists as to the proper place of these processes in criminal justice administration.

ADR AS A CULTURAL RIGHT IN NIGERIA

Much of what is today regarded as ADR in Nigeria is essentially the formal repackaging of processes that the people use informally without placing any tag or name on them. ADR is not alien to the customary justice system in Nigeria. It has always been part of the native jurisprudence. On the contrary, it is English litigation that is imported into the Nigerian legal system. Before the advent of British colonial rule in Nigeria, virtually all our traditional societies had their dispute resolution mechanisms, most of which emphasized settlement and reconciliation (essential elements of ADR). Customary ADR and arbitration still subsist in the local communities. The Nigerian Constitution enjoins the state to protect, preserve and promote Nigerian customs and cultures[5]. ADR is part of the cultures of the various ethnic nationalities in Nigeria. In most local communities, the king and his chiefs usually gather at the palace to resolve disputes amongst members of the community. In the traditional setting the elders usually adopt different approaches and tactics, depending on the nature of the dispute, to get the parties to settle their differences. To emphasize the reconciliatory nature of these processes, sometimes, the disputants are made to embrace each other or even share

[5] Section 21.

palm-wine or other local drink from the same cup as part of the settlement. Certainly, the modern concept of ADR is not alien to Nigerians. It is essentially a repackaging and reintroduction of what has always been part of the customary jurisprudence. The Supreme Court of Nigeria has severally upheld the validity of customary law arbitration so long as the process satisfies minimum standards of justice[6].

USE OF ADR IN CRIMINAL JUSTICE

To fully underscore the role of ADR in criminal justice administration it is important to briefly review the nature of crimes and criminal prosecution under Nigerian laws.

NATURE OF CRIMES

Section 36(12) of the Constitution of Federal Republic of Nigeria 1999 provides that:

> *"Subject as otherwise provided by this Constitution, a person shall not be convicted of a criminal offence unless that offence is defined and the penalty therefor is prescribed in a written law; and in this subsection, a written law refers to an Act of the National Assembly or a Law of a State, any subsidiary legislation or instrument under the provisions of a law"*

Section 2 of the Criminal Code which is the primary law on crimes in Southern Nigeria defines an offence as follows:

> "An act or omission which renders the person doing the act or making the omission liable to punishment under this code, or under any statute is called an offence"

[6] Some of the cases are: Owonyin vs. Omotosho (1961) 1 All NLR 304; Agu vs. Ikewuibe (1991) 3 NWLR Pt. 180, p.385; Nwuka vs. Nweche (1993) 5 NWLR Pt. 293 p. 295; Adeyeri vs. Atanda (1995) 5 SCNJ 157.

The Penal Code which applies in the Northern states also defines *offence* and *illegal conducts* in Sections 28 and 29.

Essentially, an act or omission is only a crime if a law made or deemed to be made by the appropriate legislative authority so prescribes. The consequence of any criminal conduct in Nigeria is whatever the law prescribes in any given case. Although imprisonment and other forms of punishment (pain) are generally prescribed under our retributive justice system, it is possible for the law creating an offence to prescribe some non-custodial measures for crimes[7].

Another important character of crimes in Nigeria is the fact that only offences defined in written laws are recognized by the constitution[8]. For this purpose, written law refers to an Act of the National Assembly; or a Law made by a state House of Assembly; or any other regulation made under powers given directly by a law. The legal effect is that customary criminal laws are now unconstitutional in Nigeria, except to the extent that any of such customs is now specifically repeated in a written law. A person in Nigeria cannot therefore be tried and punished for crimes under native laws and customs.

AVENUES FOR USE OF ADR IN CRIMINAL JUSTICE ADMINISTRATION.

Criminal justice administration refers to the collection of rules, principles, policies and practices that guide the prescription, management, monitoring, trial and punishment of crimes. It covers the whole criminal justice system. In this context criminal justice is wider than what happens at the trial of a case. In Nigeria, a criminal trial technically commences with arraignment and ends with judgment (or appeal, if any)[9]. For the purpose of our current discourse, the criminal justice system covers events that occur before, during and after the trial. It concerns issues relating to crime prevention, investigation, trial and post-trial management of victims and offenders. Major avenues for use of ADR in criminal justice administration are:

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[7] Fine, compensation and forfeiture are other forms of punishments under Nigerian Criminal laws.

[8] Section 36(12) of the constitution cited above.

[9] Section 215 of the Criminal Code; and Sections 161(1) and 181(1) of the Penal Code.

(a). Crime Prevention and Management

(b). Prosecutorial Discretion

(c). Defence Options

(d). Judicial Discretion

(e). Prerogative of Mercy

(f). Plea Bargains

(g). Concept of Restorative Justice

CRIME PREVENTION AND MANAGEMENT

Before some acts or omissions constituting crimes are consummated, ADR processes can help to avert the criminal conduct. A sizeable number of criminal cases result from failed interpersonal relationship between the parties (victim and offender). Sometimes, people threaten, endanger or harm others or commit crimes out of anger, frustration or perceived injustice in issues relating to their civil relationship. Some family, neighbourhood, social, political and business disputes have metamorphosed into criminal conduct by the parties. Sometimes, crimes are committed in the process of getting even with an opponent in a civil relationship. With the state of courts congestion; the slow and frustrating pace of civil justice, and the resultant loss of faith in the justice system by some members of the society, people easily try to sort out issues in their relationship by recourse to self-help. In some of such situations, crimes are committed. Effective deployment of ADR in the justice system will substantially reduce the recourse to criminal conducts in managing civil relationships. Community justice centres and other ADR programmes can be effectively deployed to resolve cases to the satisfaction of the parties, thus preventing the recourse to violent self-help and criminal conduct in managing civil relationships. In addition to reducing crimes and criminality in the society, this will also contribute substantially to courts and prison decongestion.

PROSECUTORIAL DISCRETION

The Constitution of the Federal Republic of Nigeria confers prosecutorial powers on the Attorney General of the Federation or a State[10]. The respective Attorneys General have power to institute, conduct, continue, take over and discontinue criminal proceedings in any court except a court martial. The powers conferred on the Attorney General can be exercised by him in person or through officers of his department[11]. In exercise of his prosecutorial powers the Attorney General shall have regard to public interest, the interest of justice and the need to prevent abuse of legal process[12]. The Attorney General, and by constitutional delegation, his law officers, enjoy supreme prosecutorial powers in all courts in Nigeria, except a court martial. Therefore, the Attorney General in exercise of his constitutional powers may settle or compound any case before or during trial. Nigerian laws recognise the general prosecutorial discretion and in fact give it a constitutional flavour[13]. Apart from the caution of upholding public interest, the interest of justice and the need to prevent abuse of legal process, we submit that the Attorney General can resolve any criminal case by ADR[14]. Although Section 127 of the Criminal Code creates the offence of compounding felony, we submit that this provision is subject to the constitutional powers of the Attorney General to exercise prosecutorial discretion. To maximise the potentials of use of prosecutorial discretion and ADR in criminal cases, it is necessary for the Attorney General to promulgate clear prosecutorial policy and guidelines to guide his law officers[15]. This will help prevent abuse of the powers; ensure protection of public interest, the interest of justice; and prevent the abuse of legal process.

DEFENCE OPTIONS

[10] Sections 174 and 211 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended).

[11] Ibid.

[12] Ibid.

[13] Ibid.

[14] This may be by negotiation and settlement with the criminal defendant or preferably by initiating a victim-offender mediation.

[15] Presently there are no clear prosecutorial policies and guidelines for public prosecutions in Nigeria both at federal and state levels.

From the time an allegation of crime is made to the end of the trial a criminal defendant has options open to him in the defence[16]. The defendant can admit the wrong at the point of investigation or prior to arraignment in court. Such remorseful defendant may decide to fully cooperate and assist the authorities in the investigation of the crime. There is no known legal inhibition whatsoever where the defendant decides to admit the crime prior to arraignment, even where such admission was done in expectation of some relief from the prosecution. An open and unequivocal admission of the crime to the investigating / prosecuting authority prior to arraignment can lead to some legal arrangement between the prosecution and the defendant regarding the modalities for disposal of the case. ADR mechanisms can be effectively deployed in structuring such arrangement.

Where a case is not settled at the preliminary stage, ADR processes may still be deployed during trial. Nigerian procedural laws provide that on arraignment in court, the defendant may plead guilty to the charge(s) and upon such a plea the court shall enter a conviction if satisfied that the defendant intends by the plea to admit the offence[17]. There is nothing legally or morally wrong with a plea of guilty by a defendant; and such a plea on arraignment may provide a *prima facie* evidence of some remorse on the part of the offender. Regrettably, the general practice and the current attitude of legal practitioners seem to provide some *psychological escape* and justification to most offenders who easily cling to the constitutional presumption of innocence. The onus and burden of proof which the law places so heavily on the prosecutor sometimes provide an academic shield for the offender to escape justice. In the process the moral and ethical essence of crime is lost on the alter of legal technicalities. It does now appear that a sincere and honest plea of guilty by an offender is a mark of weakness on the part of his legal counsel. The general approach and attitude of defence lawyers seem to suggest that every case must go to full trial. Plea of guilty upon arraignment is now largely seen as an indictment on the capacity of the lawyer to free their client at all costs. This attitude has caused more harm both to the society at large and even more to the clients that lawyers seek to protect. There is no doubt that there are cases

[16] Section 287 of the Criminal Procedure Act.

[17] Section 218 CPA; Section 161(2)(3) and 187(2) CPC.

where a plea of guilty will be in the best interest of the defendant, all other factors considered. The current case overload in the criminal justice system and the consequent congestion of the prisons, especially by awaiting trial detainees, can be attributed largely to the prevailing attitude that every case must go through the whole hug of the criminal trial process. Accused persons who should have had their criminal charges speedily and expeditiously disposed on a plea of guilty, especially when they truly and legally committed the offence charged, now suffer more physical, emotional and psychological damage in the course of a protracted and almost endless trial on a plea of not guilty. Interestingly, in addition to the duty to always "act in a manner consistent with the best interest of the client"[18], a defence counsel has professional responsibility to "warn his client of any particular risk which is likely to occur in the course of the matter"[19]. Without in any way encouraging or promoting any attempt to cajole people to admit guilt when they are innocent, it must always be noted that plea of guilty by an offender is a legitimate legal, moral and ethical option open to an accused in a criminal case in Nigeria. Both the Criminal Procedure Code in the Northern states and Criminal Procure Act in the South provide that an accused can plead guilty to the charge and if satisfied the court can proceed to enter conviction without full trial[20]. Such plea is not only legally available, it is also morally and ethically obligatory for people to admit and repent of their wrongdoing. Interestingly, both the Christian religion and Islam respectively enjoin their followers to admit and confess their sins and ask for forgiveness. [21]

With the proper skills and guidelines, ADR processes can be deployed in structuring an arrangement for a plea of guilty by the defence upon arraignment in exchange for some favourable exercise of prosecutorial or judicial discretion. This practice will help in reducing substantially the criminal case overload in the courts.

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[18] Rule 14 (1) of the Rules of Professional Conduct for Legal Practitioners in Nigeria 2007.

[19] Rule 14 (1)(c), Ibid.

[20] Supra. Note 21.

[21] For Christians the book of *Mathew 5:25* specifically enjoins a good Christian who commits an offence to settle with his adversaries (prosecutor) in order to avoid being sent to prison.

JUDICIAL DISCRETION

ADR can be useful in the criminal justice system in the post-conviction management of offenders. In the Nigerian criminal trial process, after a person is convicted of an offence the court may need some guidance in the exercise of its discretion to impose punishment[22]. Except upon a conviction for capital offence (where Nigerian law prescribes death as mandatory sentence)[23] or where the law provides for a mandatory minimum sentence or order, the court usually has discretion on the punishment to impose. Punishments prescribed for offences are the maximum and the court has discretion to impose any lesser term if in its opinion the circumstance is such that the offender shall be reformed by the lesser punishment. To guide it in the exercise of this discretion the court usually invites the accused to make some statements after conviction. This plea for mercy by the offender after conviction is called *allocutus*. For a better guide, it is possible for the court to allow some form of post-conviction reconciliation (through negotiation or mediation) between the victim and the offender. Such post-conviction ADR can provide an arrangement that could enable the court come to an informed decision as to the appropriate punishment to impose in a particular case.

A major challenge in the Nigerian criminal justice system is the stigmatization of offenders and the lack of any effective scheme for reintegration of convicted persons after they may have finished serving their terms. With appropriate legal and institutional framework, post-conviction ADR can assist in overcoming this challenge.

PREROGATIVE OF MERCY.

The President of the Federal Republic of Nigeria and the Governor of a state respectively have constitutional powers to grant pardon to any person charged or concerned with an offence. Section 175 of the Constitution provides:

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[22] This practice is generally referred to as *Allocutus.*

[23] Nafiu Rabiu vs The State (1980) 2 NCR 117

175 (1) The President may –

(a) grant any person concerned with or convicted of any offence created by an Act of the National Assembly a pardon, either free or subject to lawful conditions;

(b) grant to any person a respite, either for an indefinite or for a specified period, of the execution of any punishment imposed on that person for such an offence;

(c) Substitute a less severe form of punishment for any punishment imposed on that person for such an offence; or

(d) Remit the whole or any part of any punishment imposed on that person for such an offence or of any penalty or forfeiture otherwise due to the State on account of such an offence".

State governors have equivalent powers under section 212 of the Constitution. The above provisions can be well utilized to create measures for use of non custodial options in criminal justice in Nigeria.

PLEA BARGAIN

Plea bargain is an arrangement between the prosecution and the defence where in exchange for a plea of the guilty by the defence the prosecutor offers some reliefs to the defendant. Such reliefs may be in the form of reduced charge in a multiple charge case or recommendation of lesser punishment. The United States Supreme Court affirmed the constitutional validity of plea bargains in America in the following words:

> "The disposition of criminal charges by agreement between the prosecutor and the accused, sometimes loosely called 'plea bargaining' is an essential component of the administration of justice. Properly administered, it is to be encouraged. If every criminal charge were subjected to a full-scale trial, the States and

> the Federal Government would need to multiply by many times the number of judges and court facilities."[24]

Despite some of the criticisms[25], plea bargaining is generally acknowledged to offer mutual benefits to all stakeholders in the criminal justice system – the prosecutors, defendants, judges, victims and the public. As Roland Acevedo notes:

> "Plea bargaining allows defendants ... to gain prompt and final dispositions of their cases, 'avoid the anxieties and uncertainties of a trial' and escape the maximum penalties authorized by law. Prosecutors ... avoid time consuming trials and, thus, conserve vital and scarce prosecutorial resources. ... ... Judges ameliorate congested court calendars and conserve judicial resources through the speedy dispositions attributed to plea bargaining. Victims may benefit by avoiding the rigors of a trial and by not having to relive the horrors of their victimisation in the presence of the defendant and the public.[26]

Although plea bargaining is a standard criminal justice practice in the United States of America[27] and some other jurisdictions, its introduction into Nigeria

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[24] Santobello vs. New York, 404 U.S 257 (1971).Some comparative study of plea bargaining in USA, Republic of Georgia and Bosnia and Herzegovania has been conducted to underscore the need for caution in importing the practice into some troubled criminal justice systems. Cynthia Alkon *Plea Bargaining as a Legal Transplant: A Good Idea for Troubled Criminal Justice Systems*? (2010) TRANSNATIONAL LAW AND COMPARATIVE PROBLEMS, p. 355. Some research has also been done on the application of plea bargaining in France, Italy, Germany and Argentina by Maximo Langer, *From Legal Transplants to Legal Translations: The Globalisation of Plea Bargaining and the Americanisation Thesis in Criminal Procedure*, 45 *Harv. Int'l L.J.* 1.

[25] Albert W. Alschuler, The Prosecutors Role In Plea Bargaining *36 U. Chi. L. Rev. 50, 50* (1968); Albert W. Alschuler, Implementing the Criminal Defendants Right to Trial: Alternatives to the Plea Bargaining System, 50 *U. Chi. L. Rev. 931, 970 (1983*); Douglas D. Guidorizzi, Should We Really "Ban" Plea Bargaining?: The Core Concerns of Plea Bargaining Critics *47 Emory L. J 753 (1998)*. Stephen J. Schulhoffer, Plea Bargaining as a Disaster *101 Yale L. J. 1979 (1992).*

[26] Roland Acevedo, Is a Ban on Plea Bargaining an Ethical Abuse of Discretion? A Bronx County New York Case Study, 64 Fordham L. Rev. 987 (1995)

[27] It is widely acknowledged that about 90% of criminal cases in America at both federal and state levels are settled by plea bargains. Detailed discuss on plea bargaining is outside the scope of this paper. For more on the subject, see, Robert E. Scot and William J Stuntz, Plea Bargaining as a Contract, *101 Yale L. J. 1909 (1992)*; Robert A. Weninger, The Abolition of Plea Bargaining: A Case Study of El Paso County Texas *33 UCLA L. Rev. 265 (1987*); Shayna M. Sigman, An analysis of Rule 11 Plea Bargain Options *66 U. Chi. L. Rev. 1317* (1999);

has been very controversial[28] Presently, the practice of plea bargaining is expressly provided for by the Economic and Financial Crimes Commission Act[29] and the Administration of Criminal Justice Law of Lagos State, 2007[30]. The lack of express legal provision is not necessarily an indication that plea bargaining is alien to the Nigerian criminal justice system. Essentially, plea arrangements can be achieved in Nigeria by a combination of prosecutorial discretion, defence options and judicial discretion discussed above. It is important to note that plea bargaining is not an end in itself, it is just a means to an end. Plea bargain is a means of securing a guilty plea by the defendant upon arraignment. In a sentence bargain, the court before which the defendant is arraigned essentially records a plea of guilty if satisfied that the accused admits the offence. The plea agreement in such situation is considered for the purposes of punishment. The court may refuse to uphold the plea agreement although this rarely happens.

RESTORATIVE JUSTICE

Restorative justice emphasizes creative problem-solving in dealing with a criminal conduct[31]. The current Nigerian criminal justice system is retributive. This system focuses on inflicting punishment and pain on the offender than any real attempt to reform and reintegrate the offender back into the society.

Roland F. Wright, Trial Distortion and The End of Innocence in Federal Criminal Justice *154 U. Pa. L. Rev. 79* (2005); Stephanos Bibas, Plea Bargaining Outside the Shadow of Trial *117 Harv. L. Rev. 2463* (2004);

[28] Perhaps as a result of the fact that it gained prominence through its use in trial of corrupt politicians and rich business executives by the Economic and Financial Crimes Commission (EFCC). Thisday (Nigerian) Newspaper editorial titled *Cecilia Ibru: One Case, Many Lessons*, published October 18, 2010. News story titled, Bribe Scandal: Siemens Fined N7bn, published by the same newspaper on November 23, 2010, p.6.

[29] Section 14, EFCC Act LFN 2004. This provision was evoked in the case of *Federal Republic of Nigeria vs. Emmanuel Nwude & Anor* (2006) 2 EFCSLR 145, where the defendants who were charged with defrauding a Brazilian Bank received reduced sentences in exchange for their plea of guilty.

[30] Sections 74 – 76.

[31] *The Vienna Declaration on Crime and Justice: Meeting the Challenges of the Twenty-First Century*, 10th UN United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Vienna, 10 – 17 April 2000, A/CONF. 184/4/Rev. 3, para. 29, encouraged the " development of restorative justice policies, procedures and programmes that are respectful of the rights, needs and interests of victims, offenders, communities and all other parties".

Victims of crime and even the community who suffer the direct impact of the offence are relegated to the background.

Restorative justice programmes focus more on addressing the problems caused by a criminal conduct than just trial and punishment of the offender[32]. It is an all inclusive problem-solving approach that ensures that the interests of major stakeholders in the crime are well addressed and protected. With restorative justice, the victim, the offender and the community all participate in the crime disposal process. Basically, the victim is compensated as much as can be reasonably achieved; the offender is effectively reintegrated back into the community of responsible citizens; and the community is restored to normalcy. Key components of restorative justice include: -

= Reconciliation

= Restitution

= Reintegration

= Restoration

Reconciliation

Restorative justice programmes attempt to set up a possible meeting or encounter between the victim and the offender. The underlying essence is to address some of the fears or concerns of the victim and to also bring the offender in close experience with the extent of the harm caused by his conduct on a fellow citizen. It is not unlikely that some offenders never get to fully appreciate the extent of damage they may have caused on fellow humans until they are actually confronted with the reality of meeting with the victim. On his part, the victim may suffer from post psychological trauma bordering on fears about the faith that befell him. Some victims of crime may live in perpetual fears and a sense of insecurity if certain issues regarding the crime are not clarified. While full reconciliation between the victim and the offender may not be achieved in all cases, a well managed encounter between them can no doubt offer some relief to the victim and remorse for the offender. The value

[32] See the Vermont Community Restorative Justice Continuum (attached). Also, *Handbook on Restorative Justice Programmes* United Nations Publication No. E.06. V. 15.

of reconciliation in restorative justice is very high in crimes between people in relationships or some acquaintance. There are situations where the victim and offender may have to continue in some form of relationship after the criminal case has been disposed. Integrating reconciliation as restorative justice does help such future relationship.

Restitution.

A major value of restorative justice is its emphasis on victim compensation. Restorative justice programmes facilitate restitution to the victim as nearly as can be achieved to the pre-crime status. Damage caused the victim by the offender is repaired. Although it may be impossible to fully restore the victim to pre-crime situation restorative justice programmes usually give victims of crime better focus and outcomes than they can ever have under retributive justice.

Reintegration

Restorative justice programmes seek to fully reintegrate the offender back into the society in a practical and realistic manner. Restorative justice deemphasizes punishment and stigmatization of offenders. Instead, they are given opportunity to continue to see themselves as useful members of the society who can still make positive contributions towards the common good. Using disposal options such as community service, vocational training, compulsory education and other forms of constructive engagement the programme offer offenders real and genuine opportunity of rebuilding themselves materially, emotionally and psychologically. With a well thought out and professionally implemented restorative justice scheme, a good number of citizens languishing in detention today with no real prospect of reforms can be engaged in some form of productive activity without compromising the integrity of the criminal justice system and the security of the state. The irony is that restorative justice scheme will cost less than what is presently being spent on bogus programmes of prison decongestion.

Restoration.

The healing value of restorative justice programmes is complete with the restoration of the community to the pre-crime situation. The full circle of the programme is complete with the community being assured against future occurrence of the offending conduct. The societal equilibrium distorted by the crime is redressed and repaired so that society can be rest assured that the people are secured and protected as citizens in community of humans.

5 : 4. RESTORATIVE JUSTICE AND TRADITIONAL JUSTICE IN NIGERIA

Traditional African community justice system is essentially reconciliatory and restorative. Nigerian customary laws and systems essentially operate on the basis that crime distorts the social equilibrium in the community and accordingly the customary justice system seeks the restoration and maintenance communal solidarity and cohesion[33]. With the benefit of this historical foundation, traditional rulers and community leaders in Nigeria who largely administer non-judicial mechanisms through customary mediation and arbitration can be better empowered under restorative justice schemes. Restorative justice programmes in Nigeria can leverage on the revered position of traditional rulers to create an effective mechanism for non-judicial access to criminal justice. By their unique position, traditional rulers can serve as representative of the community in the restorative justice programmes. Victim–Offender mediation and reconciliation can be conducted by traditional rulers with requisite training and capacity. Also offender reintegration can be better achieved with the involvement of traditional rulers and community leaders. They can be very useful in monitoring and supervision of the offender's participation and commitment to the agreed disposal measures in a particular case. With the requisite training and empowerment traditional

[33] Nigerian scholars and jurists are unanimous on the restorative essence of the customary criminal justice system. A. G. Karibi-Whyte, *Groundwork of Nigerian Law* (Lagos: Nigerian Law Publications, (1986); O. A. Onwubiko*, African Thought, Religion and Culture* (Enugu: Snap Press, 1991) p.83; Akin Ibidapo-Obe, "Restorative Justice and Plea Bargaining Practices: A Tilt Towards Customary Criminal Justice", in K. N. Nwosu ed., *Dispute Resolution in the Palace: Legal Principles and Rules* (Ibadan: Gold Press Ltd, 2010) p. 220.

rulers can be a necessary pillar on which a successful restorative justice scheme can be built in Nigeria.

NEW DIRECTION FOR CRIMINAL JUSTICE IN NIGERIA – THE JUSTICE SMA BELGORE MODEL

The foregoing analysis clearly indicate the huge potentials of ADR in crime management; caseload reduction and prison decongestion in Nigeria. The Justice SMA Belgore Model of criminal justice system is an integrated and harmonised blend of retributive justice, restorative justice and African customary justice systems. The model essentially aims to promote effective crime management, caseload reduction and prison decongestion through the mainstreaming of Fast-Track Trials, Case Diversion Measures; Non Custodial Options; Plea Bargains; ADR for Crimes and Restorative Justice principles in the Nigerian criminal justice system. The comparative advantage of THE Justice SMA Belgore model over the current non-ADR regime of criminal justice is illustrated in the table below.

Apart from deliberate shift towards a restorative justice regime, systematic and structured infusion of ADR principles and practices into the existing criminal justice system can be achieved. This requires a sincere commitment of all stakeholders to the challenge of retooling themselves by the acquisition of requisite knowledge and skills. There is no doubt that adequate legal framework already exist for use of the new measures and practices in criminal cases in Nigeria beyond the level that it is currently being applied. The combined use of prosecutorial discretion, defence options and judicial discretion within the framework of clearly established prosecutorial policies and sentencing guidelines is perhaps all that is presently required to maximise the potentials of ADR in criminal justice administration. With the right attitude and capacity ADR can be used at different phases of the criminal justice spectrum as indicated in the table below.

LEGAL PRACTITIONER'S REMUNERATION IN THE NEW CRIMINAL JUSTICE REGIME

One of the greatest challenges to the efforts at mainstreaming ADR mechanisms in justice delivery in Nigeria generally is the prevalent (but largely unfounded) fear by lawyers that the use of ADR will diminish their income. Because of the influence legal practitioners command over a client's choice of defence options, it is important to critically address this issue in any effort to promote the use of ADR for criminal justice in Nigeria.

The fear by Nigerian lawyers about loss of income with the use of ADR is borne more out of limited knowledge of the nature and dynamics of ADR processes than any assertion of reality. ADR does not lead to a reduction in lawyers' revenue. Clients only prefer to pay lawyers for litigation because over time lawyers have created the impression in the minds of the public that consulting a lawyer over a case only becomes necessary when the case is mature for an adversarial contest. Where the public believes lawyers only help their clients to 'fight' their opponents in court, it becomes difficult for clients to appreciate the value-added by a lawyer where a case is settled by other mechanism. This situation and not ADR is the major problem lawyers have to deal with in order to expand their revenue base in an ADR regime in criminal justice.

As a professional body, legal practitioners in Nigeria must begin a concerted effort to re-create the mindset of the public about the role of lawyers in the society. Clients must be enlightened to begin to see counsel as a multi-talented creative problem-solver with a diverse set of tools for dispute resolution. This is the approach that will expand the revenue base of lawyers in an ADR criminal justice context. Client's interest is better served when cases get resolved expeditiously through ADR. When lawyers get their clients to appreciate the value of ADR processes, they will pay counsel for ADR services.

In addition to the foregoing it is important to note that Nigerian lawyers now have a professional duty to advise their client about the prospects of use of ADR. Rule 15(3)(d) of the Rules of Professional Conduct for Legal Practitioners 2007 specifically provide that in his representation of his client a lawyer shall not fail or neglect to inform his client about the options of Alternative Dispute Resolution before resorting to, or, continuing with litigation. Failure to comply with this rule is professional misconduct for which a legal practitioner may be

subject to disciplinary action[34]. Interestingly, the Rule of Professional Conduct for Legal Practitioners, apart from enjoining lawyers to mainstream ADR in their practice, also state that the remuneration and fees of a legal practitioner shall be for *"... his service to the client"* (Rule 48 (1) RPC 2007). Nothing in the Rules restricts the fees of a legal practitioner to litigation alone. In addition to a general or special retainer with a client, Counsel may charge appropriate fees for his services where the client's case is resolved by negotiation, mediation, arbitration or other form of ADR process. It is therefore a professional duty for lawyers to consider and advise their clients on the use of ADR in the conduct of the case for the defence.

Another important issue to consider here is the obvious conflict of interest between legal counsel who may be inclined to going to trial in expectation of higher income and the interest of the client who may desire a quick and expeditious resolution of the case. Although this conflict is a recurrent issue in lawyer / client relationship, it is important to note that in Nigeria, a lawyer has a professional duty to "act in a manner consistent with the best interest of the client"[35] It is therefore unethical and a professional misconduct for counsel to allow his financial interest to override his duty to offer ADR advise to the client in an appropriate case.

Still on the role of lawyers in promoting use of ADR for criminal justice delivery, it is important to note once again the fact that most criminal defendants in Nigeria are poor citizens who have no reasonable means of livelihood and can hardly afford a legal retainer. This socioeconomic dynamics may sometimes render it more expedient for the defendant to opt for a quick and cost effective settlement of the case through ADR mechanisms; especially where such an arrangement does not violently breach his/her constitutional rights. In the light of a weak legal aid scheme for indigent defendants in Nigeria, it is imperative that lawyers consider the economic circumstances of their clients as a major factor in deciding the course of conduct of the case for the defence. The current situation where some defendants lose their businesses / career and sometimes may have to sell their personal / family property in order to

[34] Rule 55(1) RPC 2007.

[35] Rule 14(1) Rules of Professional Conduct for Legal Practitioners, 2007.

sustain the costs of protracted criminal trial call for a deep reflection on the use of ADR for criminal justice.

CONCLUSION

With the poor state of criminal justice administration there is the need for the adoption of mechanisms and practices that will help reduce the case load. ADR processes in the form of new measures like fast track trials; non-custodial options; plea bargains and restorative justice, if fully mainstreamed can provide the necessary relief. The role of ADR in the criminal justice system cover areas such as crime prevention and management; prosecutorial discretion; defence options; judicial discretion; plea bargaining and restorative justice. However, in order for the present and future potentials of ADR in criminal justice administration to be fully maximized, there is the need for a comprehensive, systematic and structured programme of training and capacity building on the emerging trends and practices for all stakeholders. The time to act is NOW.

COMPARATIVE CASE DISPOSAL CHART

This table shows how the Justice SMA Belgore Model of criminal justice will lead to better processing of criminal cases in jurisdictions that subscribe to it.

(A) STAGES OF EVENTS	(B) CURRENT REGIME	(C) NEW REGIME (JUSTICE BELGORE MODEL)
1. Early conflict/ Misunderstanding	No crime yet. No action. Evil-day postponed	Dialogue/Settlement possible. Full crime prevented. Crime rate reduced.
2. Full Conflict/Disagreement Reprehensible Conduct	Report to Police. Civil Case. No crime yet. No action.	Report to Police. Civil Case. No crime yet. Negotiation / Mediation offered. Settlement Possible. (*No Record Settlement*)
3. Crime Committed	Charge to Court.	Settle / Resolve some. (*Condoned Behaviour*) Charge others to court.
4. Case in Court	Trial (with delays).	Case Diversion Measures. Fast Track Trials. Full trial (without delays).
6. Conviction	Punishment. Imprisonment / Fine.	Non-Custodial Options. Victim-Offender Mediation. *(Grade B Conviction)* Imprisonment / Fine.
7. Post Conviction	Discharge after prison term / payment of fine. No definite program of rehabilitation	Reconciliation/ Rehabilitation offered. Clear, definite and cost-effective programme for reintegration of ex-offenders into the society.

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