CHAPTER ONE

INTRODUCTION

1.1 Background to the Study

Every modern state, such as Federal Republic of Nigeria must live up to certain global expectations and meet the international standards in every sphere of governance. Criminal justice is one of the indices every government must work hard at for it to be accorded that self reliant status most developing nations so desperately seek to achieve.

The gamut of criminal justice includes the collective institutions which an accused offender passes until the accusations have been disposed of or the assessed punishment is concluded. The system envisions at least three components, law enforcement, police, sheriffs and marshals[1]; the judicial process, judges, prosecutors and defence lawyers[2]; and corrective agents, prison officials, probation and parole officers.[3]. Furthermore, there are other components and these include; Legislature who are expected to make the laws upon which the whole framework of the criminal justice system will rest and the Executive arm of Government upon who the actual will to deliver a modern criminal justice system rests.

Regrettably, the primary laws on crime at both Federal and States levels in Nigeria are outdated, imprecise and largely incompatible with the culture and environment of the people, leading to overall inadequacy of the laws to enthrone law and order.

It is pertinent to note that the new democratic dispensation has introduced a new dimension to criminal justice in the form of the Economic and Financial Crimes Commission, the Independent Corrupt Practices and Other Related Offences Commission, and AMCON

[1] KN Nwosu , 'Role of Traditional Rulers and Community Leaders in Criminal Justice Administration' in KN Nwosu (ed), *Dispute Resolution in the Palace* (Ibadan: Gold Press Limited, 2010) p.181
[2] Ibid
[3] Ibid

related criminal cases. Indeed the emphasis is now on the fight against corruption induced conduct, which is the bug that has plagued our country. At the moment, it is largely thought that too much lip service is being paid to crime fighting and prosecution in Nigeria. The United Kingdom is at the moment engaged in preparatory steps in the enforcement of their Anti-Bribery Act which criminalizes individual and corporate misconduct in this regard. Nigeria caused some foreign organizations to pay large fines arising from conduct that was perceived as institutional bribery. Nigeria is yet to fine tune her extant legislations to accommodate such bold initiatives. To achieve this feat, existing legislations had to be interpreted expansively.

Another striking feature of the Nigerian criminal justice is the fact that most criminal defendants whether on bail or in pre-trials detention are poor citizens who are hardly able to afford the resources necessary for mobilizing effective defence to the criminal charge[4]. The socio-economic 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. More so, in criminal trials, the Nigerian legal system provides for right of appeal from the lowest courts with criminal jurisdiction – Magistrates – to the highest courts of the land - the Supreme Court. Presently, it takes average minimum of between 3 – 10years for a case to be tried and disposed of in the court.[5] Usually, the time frame increases where the parties exhaust their right of appeal up to the Supreme Court.

1.2 Statement of the Problem.

ADR is simply the acronym for Alternative Dispute Resolution, which generally refers to processes of resolving dispute outside court-room litigation. Major ADR processes include

[4] KN Nwosu, loccit, p.181.
[5] *Aiguoreghian v. State* (2004), 3 NWLR (Pt. 860) 367

Negotiation, Mediation, Conciliation, Arbitration, Early Neutral Evaluation and other Hybrids. There is no doubt about the general categorization of ADR processes. That being the case, one compelling problem which this research work sought to solve is the much controversy that still exists as to the proper place of these processes in criminal justice administration.[6] This notion is very common especially amongst lawyers in Nigeria that prosecution is the principal process for dispute resolution and that ADR is secondary or inferior to prosecution. There is no doubt that until recently, the training of lawyers in most jurisdictions focused substantially on the skills for use of litigation for dispute resolution. It is therefore this limited training and skills that creates the wrong perception by lawyers about the nature and value for ADR in justice delivery.

Proper review of the nature and dynamics of conflicts will reveal that ADR processes are useful before, during and sometimes even after litigation. Prosecution results essentially from breakdown of negotiation and sometimes mediation by the parties. Even where a case is pending in court, the parties can resolve their differences amicably by out of court settlement at any time before judgment. It is pertinent to remember that parties to a suit can use ADR to terminate the court proceedings at any stage of the case before judgment. Furthermore, even after judgment, the parties can reach some form of settlement outside the terms of the judgment, although the negotiating powers of the parties may not be the same as before the judgment. Logically, if by current practice ADR mechanism can be used to settle a civil case before, during and even after litigation, one wonders the real basis for the notion that ADR is secondary to litigation.

Another problem which this research work sought to solve will focus on is the fundamental misunderstanding about ADR especially by lawyers in Nigeria, that ADR is another set of judicial or quasi judicial processes and therefore not amenable to criminal trials. The

[6] KN Nwosu , 'Role of Traditional Rulers and Community Leaders in Criminal Justice Administration' in KN Nwosu (ed), *Dispute Resolution in the Palace* (Ibadan: Gold Press Limited, 2010) p.181

tendency by legal minds to try to reason out ADR principles from the litigation and adversarial mindset is a major challenge to unlocking the potentials of ADR in justice sector. Most ADR processes in their true nature are not sets of rigid legalistic options for dispute resolution. ADR processes are essentially multi-disciplinary tools for creative problem-solving than a set of legal processes and principles. Although ADR processes and practices are recognized and conducted within the framework of the law, their full potentials cannot be maximized if stakeholders continue to apply them with the same litigation mindset and skills.

Accordingly, where non-lawyer neutrals resolve disputes by ADR, their proceedings, practices and outcomes should not be accessed according to strict standards of technical legal principles and procedures[7]. ADR processes are characterized by flexibility, voluntariness and privacy. Their success essentially rely more on the trust and confidence of the parties in the processes and outcome than the adherence to rigid codes of procedure. By resorting to ADR processes the parties to a dispute look beyond the immediate issues on the table to their future relationship. They are more concerned about the future than passing judgment on past errors.[8] In the effort to locate the place of ADR in the criminal justice system it is important to always appreciate the fact that much of what lawyers regard as ADR is largely the formal packaging of processes that the people use informally without placing any formal tag or name on them. Essentially, ADR is the same as what people do in our family(s) and communities in Nigeria where some family members or elders intervenes to help parties in their relationships.[9] It remains a problem in this research whether the aforestated misconceptions and reasoning are correct and

[7] *Adeyeri v. Atanda* (1995) 5 SCNJ 157
[8] KN Nwosu, loccit, p.182
[9] TO Elias, 'Traditional Forms of Public Participation in Social Defence' No. 22 (1969) *International Review of Criminal Policy*, pp. 18-24.

reflects the true state of the law in our justice system. Certainly, the misconceptions show that our criminal justice system is in dire need of urgent reform.

1.3 Aim and Objectives.

The aim of this research work is to cogently make a case for alternative dispute resolution (ADR) in criminal trials in Nigeria. Its objectives are:

i. to explore the extent to which alternative dispute resolution (ADR) can contribute to the current efforts at justice sector reforms in Nigeria, and other jurisdictions with similar legal history;
ii. to examine why some legal practitioners despite the relevance of ADR have prejudices against it, and dismissed it as an idea that can never work;
iii. to address some of the fundamental issues affecting the perception, knowledge and skills of ADR, especially in the provision of criminal justice; and
iv. the ultimate objective of this work is that at the end of this research, our findings and recommendations should lead to development of a better criminal justice system and criminal jurisprudence in Nigeria, that will mainstream ADR.

1.4 Research Methodology

In conducting this research work, doctrinal research method as well as comparative approach were adopted. Hence, uses of primary source namely, Nigerian Statutes, Case Laws, International Declarations and Protocols; secondary sources such as Law Textbooks; and tertiary sources such as News Papers, Journal Articles, Internet Materials and Textbooks from other field of studies were made.

1.5 Significance of the Research

This research work could not have been more appropriate than now because from all indications, a large majority of Nigerians seems to have lost confidence in litigation in their endless search for justice. No wonder, some people have started resorting to the old facet of justice, to wit, jungle justice[10] and *'juju*' practice.

The provisions of the law are therefore made for a purpose. This is equally the case with High Court Laws of various States, Arbitration and Conciliation Act and Administration of Criminal Justice Act that encouraged the courts to recognize and promote ADR. The purpose of making these laws and the rationale for its provisions are always the subject of scrutiny especially within the academic.

Due to the dust that has been raised as to the recognition of the use of ADR processes in Nigeria, it becomes material and crucial that a holistic approach is exercised in ascertaining whether Nigerian laws recognize the use of ADR processes in the promotion of criminal justice; the laws that regulate practice and procedure of ADR processes, and the right to practice statute is made, its provisions become the subject of interpretation. In interpreting the sections of the law, it must not be done in isolation. A consideration of all the provisions of the law has to be done by properly interpreting statutes and not just interpretating sections of the law in isolation.

This research is, therefore, significant because it explored possible avenues to broaden the accessibility of criminal justice by ADR processes.

1.6 Scope of the Research

Territorially, the scope of this research is within Nigeria. The relevant Nigerian Laws will be evaluated with particular attention in the area of Alternative Dispute Resolution (ADR):

[10] Lynching and violence

Practice and Procedure in criminal litigation. Substantially, it seeks to explore the extent to which alternative dispute resolution mechanisms and restorative / reparative justice principles can contribute to current efforts at justice sector reforms in Nigeria, and other jurisdictions with similar legal history. In doing this, the research work shall highlight and consider suitable appropriate legal and institutional framework for mainstreaming ADR in criminal justice in Nigeria and the researcher will attempt to discover why some Nigerian legal practitioners despite the obvious relevance of ADR have prejudices against it and dismissed it as an idea that can never work.

It will go further to address some of the fundamental issues affecting the perception, knowledge and skills of ADR in the provision of criminal justice in Nigeria.

The research shall also attempt a comprehensive analysis of what obtains in criminal justice system of some selected foreign jurisdiction, with a view to taking a leaf where necessary. It will go further to address some of the fundamental issues affecting the perception, knowledge and skills of ADR in the provision of criminal justice in Nigeria.

1.7 Literature Review

There is dearth of materials on this topic at present, as it a new area in the field of justice. Apparently, no criminal justice text book author has included the study of Alternative Dispute Resolution (ADR) in crime disposal as topic in his or her work. In fact, it may be sad to note that none of the criminal justice text books consulted by the researcher for the purposes of this research work disclosed any study of the concepts of making case for ADR in criminal trials, and as a corollary, most criminal law texts dealing with processes such as conferencing and victim-offender mediation do not utilize ADR terminology. This is because ADR is usually described as a method of resolving disputes between parties without resorting to formal court- based

adjudication. Traditional theories of criminal justice, on the other hand view criminal offending as largely a matters between the offender and the state[11].

The use of ADR processes in criminal matters is a relatively new phenomenon in Nigeria. In part, the increased interest in the application of ADR processes to the criminal justice system was borne from a general dissatisfaction with traditional adversarial methods of dispute resolution. However, the criminal justice system has attracted a particular set of criticisms: it is seen as unsuccessful in reducing rates of recidivism (and even may increase the likelihood of re-offending for particular groups, such as juveniles and indigenous persons); it ignores the victims of crime and fails to recognize crime as a form of social conflicts[12]. As part of the processes of achieving the main objectives of this work, attempt was made at critical review of some of the existing literature that are of relevance to this research work. Some of these previous contributions include the works of Nils Christie[13], Farida Akande,[14] Akin Ibidapo- Obe[15], James Agaba[16], A.M Adebayo[17], Joseph J. Senna and Larry J. Siegel[18], Agbai Iro Ogbuabia[19] and Chino Edmund Obiagwu[20]

[11] R Sarre, and K Earle, 'Restorative Justice' in R Sarre, and J Tomaino, (eds), *Key issues in Criminal Justice (*Oxford: Clarendon Press, 2004*) p. 144.*

[12] S Kift, 'Victims and Offenders; Beyond the Meditation paradigm?' (1996) *Australian Dispute Resolution Journal* 71.

[13] N Christie, 'Conflicts as Property' (1977) *British Journal of Criminology*, 1 - 4

[14] IF Akande, 'The Need for ADR in the Nigerian Criminal Justice System' in IA Aliyu (ed) *Alternative Dispute Resolution and Some Contemporary Issues* (Kaduna: M. O. Press & Publishers Ltd, 2010) p. 318

[15] A Ibidapo – Obe, 'Restoration Justice and Plea Bargaining Practices: A Tilt Towards Customary Criminal Justice', in KN Nwosu (ed), *Dispute Resolution in the Palace (Vol. 2),* (Ibadan: Gold Press Ltd, 2010) p. 203

[16]JA Agaba, *Practical Approach to Criminal Litigation in Nigeria* (3rd edn, Lagos: Bloom Legal Temple, 2015) p. 1031

[17] AM Adebayo, *Administration of Criminal Justices System in Nigeria* (Lagos: Princeton Publishing Co., 2012) p.12

[18] JJ Senna and LJ Siegel, *Introduction to Criminal Justice System* (2nd edn, San Francisco: West Publishing Company 1981) p.348.

[19] AI Ogbuabia, *Criminal Trials and Procedure in Nigeria*,(Lagos: Logicgate Media Ltd, 2017) p.8

[20] CE Obiagwu, *The New Criminal Law & Procedure of Lagos State*, (Lagos: LEAP Publishers, 2016) p.3

Their works which touched on some aspects of the subject matter are not extensive and specifically focused on only restorative justice and plea bargaining, hence the necessity of this research work in order to come up with a comprehensive review of the various ways of how ADR can be mainstreamed into crime disposal in Nigeria.

Nils Christie asserted that conflicts become the property of lawyers and that formal legal processes rob individual of the right to full participation in the dispute resolution process. The proliferation of the idea that a criminal offence represents not just a violation of state but also a community conflict which requires resolution between individuals has led to increased support for the use of non- traditional criminal justice methods. Nils Christie also posited that traditional criminal justice processes make the offender *"an object for study, manipulating and control"* and that we have *"reduced the victim to a nonentity and offender to a thing"* Further, he took objection to the fact that the law defines what is relevant and therefore deems irrelevant the contextual factors which the parties may view as important. He also noted that:

> The key element in a criminal proceeding is that the proceeding is converted from something between the concrete parties into a conflict between one of the parties and the state... The one party that is represented by the state, namely the victim, is so thoroughly represented that she or he for most of the proceedings is pushed completely out of the arena... She or he is a sort of double loser; first, vis-à-vis the offender, but secondly and often in a more crippling manner by being denied rights to full participation in what might have been one of the more important encounters in life. The victim has lost the case to the state[21].

Nails Christie did not delve into the analysis of how ADR can be mainstreamed into assisting the victim of crime. He only attempted a discussion of victimology.

According to Farida Akande:

> The task of achieving the objective of criminal justice system which is punishment is responsible for the provisions for imprisonments in the various Nigerian criminal statutes. A concomitant result of this is that the

[21] N Christie *opcit,* p.34

> courts, in order to achieve the said penal objective, are much more at ease in sentencing accused to various terms of imprisonment. The question that arises here is: In what way or manner has the victim of crime benefited by seeing his assailant convicted and sentenced to a term of imprisonment? Yet, the society itself does not in any way benefit from criminal justice systems that incarcerates its member. Rather, the state incurs more expenses in keeping prison inmates within the walls of prison. For no matter how small, prison inmates must be fed, housed and officials paid to keep surveillance on the prisoners[22].

This writer posed the question, in what way or manner has the victim of crime benefited by seeing his assailant convicted and sentenced to a term of imprisonment? The aim of her work was a case for the adoption of ADR in the Nigerian criminal justice system through a further adoption of the United Nations Declaration of the Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters. Unfortunately, the writer, who made a case for the adoption of ADR into the Nigerian criminal justice through the adoption of the UN Declaration on the Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters also opined that: "ADR is not applicable to all kinds of criminal matters such as murder/ homicide, sedition, riot and unlawful assembly…[23]"

The above notion from Akande that ADR is not amenable in crime disposal except for restorative justice makes her work incomprehensive and incomplete, hence the need for this current research work. Also, Ibidapo-Obe in his work canvassed only two ways of mainstreaming ADR into Nigerian criminal justice system, Restorative Justice and Plea Bargain. In his analysis, he opined that restorative justice is an idea of criminal justice that centers around systematic provision of adequate and accessible remedies for victims of crime. It stretches to effective re-socialization or re-integration of an offender into the society. According to him, in some countries, it includes programmes in which the offenders and victims are made to confront

[22] IF Akande, *opcit,* p. 319
[23] *Ibid.*

each other through a mediator in order to resolve the criminal event and bring final closure to the victimization[24]. He towed the line of argument of Farida Akande in advocating for the mainstreaming of restorative justice and plea bargaining through the adoption of the United Nations Declaration of Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters, 1999, which expounds the concept of restorative justice by highlighting programmatic expressions of it such as restitution, community service and any other programmes designer to accomplish reparation, for the victim and the reintegration of the victim and/ or the offender into the community. He also submitted that mediation in some form is central to restorative justice; this could take the form of family mediation, neighbourhood disputes settlement and post- court- victim- offender mediation. Thus, restorative justice may involve a mediation process whereby the victim and offender are enabled if they freely consent, to participate actively in the resolution of matters arising from the crime through the help of an impartial third party[25].

Secondly, he explored the ways in which restorative justice connects with plea bargaining and how each admittedly independent area of criminal justice can be aligned for optimal advantage. Thus, apart from similarities in procedure and personnel between plea bargain and ADR procedures, there is also a similarity in the penal philosophy of plea bargaining and restorative justice. He further suggested that retribution and deterrence have no place in both restorative justice and plea bargaining; instead, there is the ascendency of rehabilitation, reformation and reconciliation. By giving the defendant the opportunity of a lesser sentence or

[24] See: United Nations Declaration of the Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters, 1999. <http/www.restorativejustice.org/rj3/unbasicprinciplesHtml> accessed on 5 September 2017 (hereinafter, 'UN Basic Principles on Restorative Justice')

[25] See: Council of Europe Committee of Ministers: Mediation in Penal Matters; Recommendation No 5 (99) 19, adopted on September 15, 1999.

charge in a plea bargain, society is sending a message of mercy and readiness to forgive the defendant. It is expected that the defendant will in turn feel less traumatized and ready to re-enter the society that he has scorned with his crime. The road to reconciliation of the offender with the community is thus opened. Ibidapo- Obe did not go further outside the aforestated two, in making a case for other ways of ADR in criminal trial, hence this research work.

Agaba in his work "Practical Approach to Criminal Litigation in Nigeria," dealt extensively with ways of introducing the practice of restorative justice and plea bargaining in Nigeria. According to him, to appreciate the idea of restorative justice, one must have at the back of his/her mind that crime is a conflict situation, restorative justice programs are therefore based on the assumption that parties to a conflict ought to be involved actively in resolving it with a view to mitigating its negative consequences. But he did not deal with other ways of mainstreaming ADR in criminal trials[26].

Adebayo in his book 'Administration of Criminal Justice System in Nigeria' discussed extensively the new administration of criminal justice in Nigeria but unfortunately, did not mention any single ADR processes in crime disposal[27], hence this research work. This is the same line Hambali toed in his work "Practice and Procedure of Criminal Litigation in Nigeria[28] and Ogbuabia, 'Criminal Trials and Procedure in Nigeria' ". Obiagwu, on his own highlighted only, the introduction of the use of alternative punishments than custodial sentences as introduced by Administration of Criminal Justice Law of Lagos State, 2011 and Administration of Criminal Justice Act, 2015[29].

[26] J Agaba, *opci*t, p.1031
[27] AM Adebayo, *opcit*, p. 12
[28] YDU Hombali, *Practice and Procedure of Criminal Litigation in Nigeria*, (Lagos: Feat Print and Publish Limited, 2012)
[29] CE Obiagwu, *opcit* , p.15

Ogbuabor, Obi-Ochiabutor and Okiche dealt extensively with comparative perspectives of using alternative dispute resolution (ADR) in the criminal justice system[30]. Going further, they took a survey of selected jurisdictions on the practice of ADR within the criminal justice context based on different legal traditions. They even argued for the extension of ADR from minor offences to serious offences and legal measures to bring the law into conformity with practice. But they did not deal with alternative dispute resolution as being amenable to serious criminal matters rather they discussed ADR with regards to minor criminal offences. More so, they failed to discuss ADR with regards to minor criminal offense /ADR spectrums that are amenable to crime disposal. Nevertheless, Ogbuabor, Nwosu and Obimma Ezike[31] attempted making a case for ADR in Nigeria criminal justice system[32]. They identified in a nutshell only for entry points for ADR under the current legal framework, namely, crime prevention, prosecutorial discretion, judicial discretion and correctional discretion. These entry points are limited in scope, hence, this research work.

1.8 Organizational Layout

This research work is divided into six (6) chapters. The first chapter which is the general introduction, discusses the spirit, intent and purposes of this research work. The second chapter juxtaposes disputes and conflicts and presents ADR Mechanisms as problem-solving tools in justice sector reforms. Chapter three makes a strong case for the mainstreaming of ADR in criminal trials in Nigeria. Chapter four presents a new model of non-custodial measures for crime disposal - The Nwosu Model. Chapter five compares the Nigerian criminal justice system

[30] CA Ogbuabor, et al 'Using Alternative Dispute Resolution (ADR) in the Criminal Justice System: Comparative perspectives', *International Journal of Research in Arts and Social Sciences, Vol 7, N0 2*. <www.raadaa.com> accessed on October 17, 2016.

[31] *Ibid*

[32] CA Ogbuabo, et al. 'Mainstreaming ADR in Nigeria's Criminal Justice System', *European Journal of Social Sciences*, (2014), p.32.

with selected foreign jurisdictions. Finally, chapter six concludes the work and makes recommendations based on the findings.

1.9 Definition of Key Terms

For better understanding of this work, the meaning of some terminologies are hereby defined:

1.9.1 Alternative Dispute Resolution: Alternative Dispute Resolution refers to all means or methods of resolving disputes outside courtroom litigation[33]. (The acronym ADR has variously been held to refer to Appropriate Dispute Resolution; Amicable Dispute Resolution, etc.) These include a wide range of processes that encourage dispute resolution primarily by agreement of the parties as against a binding decision in litigation.

1.9.2Criminal Justice Reforms: This is fixing perceived errors in the criminal justice system. Goals of organizations spearheading the movement for criminal justice reform include decreasing the Nigerian's prison population, reducing prison sentences that are perceived to be too harsh and long, altering drug sentencing policy, policing reform, reducing over-criminalization, and juvenile justice reform. Criminal justice reform also targets reforming policies for those with criminal convictions that are receiving other consequences from food assistance programs, outside of serving their time in prison[34].

1.9.3Pre-crime (or **precrime**) is a term coined by science fiction author Philip K. Dick. It is increasingly used in academic literature to describe and criticize the tendency in criminal justice systems to focus on crimes not yet committed. Pre-crime intervenes to punish, disrupt, incapacitate or restrict those deemed to embody future crime threats. The term pre-crime

[33] BU Odoh, *Christlike Approach to Dispute Resolution* (Enugu: His Glory Publications, 2013) p.85
[34] Ibid

embodies a temporal paradox, suggesting both that a crime has not occurred and that the crime that has not occurred is a foregone conclusion[35].

1.9.4 Reintegration: In the criminal justice system, reintegration refers to the process of reentry into society by persons that have been in prison, or incarcerated[36]. Reintegration includes the reinstatement of freedoms not previously had by individuals as a result of being in prison.

1.9.5 Restitution: Restitution proactively involves the victim and offender in repairing the harm done to the victim[37]. Unlike retributive responses to crime, restitution has the potential to repair the financial and perhaps relational harms that crime has left in its aftermath.

1.9.6 Prosecutorial Discretion: Refers to the discretion exercised by the Attorney-General in matters within his authority in relation to the prosecution of criminal offences[38].

1.**9.7 Judicial Discretion**: This is the power of the judiciary to make some legal decisions according to their discretion. Under the doctrine of the separation of powers, the ability of judges to exercise discretion is an aspect of judicial independence[39]. Where appropriate, judicial discretion allows a judge to decide a legal case or matter within a range of possible decisions.

1.9.8 Allocutus: In criminal procedure, when a prisoner is convicted on a trial for treason or felony, the court is bound to demand of him what he has to say as to why the court should not proceed to judgment against him; this demand is called the "allocutus," or "allocution," and is entered on the record[40].

1.9.9 Prerogative of Mercy: It is the power of a governor or the president to grant either conditional or total pardon to those who have been convicted of crimes whether they are still

[35] KN Nwosu loccit, p. 182
[36] Ibid
[37] Ibid
[38] Ibid
[39] Ibid
[40] Ibid

serving their punishments or they are ex-convicts[41]. Once a person is granted pardon, especially if total, such person's criminal record is totally erased and the previous conviction cannot count against him anymore.

1.9.10 Restorative Justice: It is a process where all stakeholders affected by an injustice have an opportunity to discuss how they have been affected by the injustice and to decide what should be done to repair the harm. With crime, restorative justice is about the idea that because crime hurts, justice should heal[42]. It follows that conversations with those who have been hurt and with those who have inflicted the harm must be central to the process.

[41] MT Ladan, 'Alternative Dispute Resolution in Nigeria, Benefits, Processes and Enforcement in Current Themes in Nigeria Law', (1998) *ILARN*, 249

[42] Ibid.

CHAPTER TWO

DEFINITION AND MEANING OF CONFLICTS AND DISPUTES: GENERAL CATEGORIZATION OF ADR MECHANISMS AS PROBLEM- SOLVING TOOLS.

2.1 Nature and Characteristics of ADR Processes.

Alternative Dispute Resolution (ADR) has no fixed definition. The term ADR includes a wide range of processes, many with little in common except that each is an alternative to full-blown litigation. It has become such a well-accepted option for the vast array of non-ligation processes that its continued use seems assured.

ADR is a term generally used to refer to informal dispute resolution processes in which the parties meet with professional third party who helps them resolve their dispute in a way that it is less formal and often more consensual than is done in the courts. ADR includes dispute resolution processes and techniques that act as a means for disagreeing parties to come to an agreement short of litigation.

Despite historic resistance to ADR by many lawyers, ADR has gained wide-spread acceptance among both the general public and the legal profession in recent years, especially in Nigeria In fact, our Rules of Professional Conducts now require some courts to resort to ADR of some type before parties' cases to be tried expressly contemplates ADR. The rising popularity of ADR can be explained by the increasing caseload of multi-door courthouses, the perception that ADR imposes fewer costs than litigation, a preference for confidentiality, and the desire of some parties to have greater control over the selection of the individual or individuals who will decide their dispute.

The term alternative dispute resolution was vague so it attracted a lot of interesting discussions. Some proponents of the movement pointed out that the letter 'A' in the acronym actually stands for 'Appropriate', to others it stands for 'Africa' or 'Amicable', while majority opined that it stands for "Alternative"-alternative in the sense of one of many methods. Thus, according to David Spencer, ADR is described ADR as:

> Methods and procedures used to resolve dispute either as alternative to the traditional dispute resolution mechanism of the court or in some cases as supplementary to such mechanisms. In other words, these processes are designed to aid in resolving their disputes without the need for a formal judicial proceeding[1].

Other proponents suggested an additional 'M' in between the letter 'A' and 'D', that is to say AMDR (Alternative Methods of Dispute Resolution)[2]. This they argued includes even litigation as part of the alternatives. Others prefer the acronym 'DR' – Dispute Resolution, that these methods are independent and not alternative to any other method of dispute resolution.

To some protagonist, ADR as it were, serves no meaningful purpose and is inferior to litigation because it presupposes that methods other than the traditional litigation process involving trials enjoy a second-class status as alternatives[3].

To Ladan, "ADR is a useful optional expression as long as it is understood to refer to a system of multi-justice in which a wide range of dispute resolution processes are available to parties in the public justice system"[4].

Consequently, the consensus opinion is that ADR stands for Alternative Dispute Resolution and the term is used to describe a kind of procedures outside the traditional litigation

---

[1] D Spencer, *Essential Dispute Resolution*, (London: Cavendish Publishing, 2002) p. 12

[2] Ibid

[3] K Aina, 'ADR and The Relationship With Court Processes', A Paper delivered at The NBA Annual General/Delegate Conference, held in Abuja on August 18, 2012, p.5.

[4] MT Ladan, 'Alternative Dispute Resolution in Nigeria, Benefits, Processes and Enforcement in Current Themes in Nigeria Law', (1998) *ILARN*, 249

process usually entered into voluntarily by parties to a dispute in an attempt to resolve it. It is important to realize that conflict resolution is one major goal of all the ADR processes. If a process leads to resolution, it is a dispute resolution process.

Alternative dispute resolution is of two historic types. First, methods for resolving dispute outside of the official judicial mechanisms. Second, informal methods attached to or pendant to official judicial mechanisms. There are in addition free-standing and independent methods, such as mediation and ombudsman. The methods are similar, whether or not they are pendant, and generally use similar tool or skill sets, which are basically sub-sets of the skills of negotiation.

ADR are the methodologies for resolving disputes outside courtroom litigation. ADR is not a substitute for litigation. It complements litigation. ADR is not just a solution to the problem of congestion in courts, it is a necessary part of any efficient framework for dispute resolution. Thus, even where there are no delays in litigation, ADR is still a vital component of justice delivery in any judicial system. This is so because, it is not all disputes that are about legal right and wrong, which is the foundation on which litigation is largely based. Generally, dispute may arise from differences in orientation/experience of the parties; the nature of information available to the parties; and the situation/circumstances of the parties at the time-role or job.

Although ADR is not an entirely new concept in Africa, including, Nigeria, the nature of ADR as practiced today or as advocated is definitely not particularly familiar. With the Laws of the various High Courts in Nigeria giving powers to the court to "…promote reconciliation among the parties thereto and encourage and facilitate the amicable settlement thereof"[5] as well

[5] High Court Act, Laws of the Federation of Nigeria (Abuja), Cap. H510, 2004, s.18 "When a matter is pending in a court, A judge may promote reconciliation among the parties thereto and encourage and facilitate the amicable settlement thereof" More so, High Court of Federal Capital Territory Abuja, Civil Procedure Rules, 2004, O.18 provides " A Court or Judge, with the consent of the parties, may encourage settlement of any matters(s) before it,

as the High Court (Civil Procedure) Rules of the various states, not only encouraging ADR but also providing for court annexed ADR procedures in the name of multi-door courthouse. This is now a new trend in ADR. The main characteristics of ADR processes include: -

a. The preservation of relationship and the preservation of reputation;
b. Flexibility of procedure – The process is determined and controlled by the parties in the dispute;
c. Suitability for multi-party dispute;
d. Durability of agreement;
e. Practical solutions tailored to parties interests and need (not rights and wants, as they may perceive them);
f. Parties choice of neutral third party (and therefore expertise in an area of dispute) to direct negotiations/adjudicate;
g. It provides high party involvement/participation;
h. It is voluntary, private and less complexity;
i. Confidentiality and non-judgmental; and
j. Collaborative and likelihood of speed of settlements[6].

---

by either (a) Arbitration, (b) Conciliation, (c) Mediation, (d) Any other recognized method of ADR" and High Court of Lagos State Civil Procedure Rules, 2012, O.25, R.1 provide:
(1) Within 14 days after close of pleadings, the claimant shall apply for the issuance of a pre-trial conference Notice as in Form 17.
(2) Upon application by a claimant under sun-rule 1 above, the Judge shall cause to be issued to the parties and their legal practitioners (if any) a pre-trial conference notice as in Form 17 accompanied by a pre-trial information sheet as in Form 18 for the purposes set out hereunder: (b) giving such directions as to the future course of the action as appear best adapted to secure its just, expeditious and economical disposal; (c) promoting amicable settlement of the case or adoption of alternative dispute resolution (ADR)

[6] BU Odoh, *Christlike Approach to Dispute Resolution* (Enugu: His Glory Publications, 2013) p.85

2.2 History and Development of ADR in Nigeria

Dispute resolution in Nigeria has had a chequered history. A careful study of the pre-colonial system of resolution of dispute between the indigenous people of Nigeria will attest to that reveals a system of dispute resolution akin to the present day new human face of justice popularly called ADR.

It was a system of traditional approach to dispute resolution, a system that was dependent on the desire of the people to resolve their matters and dispute amicably to achieve win-win solution than the present legal system of win-lose solution. These methods of dispute resolution included conciliation where, for example, the head of the family after listening to the conflicting parties recommends a solution which whether they like it or not the parties accept. Though there might be no prescribed sanction for non-compliance, parties felt obliged to abide by the decision handed down. There was also mediation, where the third party intervenes or is called upon to help *"settle"* the matter. The mediator does not give a decision but encourages the parties to find a middle ground where both parties are happy and have a feeling of winning. One party takes the half empty glass away and the other takes away the half full glass. Negotiations also took place in these forms of dispute resolution. As aptly put by His Lordship, Hon. Justice Umaru Eri OFR, Administration of the National Judicial Institute: ADR as African Dispute Resolution[7].

The historical evolution of the modern alternative movement is very instructive. Beginning in the sixties, a number of developed countries such as the United States of America witnessed an extraordinary growth of interest in alternative form of dispute resolution.

[7] U Eri, 'Administration of the National Institute: ADR as African Dispute Resolution'. A Speech at the 4th NCMG African ADR Summit, Lagos, Nigeria on 1st - 4th November, 1998, p.5.

Interest increased substantially in the seventies; and at the 1976 Roscoe Pound Conference in Minnesota, leading jurist and lawyers came together to address popular dissatisfaction with the crowded justice system.

It was at this conference, 42 years ago that Frank Sander after studying various legal systems including African and Asian system of settling dispute coined the words : "Alternative Dispute Resolutions"- (ADR); and proffered a radically different version of the American Justice System known as *"Multi-Door CourtHouse".*

In the last couple of years, the challenges facing the administration and dispensation of Justice (both civil and criminal) have increased tremendously. Trials have been unduly delayed and most times unnecessarily prolonged. The end product is denial of justice. There is the timeless saying that "justice delayed is justice denied". This saying, albeit a hackneyed expression, cannot be more apposite in any other jurisdiction than in Nigeria.

Owing to the attendant costs, delays, and frustrations, inherent in their adversarial nature, parties have increasingly sought recourse to alternatives to litigation. This need was filled by the formalization of ADR processes.

Recent developments have to a large extent added impetus to the development of these forms of dispute resolution. The Abuja[8], Kano, Calabar, Delta and Lagos Multi-Door Courthouses, Negotiation PowerHouse and Settlement House, Abuja for instance are breakthrough Institutions in providing ADR Services, and there is currently a bid to replicate same system in all the states of the Federation with Rivers, Abia, Ebonyi and Akwa-Ibom joining the elite league of judiciaries with court connected ADR Centers.

[8] The Abuja Multi-Door courthouse was established on October 13, 2003 and opened its door to the public in November of the same year. The Lagos Multi-Door was established on June 11, 2002 while Settlement House Abuja (Private ADR Centre) was established in November, 2006.

The Multi-Door Courthouse is an Institution that provides different ADR options for disputants. It is a one-stop place where the dispute resolution officer, if required, after assessing the controversy, recommends the best suitable door through which the parties can access a resolution of the conflict. At the Multi-Door CourtHouse, apart from the onsite ADR experts, available to disputants are a panel of neutrals made up of skilled and internationally recognized ADR practitioners.

The High Courts to which most centers in Nigeria are connected have responsibility to control and manage cases effectively and issue orders which would encourage the adoption of ADR methods of dispute resolution[9]. Sometimes, the court, as empowered by the rules, also mandates parties desires it. For example, the Lagos Multi-Door Courthouse offers a variety of ADR process and the mission of the centre is to supplement litigation as the available resources for Justice by the provision of enhanced, comely, cost effective and friendly access to Justice[10].

The benefits of ADR in Nigeria are enormous. Consequently, the statutes creating some government institutions also made provisions for the setting up of panels to deal with conflicts that may arise within those institutions. Examples of these are the *National Health Insurance Scheme Act*[11], which makes provision for the setting up of Arbitration Board in all the states of the Federation and the Capital Territory; *The Petroleum Act*[12], *The Public Enterprises (Privatization and Commercialization) Act*[13], Nigerian Communication Commission and many others. These special ADR panels will go a long way to ease the pressure on the regular courts in resolving conflicts.

[9] RD Harriman, 'The Place of Positive Non-Verbal Communication in Mediation' in KN Nwosu, (ed), loc cit, p. 24
[10] *Ibid.*
[11] Cap. N42, LFN 2004
[12] Cap. P10, LFN 2004
[13] Cap. P38, LFN 2004

2.3 Justification for ADR

A lot of writers have traced the origin of ADR to the USA in a drive to find alternative to traditional legal system seen to be adversarial, costly, unpredictable, rigid, damaging to relationships and limited to narrow rights-based remedies[14]. In South Africa, for example, there was a growing feeling before the present constitutional dispensation that the formal system of justice, a foreign, dominant, western legal system was superimposed on an intuitive, indigenous legal system[15]. No doubt, the law was largely perceived by black to be an instrument of oppression. In no time, however, it was discovered that the inability to meet the justice needs of the ordinary citizens (black population especially) was not due merely to the content of the substantive law but also because the structure and procedural requirements of the courts did not allow full access to justice. The general complaints from the various interests groups such as labour, business, religious, cultural and community groups in South Africa just as in other parts of the world even with more sophisticated judicial systems is that litigation has become rather two expensive, slow, less effective and cumbersome[16].

By and large, there is a consensus of opinion that inordinate delays as well as prohibitive cost of litigation has put justice beyond the reach of the citizens not just the common man. Furthermore, the incomprehensibility and adversarial nature of the court process with a resulting lack of control (parties can only participate in an indirect manner, that is, they can neither control

[14] S Ogunyanwo, *The Effective Mediator*, (Lagos: HMB Hephzibah Publisher, 2005) p.25

[15] GJ Van-Nirkerk , 'People's Courts and People's Justice in South Africa', *New Development in Community Dispute Resolution*, 1 De June (1995), 19

[16] JA Agaba, 'ADR: A Threat to Lawyers?' Unpublished LL.M Thesis, University of Jos, Nigeria, 2006, p. 14

the process nor the outcome) has led to a sense of frustration and disempowerment[17]. Needless to say that litigation ultimately ends in judgment which in other words creates a winner or a loser. Even winners has often times discovered that what they won amount to no more than pyrrhic history considering not only the time and resources put into it but also the limited range of legal remedies available after a successful litigation.

2.4 Reasons for the Justification of ADR.

The justification for ADR can be categorized under the following headings:

a. ***To relieve court congestion, as well as prevent undue cost and delay: -***

ADR experts in the United States (where the practice of ADR is well advanced) have expressed some doubt as to whether the practice of ADR can ever relieve court congestion, nor is there any evidence to show that this has been the case in Nigeria. Undoubtedly, however, there are methods of resolving disputes which are less expensive and more expeditious than formal litigation. This is being borne out in the labour field where research has shown that dismissal disputes were generally dealt with on a less costly and more expedious basis by arbitration than they were in the industrial court.

b. ***To enhance community involvement in the dispute resolution process:-***

This goal is of particular importance in Nigeria. Nigeria's recent history has served amongst other things to alienate a significant section of the population from the formal court system. The development of appropriate forms of dispute resolutions which encourages and enhances, community involvement and bears the stamp of legitimacy is, therefore, of cardinal importance to those who would see disputes and conflicts effectively resolved.

[17] South African Law Commission (ZALC) Issue Paper 8 (Project 94).

c. ***To Facilitate Access to Justice:***

This goal is perhaps ambitious. For example, parties, who with the assistance of a mediator, are able to resolve their dispute may not regard themselves as having received justice but may simply consider that they have attained the more modest goal of settling their dispute. Undoubtedly, dispute resolution in its broadest sense does, and will continue, to facilitate the increased resolution of dispute. Thus, in adopting court connected ADR centre popularly called the Multi-Door CourtHouse as part of the justice delivery system in the states that have them, economic access to justice by the ordinary man has been enhanced[18]. The court-connected centre is part of the judiciary.

d. ***To provide more effective dispute resolution: -***

This is the most important goal of ADR. As already stated, it is of the essence of the study and practice of alternative dispute resolution to provide mechanisms and processes which will resolve disputes more effectively than an automatic recourse to litigation. Indeed, one of the most significant effects that dispute resolution practice has had in Nigeria over the years is to challenge the view that adversarial litigation is the only means apart from agreement, of resolving disputes.

There are three major categories of dispute resolution which may be considered here:

i. Dispute resolution processes involving private decision-making by the parties themselves. This category would include negotiation and mediation;

ii. Dispute resolution processes involving private adjudication by third parties. Arbitration would fall into this category; and

[18] RD Harriman, *opcit* , p. 7

iii. Dispute resolution processes involving adjudication by a public authority. This category would include administrative decision-making and formal litigation before the courts. When parties have a dispute, therefore, many options are open to them. One of the options is to resort to self help. The other is recourse to the court. Yet another is for the parties to agree to search for a solution to the problem that is mutual to them. Because the law condemns resort to self help[19], parties may want to resort to the courts for remedy that is litigation. To effectively appreciate the nature of ADR, it is important to understand the nature of litigation.

2.5 Nature of Litigation

Litigation means a lawsuit, legal action including all proceedings therein; contests in a court of law for purpose of enforcing a right or seeking a remedy; a judicial contest, a judicial controversy, a suit at law[20]. It is an adversarial process of dispute resolution where the parties use the instrument of state courts established by law to determine their legal rights[21]. It is usually the litigant who decides on the cause of action to pursue in court and the appropriate remedy to seek. The court adjudicates based on the evidence provided by the disputing parties. Under the adversarial system as it is in Nigeria, parties are required to personally source and provide their evidence, pay the fees for the originating processes and record of proceedings for cases on appeal, settle solicitors fees and bear other incidental costs. All these require substantial amount of resources before, during and sometimes even after the trial.

[19] *Ojukwu .v. Governor of Lagos State* (1985) 2 NWLR 806.
[20] RN Joseph, et al. (1990). *Black's Law Dictionary*, (6th edn, Minnesota: West Publishing Co, St. Paul, 1990) p.934.
[21] BU Odoh, 'An Overview of ADR Processes'. A Paper delivered at The Professional Foundation Course on Dispute Resolution, held at, Tiga, Baguda, Kano, Nigeria on 12th-13th February, 2011.

Apart from these well known costs, the institutional and structural weakness in the judicial system has led to the situation where in majority of the cases, disputes spend an embarrassingly long period of time in court, thus adding to the frustrations of the parties. The frustrations resulting from litigation time and costs led to the search for rediscovery and acceptance of other options for dispute resolution.

ADR processes provide succor to litigants in most cases where litigation has failed as a means of securing justice. But, while ADR seems to address the problem associated with litigation, it must be noted that litigation could still be an effective mechanism for the resolution of certain disputes. Some of the instances where litigation should be the preferred options are:-

1. Questions bothering on legal interpretation of statutes;
2. Where legal precedent needs to be set;
3. Emergency situations where injunctive or preventive relief is necessary – absconding defendant;
4. Public policy;
5. Where it is necessary to avoid the action being statute barred; and
6. A frivolous claim that will most definitely be dismissed by the court.

2.6 The Concept of Conflict

Conflicts are adjudged to be a part of social life. They are instruments of progress in human relationship. It is a continuing reality of social existence. It is inevitable and it keeps occurring. It is true to say that life in common-be it married life, or family life, or life in the community, or business life or city life, or the nations life-is a continuous succession of quarrels and conflicts. Conflict is, therefore part of life albeit a said part of it. Society is closely bound up with conflicts. Within the society we find a mass of struggles and oppositions everywhere and at

every level. Conflict, therefore, is a phenomenon, which we cannot afford to ignore or quietly sweep under the carpet. It has to be confronted.

Necessarily, conflict involves two or more parties that have, or perceive incompatibility in either interests and values, or in strategy of achieving the end desired outcome[22]. For sure, conflict is a strain in a relationship that goes with emotion. The higher the emotion, the high the tendency of an evolving conflict intensity. Conflict occurs even in the 'best' of human societies. Conflict index includes mutual image of misunderstanding, hostile utterances, actions and responses that seek to put the interest(s) of the other party in a disadvantaged position[23]. This broad range of conflict is supplemented by the variety of motivators, which compel him to do so. Due largely to the lack of emotional intelligence, every conflict has many sides and every group or party is responsible for each side[24]. Attempting to trade off blame by the parties only creates resents and anger that often heighten any existing conflict tendency[25]. Thus far, conflict graduates in phases:

a. Early conflict indicator
b. Conflict resistance
c. Explosive or exhaustive conflict
d. Terrorism – a most deadly spiral and the highest level of violence[26].

Conflict can also be viewed as a frustration based attitude or protest against lack of opportunities for development and against lack of recognition and identity. Whether conflict or

[22] A Akpuru-Aja, *Basic Concepts, Issues and Strategies of Peace and Conflict: Resolution: Nigeria-African Conflict Case Studies* (Enugu: Kenny and Bro, 2007) p.33
[23] S Sani, *The Killing Fields: Religious Violence in Northern Nigeria*, (Ibadan: Spectrum Books Limited, 2007) p.12.
[24] A Akpuru-Aja, 'Basic Concepts of Conflict', in M Ikejiani-Clark, (ed.) *Peace Studies and Conflict Resolution in Nigeria: A Reader*; (Ibadan: Spectrum Books Limited, 2009) p.12

[25] *Ibid*
[26] *Ibid*

violence has origin in class, status, ethnicity, sex, religion, nationalism or resource control, we are dealing with the same fundamental issues.

A clear understanding of the concept of conflict will aid, in no small measure, in appreciating the various mechanisms of ADR that will be discussed in this work. thus, self help, litigation, negotiation, arbitration, conciliation are all methods by which disputants, parties in dispute or conflict resolve their differences. The bottom-line of all these processes in conflict. In other words, parties have to disagree before they can talk about any or all of these mechanisms.

2.7 Resolution

This term has been defined as "a formal expression of opinion or intention made, usually after voting, by a formal organization, a legislature, a club or other group. Such may be either a simple, joint or concurrent resolution[27]''.

This term is usually employed to denote the adoption of a motion, the subject matter of which would not properly constitute a statute, such as a mere expression of opinion, an alteration of rules, a vote of thanks or of censure. It is not a law per se but merely a form in which a legislative body express an opinion.

The principal distinction between a resolution and a law is that the former is used whenever a legislative body expresses an opinion as to some given matters or things which are to have temporary effects while by a law, the legislative body is intended to permanently direct and control matters applying to persons or things generally.

The verb "to resolve" has been defined as "a thing one has firmly decided to do[28]. It must be borne in mind here that, the type of resolution envisaged by this dissertation is not that

[27] Retrieved April 12, 2018, from www.dictionary.reference.com. Accessed on 12/4/2018.

[28] *Ibid*

coming from a legislative house as it were, but the process of arriving at a mutually accepted agreement by parties to a dispute or the mutually binding consensus that has been reached by the disputants that has been reached by the disputants with or without the help of a third party.

2.8 Advantages and Disadvantages of ADR over Litigation

2.8.1 Advantages

i. ***The results can be confidential*:**

The parties can agree that information disclosed during negotiations cannot be used latter in proceedings. The final outcome can also be made private if the parties wish. Courts do not offer this – trial are open to the public which means everyone will know your business. That is why so many high – profile cases have "out of court settlements".

ii. ***ADR is Speedy*:**

Trials are lengthy, without exception. In many jurisdictions it could take years before you even get to begin arguing your case before a judge, much less get a verdict. There are better things you could be doing with your time.

iii. ***Expenses are kept down*:**

Counsel and expert witnesses are expensive; meaning litigation of a case can easily run up obscene bills. Alternative dispute resolution offers the benefit of getting the issue resolved quicker than would occur at trial – and that means less money spent for both sides.

iv. ***It is flexible and so parties can choose the approach that best suits their case:***

ADR typically offers greater procedural flexibility than litigation. Litigation focuses exclusively on the party's legal rights and responsibilities, while ADR can address legal obligations, it also takes into account a wide variety of non-legal interest and concerns

such as an interest in preserving a relationship, in having feelings acknowledged or in preventing similar disputes in the future.

v. ***It helps the parties to improve their future relationship***:

The adversarial postures taken in litigation often exacerbate the communication problems inherent in disputes and may further damage the relationship between the parties. In many situations, such as when a dispute is between parties working on the same construction project; a bank and its customer or between a manufacturer and distributor, ADR would help to preserve their relationship.

vi. *It leads to a more effective use of experts in the resolution of disputes:*

In as much as ADR is concerned, those who engage in resolving disputes are skilled and as a result are experienced in various aspects of specialization.

2.8.2 Disadvantages

ADR also has its downside. These are:-

i. ***There is no guaranteed resolution*:**

With the exception of arbitration, ADR processes do not always lead to a resolution. That means it is possible that you could invest the time and money in trying to resolve the dispute out-of-court and still end up having to go to court.

ii. ***Participation could be perceived as weakness:***

While the option of making the proceeding confidential addresses some of this concern, some parties still want to go to court "just on principle".

iii. ***Arbitration decisions are final:***

With few exceptions, the decision of a neutral arbitrator cannot be appealed. Decisions of court, on the other hand, usually can be appealed to a higher court.

iv. ***Fewer evidentiary and procedural protections*:**

Most ADR processes operate under less stringent procedural and evidentiary rules. ADR is typically more relaxed than litigation. This can create concerns about whether the truth will come out and whether disputants will get real justice in ADR process.

Is it to one's advantage to use ADR? In many cases, the answer is a resounding "Yes". However, there is no absolute answer. Instead, the circumstances of each case need to be weighed separately. Knowing one's options is an important first step.

2.9 An Appraisal of ADR Processes

Until the year 2004, any suggestion that a lawyer in Nigeria would be committed to any method of dispute resolution other than litigation, or infrequently arbitration would have been dismissed. Like the courts, the Bar saw its "business" as litigation. Yet, few years later, many lawyers are not only heavily engaged in mediation, case appraisal and other methods of so-called 'alternative' dispute resolution, but both the Bench and the Bar Association are actively facilitating that, by providing appropriate physical premises.

The history of dispute resolution probably goes back to the dawn of time. Humans have been negotiating formally and informally well before historical journals recorded human endeavour in the field of dispute resolution. Consensual problem solving is not a new concept. The inherent desire of humans to resolve conflict means that dispute resolution is one of the oldest disciplines known to humankind. ADR processes are methodologies for resolving these disputes outside courtroom litigation. Rather than a substitute for litigation, it plays a complementary role. It vary in form and content and apart from arbitration, the processes are largely flexible and do not have generally acceptable rules of procedures or even categorization. In other words, each ADR process. Is tailored towards satisfying the need of the parties based

on the circumstances of the dispute. Thus, just as a golfer selects the proper club for the shot and a mechanic chooses the right tool for the job, different types of disputes call for different strategies for if the only tool you gave is a hammer, it is very likely that every problem that comes your way will be seen as a nail you will just ram it in. If for instance, the problem requires a temporary solution thereby needing say a screw driver and you nail it in, you would have succeeded in making permanent what was meant to be temporary.

It is worthy of note here that no one form of ADR is for all occasions. The ADR practitioners choose from among a wide range of ADR spectrum and adopt the process which to him, seem to meet the circumstances of the parties and dispute before him. These ADR processes are, negotiation, mediation, conciliation, arbitration and hybrid processes.

2.9.1 Negotiation

Negotiation is the use of information and power to affect behavior within a "web of tension[29]. If we think about this broad definition, we will realize that we do, in fact, negotiate all the time both on our job, and in our personal life.

With whom do we use information and power to affect behaviour of the job? Husbands negotiate with wives, and wives with husbands. We use information and power with our friends colleagues and relatives. We negotiate everyday of our lives but hardly do we recognize that we do nor do we bother about any systematic and structured development of professional negotiation skills[30].

Many people struggle to negotiate effectively. The reason for this is probably that until very reason for this is probably trained to be able to negotiate a resolution to conflict occurring in

[29] H Cohen, *You Can Negotiate Anything*; (New York: McGraw Hill Book Company, 1982) p.16

[30] J.A.Agaba, *Locit*

our lives. In terms of the law, our adversarial system encourages lawyers not to negotiate well. Instead, lawyers are trained to argue the merits of a case based on promoting their client's legal rights. It is these right that drive the lawyer to phrase documents in a certain manner and it is usually these rights that force the lawyer to recommend court action to their client and encourage lengthy and expensive litigation. It is usually these rights that leave many a successful litigant feeling dissatisfied, after participating in a process that places greater emphasis on the rules of evidence, instead of the litigant's own interest[31]. In terms of these maintenance of a stable society that abides by the rule of law, this is the way it should be. People have the right to feel comfortable to protect them should the occasion arise.

It is very important to note here that this appraisal of negotiation is not a criticism it is an argument that insists that only important matters that have the real potential to create precedent should make it to court. If negotiation can avoid unnecessary litigation and at the same time allow parties to resolve disputes, thereby promoting the development of the doctrinal foundation of law by the courts, then society has probably done itself a good service.

The reason negotiation is a different skill to be learned by lawyers is because a good negotiator will not just confine his or her mind to their clients legal rights; in fact, some would say that the issue of a disputant's legal rights has no place in negotiation[4]. A skilled negotiator will discover what their client's interests are and negotiate a solution based on those interests[32].

[31] Spencer, D.(2002*), Essential Dispute Resolution*; Cavendish Publishing Pty Limited, New South Wales, Australia, p.29

[32] This is what the Harvard Negotiation project (based at Harvard law school, in USA) call "Principled Negotiation". Principle Negotiation is a method of deciding issues by looking for mutual gains and independent fair standards.

2.9.2 Fundamentals of Negotiation

Unlike some other methods of dispute resolution which are often governed by complex rules such as litigation, arbitration and even sometimes even mediation, negotiation is a simple concept and fundamental to our lives, hence its lack of complexity.

Anstey defines negotiation as:

> A verbal interactive process involving two or more parties who are seeking to reach agreement over a problem or conflict of interest between them and in which they seek as far as possible to pressure their interests, but to adjust their views and positions in the joint effort to achieve agreement[33].

It is pertinent to note here that from the above Anstey's definition, it can stateed the general attributes of negotiation as being that it:

a) involves more than one party;

b) involves a joint agreement on the outcome;

c) usually requires movement of a party's position and interest;

d) usually empowers its users by providing self-determination;

e) is non-interventionary (there is often no third party involved);

f) is often less expensive than other forms of dispute resolution; and

g) allows parties themselves to control the process and the outcome[34].

Whilst there are many theories on the dichotomy of negotiations, many display similar characteristics in that they classify negotiations according to the relationships of the parties, that is, whether the parties have a relationship after the negotiation; whether the relationship has deteriorated and they seek dissolution or reconciliation of it; or whether they seek to renegotiate their relationship. Using relationships as the basis of a dichotomy of negotiation is acceptable

[33] M Anstey, *Negotiating Conflict: Insights and Skills for Negotiators and Peacemaker*; (Johannesburg: Juta & Co, 1999) p. 91
[34] *Ibid*

from a theoretical and practical viewpoint. People learning the skill of effective negotiation sometimes ask whether there are any issues that cannot be negotiated. The answer to such a question is generally "no", providing the parties are willing to negotiate. However, the willingness of parties to negotiate often comes down to the relationship between them. The relationship between disputing parties often comes down to the level of communication between them.

2.9.3 Communication Skills

Two of the great causes of disputes in our society are miscommunication and a lack of communication. Given this problem, a negotiator can be of little use if he or she is also a poor communicator. Therefore, skilled communicators are generally good communicators.

There are few basic skills that negotiators may adopt which may assist the effectiveness of negotiation. These are:

1. **Reframing:-** The skill of reframing is one of the most important skills of a negotiator. It is simply the ability to capture the essence of what has been said by the disputants and verbalize it back to the party who said it[35]. It is useful at various times throughout a negotiation. Generally, reframing shows that the negotiator has listened and has understood the speaker. Understanding the dispute and it's elements is an important factor of dispute resolution. Reframing is an excellent way to help a party see the other side's point of view. It is not just about reflecting on what was just said. It is about reframing what was just said in a way that focuses the disputant's attention on the motivation behind the statement. For example, if a party to a dispute states, "I think you

[35]CW Moore, *The Mediation Process: Practical Strategies for Resolving Conflict* (San Francisco: Jossey-Bass, 2003) p. 15

are deliberately making my life difficult because you won't let me use the photocopier", a skilled negotiator may reframe this back to the disputant as "so you need access to the photocopier to efficiently perform your job?

Reframing should seek to take the negative and confrontationist language out of the dispute. Thus, it allows the speaker to listen to the problem in another contextual framework, and focuses the disputants on what the problem is, rather than becoming lost in a maze of abuse and irrelevant material. It also shows the speaker that the negotiator has actively listened and it prevents reiteration of the dispute. Negotiators who are skilled in the art of reframing do not add opinion to the reframe, nor do they add anything that was not stated by the speaker[36].

2. **Sponging:-** Sponging is a technique used selectively by negotiators. There may be times in negotiation where emotions run high and the other party wants to "vent their spleen", that is tell you all about the dispute through an emotional frame of reference. Whilst the information gathered during this process may be largely irrelevant, without the other party articulating the emotions of the dispute, the other party may block a solution to the dispute. Sponging means that the negotiator will need to sponge, or absorb some of the emotional issues if those issues are acting as a bar to a negotiated settlement. The use of sponging in a negotiation contributes to an atmosphere where emotions may be expressed. This allows the negotiator to empathies with those emotions where appropriate and then enables the disputant to move forward to deal with the substantive issue of the dispute[37].

[36] D Spencer, *opcit*, p. 32
[37] Ibid

Sponging is a means to better understanding the issues surrounding the dispute that will ultimately assist its resolution. It should be noted here that there is a limit on the amount of sponging to be performed during a negotiation. Clearly a negotiator cannot spend vast amounts of time listening to the continuing woes of the other side. Sponging comes with time limitations. A useful tool for ending the sponging process is the communication tool discussed above; reframing. By reframing, the negotiator can send a message to the other side that the emotions are understood, empathized with, and that the disputants can move on to substantive issues that will enable resolution.

3. **Silence:-** Negotiations tend to be physically draining because skilled negotiators listen, frame thoughts and questions, manage the process of negotiation, seek options and outcomes, and promote their own or client's interests – they do all of this at the same time! The communication skill of silence can assist in reducing the exhaustion as well as assist in the efficient running of the negotiation. In some culture, silence is an important element of negotiation[38]. It allows time for reflection and the framing of an appropriate response. Many negotiators say things in the heat of the moment that they soon regret. Silence overcomes this problem. During a negotiation it is not out of place, to ask for a moment to think about a proposition, or to take a recess to consider the proposition or consult with others. Silence can be used effectively for both sides to reflect on the progress to date of a negotiation and should not be avoided for fear of lack of progress.

4. **Open – ended question:-** Questions are one of the negotiator's most important tools. It does not matter whether a negotiator is seeking information from a disputant or being an advocate for the disputant in a multitude of ways that may include court, company

[38] D Spencer, opcit, p. 35

meetings or in a negotiation – the negotiator is continually questioning those around him or her for information that will assist in achieving resolution[39].

An open-ended question seeks to elicit information from the receiver of the question. The skilled negotiator is a seeker of information that he or she will use to generate options that ultimately lead to settlement. The best way to receive the vital information need to settle a dispute is not to ask questions which elicit a limited response, that is, those questions generally known as being closed – ended. Although, closed ended questions can be very valuable, approaching the end of negotiation when testing a proposed settlement for its ability to be implemented. An example of a closed – ended question would be, *Have you gone on strike because of wages?* The open - ended question will elicit the maximum amount of information. Closed – ended questions will generally elicit a "*yes or no"* response

5. **Active Listening:-** The word 'active' means that skilled negotiators treat listening as an active, rather than passive, activity. Active listening needs to be practiced. There are a number of helpful hints that can be practiced to improve a negotiator's ability to listen:

a. clears his desk so that there will be nothing diverting his attention from the speaker;

b. holds his phone calls so that other matter do not divert his attention from the negotiation;

c. learns the skill of taking minimal, but relevant notes. He should minimize the impact of negative non-verbal communication if he do not have his head buried in a pad taking convoluted notes;

d. faces the other party and make constant eye content; and

e. only interrupt to clarify something he do not understand[40].

[39] D Spencer, opcit, p. 34

It is important not only to actively listen for the benefit of the negotiator, but to display active listening skills throughout the negotiation as this will assist in the progress of the negotiation as this will assist in the progress of the negotiation.

There two notable ways to display active listening skills. First, use positive non-verbal skills such as nodding your head to show your understanding. Secondly, use verbal skills such as reframing to show that you understand.

6. **Body Language:** Becoming an observer of body language reveals truth about people that may assist in negotiating. Negotiators need to work harder to find out what really causes dispute and whether there are emotional issues that need to be dealt with before meaningful progress can be achieved.

Eye contact for example may disclose an interest in and a willingness to negotiate, whereas a lack of eye contact may disclose a lack of confidence in the process. In such cases, the negotiator must reassure the disputant who has lost confidence in the process that negotiating can achieve a good result for the disputant providing he or she participates and contributes.

2.9.4 Elements of Negotiation

The essential elements of productive negotiations are as follows:-

1. **Interests:** Disputants focus more on their positions rather than their interest when they attempt to negotiate. The definition of position is simply *"What you have decided"* The definition of an interest is '*why you decided the way you did?* Generally, positions are the outward manifestation of interest. For example, the position of a disgruntled employee may be, "*I want a pay rise".* However, the interest behind the position may not be the

[40]CW Moore, *opcit,* p. 16

need for extra money, but the need for recognition within the organization. Settling such a dispute may involve working out ways to give the employee more recognition within the workplace that may or may not involve a pay rise[41]. The settlement of this issue would be based on the interest of the employee as opposed to the employee's position.

Finding the underlying interests is the challenging part of negotiation. Negotiators should have a clear understanding of their own interest in order to fashion a settlement that suits interest as opposed to positions, and also have some idea of the other side's interest for similar reasons.

Negotiators should go through the intellectual exercise of delineating between positions and interests in order to be certain that negotiations are proceeding on the right footing. It is generally acknowledged that a settlement based on positions will not last, if the interests of both sides have not been satisfied. To achieve this, it is necessary to ask open-ended and probing questions pertaining to the reasons behind the dispute and what the other side wants out of any partial settlement and why.

2. **Options:** A negotiate should generate a variety of possibilities before deciding what to do. Option generation becomes particularly important when there are only one or two solutions to the dispute on the negotiating table[42]. The central idea behind option generation is to increase the number of options, rather than try and distribute the existing option or options that may have caused the dispute in the first place. There is only one golden rule when it comes to generating options – make sure those options are parallel to the interests of the parties. If there are not, the negotiator is wasting everybody's time.

[41] D Spencer, *opcit*, p. 88
[42] Ibid

Multiple options assist the negotiator and making selecting a package of options that form the ultimate resolution of the dispute so much easier.

There are several ways to generate options. One of the most effective way is through an option generation session (sometimes known as "brainstorming" such a session needs to be conducted carefully and with great patience. The only way to become skilled in option generation sessions is to run them as often as possible during negotiations. Negotiators should consider running an option generation session when any of the following events occur:-

a. the negotiation is failing to achieve any agreement;
b. there is only one option for settlement on the negotiating table; or
c. the disputants have run out of ideas on any one issue in dispute[43].

There however rules of option generation that guides the negotiation. These are:

a. create a non-judgmental atmosphere;
b. options, not solutions;
c. seek multiple options; and
d. encourage the use of zany ideas[44].

3. **Alternatives:-** The reason to negotiate is to produce something better than the results that you can obtain without negotiation[45]. Negotiators should always be aware of the course of action to be taken if negotiation is unsuccessful. In negotiator parlance, this is generally referred to as the Best Alternative to Negotiated Agreement (BATNA). It is essential for the negotiator to have considered his or her own, or the client's BATNA

[43] D Spencer, opcit, p. 89
[44] Ibid
[45] R Fisher, et al, *Getting to Yes. Negotiating An Agreement without Giving In*; (London: Random House Business Books, 1992) p. 100.

before entering the negotiation, otherwise, how will the negotiator know when a settlement proposal is better than terminating the negotiation? In this respect, the BATNA is generally the outcome of the negotiator "walking away' from the negotiation. Thus, Fisher and Ertel opinionated, "if you get pushed to your bottom line, should you walk away? You should do so only if your bottom line is based on what you could get elsewhere, your alternatives; and only if the best of those, your BATNA, is better than what is on the table[46].

Once a negotiator have identified his client's BATNA, he has to put a value on it. That value is his "walk away" when he negotiates. Discovering the BATNA is relatively simple. From the negotiator's own point of view, it is a matter of assessing what options are open should the negotiation fail. The challenging task for negotiators is to discover the other side's BATNA. Some common examples of BATNAS are:

a. going to court;
b. accepting the loss;
c. discontinuing business or personal relations with the other side;
d. keeping deposits or goods held;
e. facing a disciplinary tribunal;
f. ignoring the dispute; and
g. seeking another ADR process.

Another useful element to understanding the other side's BATNA is the opportunity that presents itself to deflate the other side's BATNA. Some reliable methods of deflating BATNAS are to mention:

[46] R Fisher, and D Ertel, *Getting Ready to Negotiate*, (New York: Penguin, 1995) pp.45-46.

a. adverse publicity

b. costs – including management and administration costs to run the dispute, legal costs, opportunity cost the cost of missing potential business whilst running the dispute, net present value of a settlement;

c. cost time waiting for a hearing date and attending court and/or arbitration

d. uncertainty of a judicial or arbitral decision, and

e. loss of relationship with the other dispute (in many relationships there may be a desire by one or more parties to maintain a relationship after the resolution of the dispute[47].

Deflating BATNAS is about creating doubts about a party's course of action should the negotiation fail.

4. **Legitimacy:-** Before a negotiator agrees to the settlement of a dispute, he or she needs the comfort of knowing that they have not been take advantage of. This is referred to in negotiation circles as using an external standard to provide legitimacy to the negotiated agreement:

> If I am going to persuade myself and the Other said that a given agreement is fair, I will want to have on hand some external standards, precedent, or other objective criteria legitimacy. Such principles and standards help negotiators choose among the options they have generated and give both sides something to point to when explaining why they accepted a negotiated settlement[48].

[47] D Spencer, *Opcit*, p. 43

[48] R Fisher, and D Ertel, Opcit, p.46

Legal precedent is a good example of external objectives criteria that may be used to legitimate a negotiated agreement. Lawyers should be particularly comfortable with this notion of ensuring legitimacy in negotiations as they spend a large part of their professional lives reforming to common law of their professional lives referring to common law precedent. Other examples include:

a. Moral standards;

b. Professional standards;

c. Scientific standards;

d. Company profile;

e. Market value;

f. Tradition;

g. Costs charged by external organizations or associations; and

h. Seeking an objective export opinion (for example, a valuer, engineer, accountant, etc)[49]

The act of legitimating a negotiated agreement is a matter of comparing the agreement with the external standard and determining whether the disputants are still willing to settle the dispute based on the agreed packaged of options.

5. Relationship:- The aim, in terms of relationship is to build some trust that any negotiated settlement will be adhered to and, should there be a desire to have a future relationship, attempt to levy the foundations for the future relationship.

Treating each of the parties with some respect is a good starting point and will hopefully build the right sort of foundations for a trusting relationship, even if it only lasts until the end of the successful resolution of dispute. Negotiators may have to

[49] *Ibid*

consider being empathetic towards the other side and using some of the sponging techniques earlier discussed in order to achieve a useful relationship between the parties.

6. **Commitment**:- Commitment generally refers to the negotiators being committed to the process and having a clear understanding of what process should be. For example, a skilled negotiator should have a firm understanding of the result of any negotiations, rather, it means being able to accurately describe at what stage the negotiation should be, at any given point in time. To active this, negotiators may employ the three Ps approach[50.]

   a. Purpose:- The negotiators should plan the purpose of the meeting by knowing what product he hope to have in his band at the conclusion of the meeting. For example, it may be a document or a white board full of options, which at the next meeting can be transformed into solution.

   b. Product:- The negotiator should define the product adequately so that participants know what they need to achieve and when they have fallen short of, or exceeded the desired product.

   c. Process:- The negotiator should plan the process for achieving the purpose and the product. For example, an agenda or set of guidelines may assist in achieving the process and producing the product.

2.9.5 Negotiation Preparation

Whatever kind of negotiation we face, be it domestic, national or international, lack of preparation is perhaps our most serious handicap. This is true whether the negotiation is ongoing or has not yet begun, and no matter how much experience we have. In fact, the more experienced

[50] *Ibid* @ p 98 - 99

we are, the greater risk that we fall into an established preparation routine that takes little account of the particular problem with which we are confronted[51].

There is no negotiation. In fact, the level of preparation often determines the tone and outcome of the negotiation. Whilst different negotiators display different abilities to adequately prepare, a general rule of thumb is that negotiators should be spending half to two – thirds of the time spent actually negotiating, in preparing to negotiate.

2.9.6 Key Features of Negotiation

The key features of negotiation are as follows:-

a. It is voluntary:- This means that parties negotiate by their free choice.

b. Relationship:- In addition to helping parties solve a problem, use of negotiation enhances the quality of the relationship between the parties.

c. It is flexible:- Parties can adopt an approach that suites their purpose and desires.

d. It is private:- The confidentiality helps the parties address issues that they may not feel free to talk about in a public forum.

e. Future Focused:- Parties dwell less on past errors, they are more concerned with ensuring that their future relationship is strengthened.

f. High Party Involvement/Participation:- The parties themselves work out the solution to their problem.

g. Non-Judgmental:- It is not necessary to determine who is right or wrong in the dispute. Parties focus more on reading agreement that takes care of their concerns.

h. Largely Interest Based:- It can focus more on the real needs (Interests) of the parties and not rigid positions.

[51] *Ibid*

2.9.7 Negotiation Strategies

Basically, the strategies adopted in negotiations may be either Competitive (Win-Lose) or Problem –Solving sometimes classified as Distributive and Integrative approaches respectively[52].

The competitive strategy is where parties take positions and attempt in negotiations to get the opposing party to agree to positions. With the competitive strategy, parties approach the issues like a fixed pie with each side's goal being to take as much share as possible. In the process, there is the tendency for negotiators to adopt some tricks, techniques and tactics in order to gain undue advantage over the opponent. Because this strategy usually produces an outcome where one party's gain is seen as loss to the other side, it is often called the win – lose strategy. This win – lose character makes it an inappropriate strategy for transactions where the parties have an ongoing relationship or where they are likely to have future dealings with each other.

The Win – lose outcome also creates room for lack of commitment to performance of the contract by the party who feels he lost out in the bargain. Worse still, the competitive strategy may lead to a lose-lose outcome where each party is determined not to let the other win.

The collaborative or problem – solving strategy is the process where negotiators focus on the mutual satisfaction of their respective needs. With this technique, the negotiators try to produce an outcome that leads to acceptable gains to all parities. Because negotiators seek to achieve a solution that is satisfactory to all parties, this approach is also known as the win – win strategy. To adopt this strategy, negotiators, according to Fisher, Ury and Patton[53],should:

---

[52] KN Nwosu,' Key To Successful Negotiations' in KN Nwosu, (ed.) *Legal Practice Skills & Ethics in Nigeria*; (Lagos: Academy Press Plc, 2004) p. 283

[53] R Fisher, *et al*, p. 15

a. Separate the people from the problem; in other words separate the interpersonal relationship between the negotiators or opposing parties from the merits of the problem or transaction.

b. Focus on interest not position; that is, consider interest of the opposing parties so that each party's motives, goals, and values are fully understood by each side.

c. Generate a variety of options; for example, brainstorm to develop new ideas to meet the needs of the parties.

d. Insist that the result of the negotiations be based on some objective standard, that is, asses the proposed outcomes against easily ascertainable standard based on objective criteria.

The efficacy of the collaborative strategy is based on ethical, logical and practical considerations[54]. When both parties to an agreement are satisfied with the outcome they will make it succeed and not fail. Also, the parties should be willing to work with each other in the future. Essentially, successful negotiations require that we adopt a firm approach with the collaborative (win-win) strategy.

An effective negotiator aims at changing the frame of the dispute from adversarial to a problem solving approach. To do this need to take two major initiatives in the negotiation.

1. The negotiator should try to restructure the problem in such a way that he de-emphasizes an accusatorial and fault finding attitude to problem-solving attitude. He should change the situation from *"I v. You"* to *"We v.the Problem".*

2. He should identify 3 major aspects of the dispute – (i) issue, (ii) position, (iii) Interest. Issue is the real problem between the parties. Position is the stand each

[54] BU Odoh, *Alternative Dispute Resolution in Nigeria*, (Germany: LAP Lambert Academic Publishing, 2014), p.78

party takes on the issue. Interest refers to the real need of the parties that led them to take a particular position (stand) in the dispute. In most cases parties may take conflicting positions even where their interests are reconcilable. The ability to discover the real interests of the parties is one of the hallmarks of an effective negotiators. Use of power – based, commanding tone or approach in negotiations will reduce the chance of getting the other party to disclose their real interest.

While it is necessary to determine at the outset the strategy to adopt in the negotiations, it should not be expected that the actual bargaining would proceed on some clear-cut separate strategic framework, on the contrary, there may be a mix; with the result that one strategy may dovetail into another as the negotiation processes. Thus, it is possible to commence with what is essentially a competitive approach and change to the collaborative strategy midway in the negotiations and vice versa. What is important is that we develop the ability to control the process and adjust to changing circumstances in the negotiations[55].

2.9.8 The Stage of Negotiating a Matter through Negotiation

It depends on the facts and circumstances of a particular case. Negotiation may be applied before, during or after litigation. In most cases, the timing is important. As a general rule, it is better to attempt to resolve a dispute through negotiation early in conflict. This is so because in majority of cases, the longer a dispute is allowed to linger the more the acrimony between the parties is likely to escalate and the more difficult is to get them to reason together and settle the matter amicably. It must be noted however that negotiation; is voluntary, and so the success will depend on the willingness of the parties to attend to the process.

[55] BU Odoh, *opcit*, p. 89

Accordingly, there may be cases where the parties remain recalcitrant and unwilling to negotiate at the early stage of the dispute. Sometimes, the parties may have to fight themselves to frustration and exhaustion before they can sit to reason together and resolve their conflict. In such situations, although they should be avoided, it will be fruitless to attempt to adopt negotiation early in the dispute.

Again, sometimes, taking out a writ in court may be necessary in order to get a party to agree to negotiate. Still in some cases evidence and now facts that may emerge at the trail in court may be the catalyst that would ginger the parties to explore negotiation. There are also instances where parties are known to have returned to the negotiation table even after a court judgment. At national and international levels in Nigeria, the *"resource control"* case and the dispute between Cameroon and Nigeria over the Bakassi Peninsula respectively, are typical examples of situations where the parties returned to the negotiation table even after a court decision.

2.10 Mediation

Mediation is the intervention in a negotiation or a conflict of an acceptable third party who has limited or no authoritative decision-making power, who assists the involved parties to voluntarily reach a mutually acceptable settlement of the issues in dispute[56]. In addition to addressing substantive issues, mediation may also establish or strengthen relationships of trust and respect between the parties or terminate relationships in a manner that minimizes emotional costs and psychological harm.

[56] CW Moore, *The Mediation Process: Practical Strategies for Resolving Conflict* (San Francisco: Jossey-Bass, 2003) p. 15

A mediator is a third party, generally a person who is not directly involved in the dispute or the substantive issues in question. This is a critical factors in conflict management and resolution, for it is the participation of an outsider that frequently provides parties with new perspectives on the issues dividing them and more effective processes to build problem-solving relationship.

For mediation to occur, the parties must begin talking or negotiating. Labour management must be willing to hold a bargaining session, business associates must agree to conduct discussions, governments and public interest groups must create forums for dialogue, and families must be willing to come together to talk. Mediation is essentially dialogue or negotiation with the involvement of a third party. Mediation is an extension of the negotiation process in that it involves extending the bargaining into a new format and using a mediator who contributes new variables and dynamics to the interaction of the disputants. Without negotiation, there can be no mediation[57].

It is very important to understand that one of the hallmarks of dispute resolution is it's flexible nature. That is, dispute resolution is adaptable to the type of dispute being mediated and the personalities involved. In some respects, one of the great benefits of dispute resolution is that the disputants themselves are empowered to create a dispute resolution process that will assist them to resolve the dispute. Therefore, dispute resolution and, by association, mediation, is not rigid in terms of its ability to change to the needs of the disputants.

2.10.1 Roles of Mediators in the Mediation Process.

The mediator may assume a variety of roles to assist parties in resolving dispute. These are:-

[57] *Ibid*

a. The mediator is the opener of communication channels, who intimates communication or facilitates better communication if the parties are already talking.
b. The mediator is the legitimizer, who helps all the parties recognize the right of others to be involved in negotiation.
c. The mediator is the process facilitator, who provides a procedure and often formally chairs the negotiation session.
d. The mediator is the trainer, who educates novice, unskilled, or unprepared negotiators in the bargaining process.
e. The mediator is the resource expander, who offers procedural assistance to the parties and link them to outside experts, decision makers, or additional goods for exchange, that may enable them to enlarge acceptable settlement options.
f. The mediation is the problem explorer, who enables people in dispute to examine a problem from a variety of viewpoints, assists in defining basic issues and interests, and looks for mutually satisfactory options.
g. The mediator is the agent of reality, who helps build a reasonable and implementable settlement and questions and challenges parties who have extreme and unrealistic goals.
h. The mediator is the scapegoat, who may take some of the responsibility or blame for an unpopular decision that the parties are nevertheless willing to accept. This enables them to maintain their integrity and then appropriate, gain the support of their constituents.
i. The mediator is the leader, who takes the initiative to move the negotiation forward by procedural – or on occasion, substantive – suggestions.

2.10.2 The Hallmarks of Mediation

The philosophy of mediation revolves around five hallmarks that have set mediation apart from any other curial or non-curial form of dispute resolution. These are:-

a. **Confidentiality:** Mediators are bound not to discuss with other people what is revealed to them in mediation unless such revelations are agreed to by the participants or compelled by a court order or statute[58]. In this respect, mediations are generally conducted behind closed doors with no observers from the public unless the disputants agree to such a presence. Generally there is no transcript of proceedings and any notes taken by the mediator are generally destroyed at the conclusion of the mediation.

   Confidentiality arises in a number of ways in mediation. It may arise throughout the course of the mediation where disputants may discuss certain issues in separate session with the mediator that are not to be revealed to the other disputant. The only exception to this is where the disclosing disputant gives permission for the mediator to divulge such information. If mediators divulge such confidential information, they risk losing the confidence of the disputants as we as having committed a major breach of their ethical duty towards the disclosing disputant.

   It is important to note that if there is no guarantee of confidentiality in mediation, then disputants may not be willing to discuss certain information that could assist in the discovery of interests and BATNAs and this would seriously undermine the prospects of resolution and therefore the value of mediation[59].

---

[58] IA Folberg, *Comprehensive Guide to Resolving Conflict without Litigation* (San Francisco: Jossey Bass, 1984) p. 264.

[59] Abuja Multi-Door CourtHouse Mediation and Arbitration Procedure Rules, (Practice Direction), 2003, r.15

b. **Voluntariness:** Another of the hallmarks of mediation is its voluntary nature. That is, disputants should come to mediation on a voluntary basis and not be forced into participating in the process. The reason voluntariness is a hallmark of mediation is that if the disputants come to mediation of their own volition, then it is assumed that they are more committed to the process of seeking a non-curial resolution of their dispute. In this respect the disputants will be more committed to participate in good faith and to find and implement a settlement of their dispute.

In an article by professor Jennifer David, she stated:

> Experience has shown that willingness to negotiate and to bargain in good faith is the decisive factor in whether a case is suitable for conferencing or mediation. The experience of the Commonwealth Administrative Appeal Tribunal is that: 'No dispute whether before the Tribunal or elsewhere is incapable of resolution if all the parties want to resolve and want to participate in the process of exchange of information permitting the generation of settlement options'. All cases are suitable so long as parties are committed to finding a solution to their problem[60].

Mandatory ADR or mediation removes the willingness element of the process and does not give the disputants the appropriate motivation to settle. Not only does this factor affect the rate of settlements but also, most importantly, the rate of effectiveness of settlements. That is, whether settlements last until implementation and finalization.

[60] J David, 'Designing a Dispute Resolution System' (1994) *ICDRJ* 26 at 32-33

c. **Empowerment:** There is a popular belief amongst those involved in mediation that it is a process that empowers disputants by allowing them to control the process and the outcome.

Mediation is empowering because it is a voluntary process and that the fact that the parties are in mediation means that they have chosen to take responsibility for working on their own solutions[61]. In this respect, mediation is said to the disputants the power to deal with the dispute on their own terms as opposed to having a resolution imposed on them by a third party. Mediation allows disputants to become involved in the resolution of their own dispute by contributing to the outcome.

d. **Neutrality:-** The penultimate hallmark of mediation is said to be that the mediator is a neutral third party to the dispute. Neutrality, in this sense, relates to the mediator being neutral to the outcome of the dispute. In considering the process of mediation, it could be said that mediators have considerable power in mediation and that there is the potential for mediators to not always exercise that power in a neutral fashion.

e. **The disputants' own solution:-** The final hallmark of mediation is said to be that the disputants fashion their own solution to the dispute, and in this way they are more committed to its good faith implementation. The importance of disputants being able to decide on the outcome of their dispute is enormous. Not only does mediation allow for settlements that may be outside of the range of remedies offered by curial dispute resolution, but it allows the disputants to reject proposed settlement options that do not satisfy their interests.

[61] A Davis, and R Salem, 'Dealing With Power Imbalances in The Mediation of Interpersonal Disputes' (1994) *MQ*, 26, p.9

2.10.3 Phases of the Mediation Process

Although there is no standard form of procedural rules regulating mediation proceedings, as a matter of practice, the process of mediation involves different stages. Essentially, there are six phase/stages in the mediation process:-

1. **The Preparation phase:-** This phase refers to the work done before the mediation day and before the mediation setting[62]. It is the duty of the mediator at this phase to know who is coming for the session and such person must have the requisite authority. It is also important to know whether parties lawyers or other supporters will be coming so that adequate preparation can be made for extra attendees. Preparations made will include fixing date and time for the session, getting the venue ready for the comfort of the parties, ensuring that all documents have been processed and served where necessary and if appropriate, fees paid as well as studying the statements of the parties[63].

   Prior to the commencement of the mediation, mediators should require the disputants to enter some form of mediation appointment agreement that should cover, amongst other things:-

   a. How the mediator is to be determined and a mechanism should the parties not agree;
   b. The amount and payment of the mediator's remuneration;
   c. The basic procedures to be observed in the mediation;
   d. Confidentiality of the contents of the mediation;
   e. An exclusion clause excluding the mediator from liability;

[62] JR Harriman, 'The Place of Positive Non-Verbal Communication in Mediation' in: IA Aliyu, (ed.) *Alternative Dispute Resolution Contemporary Issues And Some* (Zaria: M.O Press & Publishers Ltd, 2010) p. 249.

[63] *Ibid*

f. An indemnity, indemnifying the mediator against any claim relating to the mediator's performance;

g. The requirement of the disputants that they send a party with the authority to settle the dispute, and

h. Committing any settlement in writing[64].

The disputants should be required to sign such an agreement and, given the confidentiality agreement contained within most mediation appointment agreements, any non-disputant party attending the mediation would also be required to sign the agreement.

2. **The Opening Phase**: Once the disputant have committed to mediation, the mediator has been selected, the disputants have given the mediator a statement of issues on the subject of the mediation and the appointment agreement has been signed, then mediation can proceed.

As previously stated, mediators are largely responsible for the process, whilst the disputants are largely responsible for the outcome. Therefore, the mediator should arrange suitable facilities, such as chairs, tables, whiteboards, audio-visual equipment and refreshments once the disputants arrive, the ensure that the disputants are acquainted with each other if they have not previously met, and with other people attending the mediation such as lawyers, accountants, other experts and *Mckenzie Friends*[65], - a person who a court will generally allow to assist an unrepresented person by quietly giving advice. After making the disputants comfortable in the venue, the mediator should commence the mediation by making an opening statement.

[64] *Ibid*
[65] *McKenzie v. McKenzie* (1970) 3 All ER 1034

The opening statement is an important step in the mediation process. It is a time for the disputants to understand the process of mediation and ask any questions about how the mediation will operate and their role in it. Also, it is a time for the mediator to instill some confidence in the disputants by showing them that there is a process at hand which will give them the opportunity to resolve the dispute, and that the mediator is a competent person who understands the mediation process and can help the parties work their way through it to a potentially successful outcome.

In the opening statement, the mediator should explain the procedures of the mediation that will include:- The parties making an opening statement, the seeking of common ground; separate meetings with disputants, shuttle negotiating between the separated parties; final joint meeting; committing the settlement to paper; and practical implementation of the settlement.

The parties make their opening statements at this stage. The mediator should impose no time limit on the disputants opening statements, unless the parties have agreed on strict time limits because of other commitments. After one disputant has made an opening statement, the mediator should allow the other disputant to make his or her opening statement. The other important element for the mediator in this opening stage of the mediation is to start understanding what the positions and the interests are of each of the disputants. This will prove invaluable for the next phase in the mediation process.

3. **The Exploration Phase:** This is the phase where the mediator begins to find out the real issues between the parties which may not be anything close to what is contained in their statements of issues or the positions they stand on[66]. At this early stage of the mediation,

[66] BU Odoh, *locit*, p.12

the parties should be cognizant of their own and the other disputant's positions, but they will have little appreciation of or understanding of the differences between a position and an interest. Therefore, it falls to the mediator to try and elucidate the interests of the parties. In this respect, the mediator not only acts as mediator for the disputants, but as an educator. That is, the mediator educates the disputants in principled negotiation by explaining the difference between positions and interests.

Depending on the nature of the issues to be determined, the mediator may consider the necessity to caucus with the parties or continue in a joint session. Where caucusing is adopted, the mediator must assure the part in caucus that whatever he says is held in confidence and he must also assure the party waiting that he will be given equal opportunity to caucus.

4. **The Negotiation Phase:** The line between the exploration stage and the negotiation phase is a thin one and it is important that the mediator knows exactly at what point to move from exploration to negotiation. The negotiation stage may involve a series of private sessions and then a joint session to enable points agreed to be noted or to make parties themselves make an offer of settlement if necessary, the mediator should encourage direct conversation between the parties. Sitting back in the seat in silence may encourage both parties to talk to each other. The parties should work through each of the issues raised on the agenda and generate a variety of ideas and solutions to address each issue. The mediator should assist the parties to reality test their ideas and alternatives so that they can craft a workable and mutually agreeable solution[67].

[67] BU Odoh, *loccit*, p. 12

It is useful to write down a summary of agreed points either on paper but preferably on a flop chart for all to see. Writing on a flip chart will show the seriousness of the situation.

5. **The Conclusion Phase:** At this stage it is clear what the parties have agreed on. This should be read out from the recording sheet or flip chart. It is also clear what the areas of agreement between the parties are. For emphasis, the mediator would read out the areas of agreement for the parties to affirm or correct and a successful completion of this brings the parties to the last phase which is the settlement.
6. **Settlement:** When the mediator has negotiated with the disputants to the point of agreement on a range of options that will constitute the settlement and has reality tested those options so that the disputants are ready to formalize their agreement, the mediator should convene of final joint meeting. At this meeting, the disputants finalize the settlement and discuss any out-standing small issues yet to be canvassed in the separate sessions[68].

At this end, if parties arrive at a settlement, this will be reduced into writing for parties to execute. Until then nothing is binding and the parties are free to exit the process. The agreement should be read out and if possible typed there and then for the parties to execute. However, a lawyer may be asked to formally prepare one for parties to sign.

2.10.4 Models of Mediation

a. **Facilitative Model:** One of the key factors in mediation models is the notion of decision making. In facilitative mediation, any decision making is left to those involved, the

[68]CW Moore, *locit,* p. 18

mediator has no decision making authority. This is based on the belief that the people involved in the situation have the best understanding of what they need for themselves and from each other. Facilitative mediation helps parties in a conflict make their own decisions, in the belief that such decision will have the best fit and therefore be highly sustainable. The mediator offers a structured process for the parties to make best use of in seeking mutually satisfactory solutions[69].

b. **Evaluative Model:** Evaluative Mediators are usually legal practitioners, often with an expertise in a particular area of law relevant to the conflict. They will provide the parties with an evaluation of the strengths and weaknesses of their case with respect to their legal positions. If asked they may also advise as to a likely outcome at court. They may also offer direction towards settlement options. There is a strong drive towards equitable settlement as an efficient and economic alternative to legal measures.

c. **Transformative Model:** Transformative Mediation is a much less structured approach that focuses on two key interpersonal processes empowerment and recognition. A transformative mediator aims to empower the parties involved to make their own decisions and take their own actions. They also work to foster and develop recognition for and between the parties. This is an organic process and highly responsive to the parties needs. The parties are very much in charge of both the content (the substantive issues) and the process, and the mediator works to support both as their conflict unfolds and the process and relationship builds[70].

d. **Narrative Model:** Narrative mediation takes a very different stance to conflict. Focusing less on negotiation and more on how people make sense of the world. By telling stories

[69] BU Odoh, *locit*, p. 90
[70] Ibid

of events and by giving meaning to these events people construct their reality. People in conflict will tell conflict stories that help them make sense of the situation, the other person and themselves. Conflicting stories can be limiting and paralyzing. Narrative mediators believe that for every conflict story there is an alternative story that can make co-operation and trust more available. Narrative mediators help parties rewrite new and more constructive stories.

2.10.5 Common Causes of Mediation Failure

Mediation is one of the most efficient ADR processes used by the World over and it has recorded substantial success story. However, mediation fails sometimes. The following are some of the factors responsible for failure of mediation processes:-

a. Where a party entered into the process not with genuine intention to settle but for purposes of stonewalling;
b. Lack of adequate mediation skill on the party of the mediator and this includes:
    i. Lack of preparation;
    ii. Lack of good communication skills;
    iii. Inability to break deadlock;
    iv. Failure to take firm control of the process;,
    v. Poor listening skill;
    vi. Inability to identify the real interests of the parties;
c. Where a party who came into the mediation process has no authority to reach settlement;
d. Unwillingness of either or both parties to submit relevant documents or other materials necessary for the process;
e. Impatience;

f. Failure to cross check confidentiality;

g. Getting into negotiation state in a hurry;

h. Where the settlement reached is unworkable;

i. Where the mediator shows bias; and

j. Where a party suggested mediation to the other party, so that there is no trust or confidence in the process abinitio[71].

2.10.6 Keys to Successful Mediation

Mediations are funny things. Sometimes the parties scratch, claw, fight, attack and hammer each other, and move at glacial speed. Other times they quietly proceed, dance a minute and reach agreement at warp speed. The funny thing is that mediation works in both situations. Mediations work because the parties want them to work. here are some of the things that are important to the success of a mediation[72]:

a. A positive state of Mind: The parties should enter the mediation process with the idea that the case can be settled. If their attitudes are negative and expectations low, the mediation does not have much of a chance to succeed.

b. Good Faith: "Good faith" is an amorphous term that means different things to different people. What it essentially means is that the parties enter into the mediation process seriously, with adequate resources to resolve the case, and negotiate in a reasonable manner.

c. Adequate Authority: Mediation cannot work if persons with adequate authority to settle the case are not physically present at the mediation. Frequently, claims representatives appear at mediation with authority to settle the case within a pre-set limit. Sometimes

[71] BU Odoh, *opcit*, p. 34
[72] Ibid @ p. 38

there is no claims representative or client present. In such cases those present at the mediation must either negotiate within the pre-determined limits or communicate by telephone with those with higher authority. This is an unsatisfactory situation. It is important to decide exactly what it means to have "adequate authority" to settle a case. Most defendants interpret it to mean authority to settle within the plaintiff's last settlement demand. Although neither of these interpretations is satisfactory, frequently cases are settled in an amount beyond the claims representative to someone with higher authority.

d. Flexibility: Negotiating environment can change quickly. New facts are brought, a different spin or emphasis is placed on known facts, or new legal arguments may be raised. Any of these developments can change the mediator's perspective during mediation. For that reason it is important to be flexible and to adjust negotiating strategy accordingly. Parties who are inflexible can, oddly enough, be successful but only a lower percentage of the time. Parties who are most successful are skilled at adjusting and expecting the unexpected.

e. Realistic Expectations: Mediations get off to a rocky start when the parties have unrealistic evaluations of the case. If a party insists on a settlement value outside the range of similar verdicts and under similar legal conditions, such a party may be in for a rude awakening during the mediation. Both the mediator and the adversary will attempt to persuade the party that their evaluation is out of line[73];

f. Preparation:- On some occasions the expectations are unrealistic because the lawyer has misevaluated the case. The misevaluation can occur for many reasons, such as a weak

[73] BU Odoh, *opcit*, p. 40

grasp of the facts or unpreparedness; successful parties are usually well prepared parties. They know their case inside out and can present their positions effectively;

g. Effective Negotiation Strategy:- There are many ways to mediate a case. An important step in the process is to adopt an effective negotiation strategy. This requires an assessment of the likelihood of success at trial, a consideration of the forum and trial judge, the general litigation environment, the presence or absence of insurance coverage disputes, an awareness of the limits of insurance coverage, and many other factors, such an analysis should result in a better understanding of the "big picture" and a detailed definition of the clients goals and objectives;

h. Willingness to Listen and Heed:- Even well prepared parties need to be able to listen to other views, including the mediator's and other parties' view. The worst mistake one ca make is to put on blinders and not see the warning signs ahead. The mediation process is designed to provide the information one needs to negotiate on an informed basis. One must heed what one has heard and put the ego aside[74]:

i. Effective Negotiation Tactics:- Effective negotiation tactics are necessary to implement the strategy, such tactics can include the following:

    i. encourage the other side to move by making bold moves without showing weakness;

    ii. putting on the brakes and signaling the other side that no further big moves will be made until there is some reciprocity;

    iii. tit for tat moves, in which one party moves in virtually the same amount as the other party (carefully, this can also work against you);

[74] BU Odoh, *opcit*, p. 44

iv. being resolute and taking a hard line (without being abusive);

v. 'Pointing to a number' by signaling a probable settlement range or number;

vi. Diffusing anger and emotion with expressions of remorse and apologies.

j. Avoid of Ineffective Negotiation Tactics:- It is equally important to avoid ineffective negotiating tactics such as the following;

i. Threatening or insulting the other side;

ii. Overplaying one's hand by turning a position of strength into abusive opening conduct;

iii. Unreasonably high opening demands;

iv. Unreasonably low opening offers;

v. Refusing to response to a proposal and demanding that the other side bod against themselves; and

vi. Making the other lawyer "look bad" in front of the client[75].

2.11 Arbitration

Arbitration is simply a process for the settlement of disputes under which the parties agree to appoint their own judge or judges (arbitrator or arbitrators) who will decide according to their agreement and the law; and their parties agree to be bound by their decisions.

It has been variously defined, "… the reference of a dispute or difference between not less than two parties for determination after hearing both sides in a judicial manner by a person or persons other than a court of competent jurisdiction"[76].

It is also defined as:

[75] Retrieved April 20, 2018, from<www.library.findlaw.com> accessed on April 20, 2018.

[76] Halsbury's Laws of England, (3rd ed) vol. 2, p.2; *Misr (Nig) Ltd v. Oyedele* 1996 2 ALR Com 157

> … a mechanism for the resolution of dispute which takes place usually in private pursuant to an agreement between two or more parties under which the parties agree to be bound by the decision to be given by the arbitrator according to law or, if so agreed, other considerations, after a fair hearing, such decision being enforcement in law[77].

The type of arbitration with which this research is concerned is that governed by the Arbitration and Conciliation Act, 1988, now CAP 18 of the Laws of the Federation, 2004 (herein referred as the Act) unlike litigation, parties agree to arbitrate. In other words, there must have been written agreements where parties agreed to submit dispute to arbitration. It is from such an agreement that arbitration derives its force jurisdiction. Nowadays, this agreement or consent can be implied in the case of standard form contracts and statutory arbitration such as those under investment protection laws[78]. Such arbitration must be one in respect of which the parties have agreed "in writing to arbitrate[79]. It must be a commercial arbitration, i.e of a relationship of a commercial nature, namely;

> … including any trade transaction for the supply or exchange of goods or services, distribution agreement, commercial representations or agency, factoring, leasing, construction of works, consulting, engineering, licensing, investment, financing, banking, insurance, exploitation agreement or concession, joint venture

[77] T Bernstein, et al, *Hand Book of Arbitration Practice* (3rd edn, London: Sweet & Maxwell, 1998) p. 13

[78] A Idigbe, *Arbitration Practice in Nigeria*, (Lagos: Distinct Universal Limited, 2010) p.3.

[79] Arbitration and Conciliation Act, 2004, s.1(1) (hereinafter referred as The Act)

and other forms of industrial or business co-operation, carriage of goods or passengers by air, sea, rail or road[80].

2.11.1 Forms of Arbitration

Arbitration may be domestic, international hoc, institutional or customary.

a) **International Arbitration:-** International arbitration is usually used to describe arbitration between persons carrying on business in different countries. However, parties may agree that their dispute be treated as international and so an arbitration which should ordinarily be treated as international arbitration may be agreement of parties[81].

b) **Ad hoc Arbitration:**- This is arbitration which is conducted pursuant to the agreement of parties and any applicable law and is not conducted under the rules of any arbitration institution.

c) **Institutional Arbitration:** - This type of arbitration is conducted by or under the auspices of an Arbitration Institution which promotes and administers the arbitral process. These institutions have their rules of procedure. The following are some of the institutions:

   i. Lagos Regional Centre for International Commercial Arbitration.

   ii. International Chamber of Commerce (ICC) in Paris

   iii. The London Court of International Arbitration (LCIA)

   iv. American Arbitration Association (AAA)

   v. Chartered Institute of Arbitrators UK (Nigeria Branch) etc.

[80] *Ibid*, s.57(1)
[81] *Ibid*, s.43

d) **Customary Arbitration:-** This is arbitration conducted in accordance with the customary law and general usage.

2.11.2 Arbitration Agreement

An arbitration agreement is a written contract which two or more parties agree to settle a dispute outside court. The arbitration agreement is ordinary a clause in a larger contract. The dispute may be about the performance of a specific contract, a claim of unfair or illegal treatment in the workspace, a faulty product, among other various issues. People are free to agree to use arbitration concerning anything that they could otherwise resolve through legal proceedings[82].

An arbitration agreement can be as simple as a provision in a contract stating that by signing that contract you are agreeing to arbitration in the case of any future disputes. Although a party to an arbitration agreement may decide to institute proceedings in court rather than explore arbitration as agreed by the parties. If the other party agrees, the court action will proceed. Where the defendant insists on his right to have the matter resolved by means of arbitration, then the court's responsibility is to, by referring them to arbitration, ensure that the parties agreement is enforced. This is reflected in section 4 (1) (2) of the Act. It provides:

a. A court before which an action, which is the subject of an arbitration agreement is brought, shall, if any party so requests not later than when submitting his first statement on the substance of the dispute, order a stay of proceedings and refer the parties to arbitration.

b. Where an action referred to the subsection (1) of this section has been brought before a court, arbitral proceedings may nevertheless be commenced or continued, and an

[82] The Act, s.1

award may be made by the arbitral tribunal while the matter is pending before the court.

Is it important to state here that an arbitration clause in an agreement generally does not oust the jurisdiction of the court or prevent the parties from having recourse to the court in respect of dispute arising therefrom[83]?

2.11.3 The Arbitral Tribunal

Parties to an arbitration agreement are free to agree on such arrangements as they wish regarding the appointment of the arbitrators.

In particular, they are at liberty to determine their number[84] and the mode of their appointment[85] where the number is not prescribed, it is deemed to be three[86] thus the agreement may provide that the dispute shall be referred to a single arbitration arbitrator or arbitrators may actually be named in the agreement or the method of their appointment may be specified therein, but the naming of the arbitrator in the agreement is not recommended because it has some drawbacks[87].

The tribunal has the power to rule on questions pertaining to its own jurisdiction[88], the final decision on jurisdiction rests with the court as a dissatisfied party may chose to apply to court. The result is that there is concurrent control of the arbitration by the court and the tribunal on the question of jurisdiction.

The arbitration tribunal has the cardinal duty to decide dispute on evidence before it, acting judicially, and in accordance with the arbitration agreement and the law; to ensure that

[83] *Lignes Aeriennes Congolaise .v. Air Atlantic Nigeria Limited* (2006) 2 NWLR (pt 963) p.49
[84] The Act,s.6
[85] The Act, s.7
[86] The Act, s.6
[87] G Ezejiofor, *The Law of Arbitration in Nigeria* (Lagos: Longman Nigeria Plc, 2005) p. 51
[88] The Act, s.12(1)

parties are accorded equal treatment and given full opportunity to present their cases[89], to make disclosure relating to independence and impartiality[90] and to conduct the proceedings in a way to ensure fair hearing.

The powers of the tribunal are derived from arbitration agreement, further consist of parties, statutes/common law and custom, for example trade usage under the Act[91]. The tribunal's fees should be reasonable in the amount taking into account the amount in dispute, the complexity of the subject-matter, the time spent and other relevant circumstances[92], sometimes Arbitration Institutions provide scales of fees. The arbitrators need to know Arbitration Law and practice, have continuous trading (CPD) to be qualified as arbitrators.

2.11.4Notice of Arbitration

Notice arbitration is the demand that an arisen dispute between disputants be referred to arbitration. It must contain names and addresses of the parties; reference to the arbitration agreement and contract; general nature of the claim; and relief sought, for it to be valid. The claimant gives the notice to the respondent. Arbitration is deemed to commence on the date notice of arbitration is received by the respondent[45], the notice of must contain point of claim and point of defence[93].

2.11.5 Preliminary Meeting

This is the first meeting of the tribunal and the parties to determine matters to be addressed in the course of the proceedings. Matters for consideration will include pleadings or statement of case, form of trial, discovering, method of taking and recording evidence, expert

[89]*Ibid*, ss.12 and 15
[90]*Ibid*, ss.8 and 9
[91]*Ibid*, s. 33(3)
[92]*Ibid*, s. 39
[93] The Act,s.19

witness, place of hearing, language of the arbitration, arbitrators' and administrative fees, and order for directions.

2.11.6 Pre-Hearing Meeting

This is the second meeting of the tribunal and the parties to consider issues for consideration, issues for determination, bundles of documents, visit to locus in quo, further orders (if necessary), date for hearing and consolidation-strengthening of position of the parties.

Whether or not the parties are to be represented by counsel should also be considered. A party is free to conduct his own case, or employ the services of a solicitor, valuer or other agent.

Procedural issues such as questions relating to amendment of pleadings, or further and better particulars are considered by the tribunal too.

2.11.7 Hearing

The hearing may either be oral hearing with witnesses or documents only[94]. The general rule is that arbitral tribunal shall be independent of national courts and the parties are vested with freedom by the tribunal. This rule is captured in the guiding principle of party autonomy as reflected in most sections of the Act which empowers the parties to specify or agree to procedures. For instance, section of the Act provides "the parties may determine the procedure to be followed in challenging an arbitrator".

The words "unless otherwise agreed by the parties" as contained in most sections of the Act further reinforces party autonomy. However, party autonomy is not unlimited. It is restricted by the tribunal's consolidation of fairness and equality of access[95].

During hearing, the usual order of proceedings is as follows:-

1. The claimant opens his case himself or through his counsel

[94] The Act, s. 20
[95] *Ibid*, s. 14

2. The claimant calls and examines his witnesses who are cross-examined (questioning) by the respondent or his counsel,
3. If a witness is cross-examined (questioned) the claimant or his counsel may re-examine his on matters raise in cross-examination,
4. The respondent opens his case himself or through his counsel,
5. The respondent calls and examines his witnesses who may be cross-examined by the claimant or his counsel,
6. If a witness is cross-examined, the respondent may re-examine him on any matter raised in cross-examination,
7. The respondent or his counsel sums up his case,
8. The claimant or his counsel replies.

If the hearing is by documents only, no oral evidence is permitted. Documents are produced in support of a party's case. It is usually used in consumer disputes and disputes on quality or conditions in a commodity supply contract, such trials are quick and save costs.

Through, it is expected that arbitration once commenced should be conducted without any need to refer to a court, however the involvement of a court is necessary to ensure the proper conduct of the arbitration. For instance, section 23, of the Act provides thus;

1. The court or the judge may order that *writ of subpoena and testificandum* or of *subpoena duces tecum* shall issue to compel the attendance before any arbitral tribunal of a witness where he may be within Nigeria.
2. The court or a judge may also order a *writ of habeas corpus ad testificandum* shall issue to bring up a prisoner for examination before any arbitral tribunal.

3. The provisions of any written law relating to the services of an execution outside a state of the federation of any such subpoena or order for the production of a prisoner issued or made in civil proceedings by the High Court shall apply in selection to a subpoena or other issue or made under this section.

It may also be necessary before or during arbitration to apply to make an order for the preservation of the property which is subject of the dispute, or to take some other interim measures of protection[96]. An important point to add here is that the arbitral tribunals have no such powers and assist the arbitral process.

2.11.8 Award

An award is the decision of an arbitrator or arbitrators in assessing damages. At the conclusion the proceedings, the arbitral tribunal is obliged to carefully study the evidence and arguments presented to it, come to a decision in the form of an award. In making the award, the arbitral tribunal has to pay particular attention to certain crucial issues. The way in which those issues are handled determines the validity or otherwise of the award.

An award must be in writing, signed and dated and state the place. It is the majority decision where there is dissention[97], it must be reasoned[98], and it must not decide matters not referred and copies made available to parties[99]. In addition to making a final award[100], the arbitral tribunal shall be entitled to make an interim, interlocutory or partial award. An award could also be Agreed, Default or Exparte[101], declaratory or Additional costs generally follow the

[96] The Act, s. 13 and The Arbitration Rules, a.26
[97] The Act, s.26 (1)
[98] *Ibid*, s. 26 (3) (a)
[99] *Ibid*, s. 26 (4)
[100] The Arbitration Rules, a.32(1)
[101] The Act, ss. 21 (1) (c) and 25

event, i.e the loser bears the costs of the winner[102]. However, in apportioned between the parties. Costs recoverable include arbitrator's fees, administrative expenses, travel and other expenses of arbitrator and witnesses and legal fees[103], parties may agree on the award of interest and the rate. Where there is no agreement, the tribunal shall decide judicially whether to award interest, if claimed, and at what rate, which shall be such as a party, might be able to ensure as return from a normal commercial transaction or investment.

An offer for settlement made by a respondent may be taken into account in determining costs. As a general rule, where a claimant refuses an offer and is awarded the amount offered or less, he would pay for the wasted time and proceedings after the offer. However, if he is awarded more than the offer, the offer is of no effect in determining the costs.

2.11.9 Recognition and Enforcement

An award that cannot be enforced at the end of the day is useless. The successful party in arbitration expects the award to be performed without delay. That is a reasonable expectation, once an award has been rendered, the arbitral tribunal becomes functus officio, unless on exceptional grounds. The losing party has some options, namely;

1. He may simply carry out the award voluntarily;
2. He may use the award as a basis for negotiating a settlement;
3. He may challenge the award; and
4. He may resist any attempt by the winning party to obtain recognition or enforcement of award.

[102]*Ibid*, s. 28 (4)
[103]*Ibid*, s. 49

Where a court is asked to enforce an award, it is asked not only to recognize the legal force and effect of the award but also to ensure that it is carried out by using such legal sanctions as are available.

In Nigeria, once an award is registered in the court, it becomes enforceable as a judgment of that court. Thus section 31 of the Act provides:

1. An arbitral award shall be recognized as binding and subject to this section 32 of this Act, shall, upon application in writing to the court, be enforced by the court.
2. The party relying on an award or applying for its enforcement shall supply-
    a. the duly authenticated original award or duly certified copy thereof;
    b. the original arbitration agreement of a duly certified copy thereof.
3. An award may, by leave of the court or a judge, be enforced in the same manner as a judgment or order to the same effect[104].

Arbitration awards can also be enforced in most countries of the world provided that those on the recognition and enforcement of foreign arbitral award. Article 1.1 of the New York convention 1958 provides:" This convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a state other than the state where the recognition and arising out of differences between persons, whether physical or legal". It shall also apply to arbitral awards not considered as domestic awards in the state where their recognition and enforcement are sought. Despite the above provisions, a party may request the court to refuse recognition or enforcement of award[105].

[104] The Act,s. 31 (2); See also the case of *Ebokan v. Ekwenibe & Sons Trading Co*. (2001)2 NWLR (Pt 696) P. 32

[105]The Act, s.32 provides that any of the parties to an arbitration agreement may request the court to refuse recognition or enforcement of the award. The circumstances under which the court will refuse to recognize and enforce and award are provided under section 52 (2) of the Act.

2.11.10 Setting Aside Award

An award is final and binding on the parties. The court cannot and would not inquire into the substance of the award. For this reason, it is always important that parties select arbitrator/arbitrators who is/are knowledgeable and skilled in the subject matters of the dispute, for even if an arbitral tribunal erred in law or in fact in making its award, the court will not set the award aside on that ground.

The Supreme Court in *Kano state Urban Development Board vs. Fanz Construction Co. Ltd*[106], held on the power of court to set aside an award thus; *"Parties take their arbitrator for better or worse both as to decision of fact and decision of law. However, by virtue of the provision of section 12 (2) of the Arbitration Law where an arbitrator or umpire has misconducted himself or an arbitration or award has been improperly procured, the court has the power to set the award aside".*

Thus, while an award cannot be set aside in substance, it can set aside on ground of misconduct, lack of jurisdiction or other procedural irregularity by the court[107]. The term 'misconduct' is not defined in the Act and has been subject to very wide interpretation. The Supreme Court's decision in *Taylor Woodrow (Nig.) Ltd vs. Suddeutsche Enta Werk GMBH*[108], held:

> "Misconduct" has been stated not to land itself to an exhaustive definition and the term has been described to include "on the one hand that which is misconduct by any standard such as being bribed or corrupted, and on the other hand, more "technical misconduct" such as making a mere mistake as to the scope of the authority conferred by the agreement of reference[109]".

[106] (1990) 4 NWLR (pt 142) 1 @ 43
[107] The Act, ss. 29 and 30
[108] (2993) 4 NWLR (pt 286) p. 127
[109] This decision has also be upheld by the supreme court in the case of *Baker Marine Nigeria Ltd v. Chevron Nigeria Ltd* (2000) 12 NWLR (part 681) p.393.

2.11.11 Role of the Court in Arbitration

The court intervenes in the arbitral process whenever it is necessary to assist the process. Such intervention can arise in any of the following instances: -

1. To stay court proceedings brought in defiance of the arbitration agreement[110.]
2. To order revocation of arbitration agreement[111]
3. To appoint arbitrator where a party fails to appoint or the parties cannot agree[112].
4. To compel attention of witness or production of documents[113].
5. To set aside or remit an award[114].
6. To enforce or refuse the enforcement of an award[115].

2.12 Conciliation

Conciliation is a process whereby a third party seeks to bring the disputants together to settle their dispute. Often conciliation will not necessary focus on settlement, rather it may focus on the sharing of formation and identification of issues and options for settlement.

To a large extent, conciliation shares the same character as mediation and in most jurisdictions both are used interchangeable. Sometimes attempt is made to distinguish mediation from conciliation by emphasizing the following attributes of conciliation;

a. A conciliation may give an opinion or suggest an agreement for the parties.

---

[110] The Act, ss. 4 and 5.
[111] *Ibid*, s. 2.
[112] The Act, s.7
[113] Ibid, s.23
[114] Ibid, ss. 29, 30, and 48.
[115] *Ibid*, ss. 31, 32, 51 and 52.

b. It is usually statutory provided for. In Nigeria, conciliation is given by the Arbitration and Conciliation Act, 1988, now CAP 18 LFN 2004.

c. Often the conciliator is a government official who is require to act as an advocate of government policy and has a statutory obligation to further the objectives of legislation; e.g the Minister for Labour under the Trade Disputes Act.

2.13 Mini-Trial/Settlement Conference

This is a process whereby information is exchanged before a panel comprising representatives of the disputants who are authorized to reach a settlement. Usually there will be an impartial third party who, with the rest of the panel, will hear both sides of the dispute and chair a question and answer session with all the participants, after which the panel will seek to negotiate a settlement.

2.14 Early Neutral Evaluation

This is a process whereby the disputants are provided with an objective evaluation of the strengths and weaknesses of their respective cases. Usually a respected member of the legal profession, act as the evaluator and also encourage settlement based on the objective evaluation of the matter.

2.15 Expert Appraisal

This is a process whereby the disputants agree on an expert who, after investigating and hearing from each other of the disputants, will tender an appraisal. Disputants may choose prior to agreeing on the expert, to be contractually bound by the appraisal.

2.16 Med-Arb

This process can also be called mediation arbitration and has a two-step dispute resolution process involving both mediation and arbitration. This is actually an innovation in

dispute resolution process. This is process whereby the third party called, the med-arbiter, is authorized by the parties to serve first, as a mediator, and then as an arbitrator. When the med-arbiter serves as an arbitrator, he is given further powers to resolve other issues not resolved during mediation. In med-arb, thee neutral used is usually skilled in both mediation and arbitration process. In order to guide the parties through the mediation process and then to sit over the arbitration process and hand down a binding decision. The final result in a mediation-arbitration combines the agreement reached from the mediation phase with the award in arbitral phase[116].

2.17 Rent-A Judge and Ombudsman

Rent-a judge or private judging is more popular and common in the United States of America. The process is now recognized in the United States by the legislature. This is a mechanism through which the court, on stipulation of the parties can refer a pending law suit to a private neutral party, usually a retired judge for trial with the same effect as though the case were tried in the courtroom before a judge. The decision of the process can be appealed against through the regular court appellate system[117].

Ombudsman on the hand is a public officer appointed to listen to complaint from citizens in order to conduct independent fact-finding investigations with the aim of correcting abuses in public service.

Principally, the ombudsman's job is to help resolve work-related dispute through informal counseling, mediation, investigation and making recommendations to management. Both large and small corporations and some universities have instituted ombudsman offices to

[116] JA Agaba *opcit*, p.69.
[117] D Peters, *Alternative Dispute Resolution in Nigeria; Principles and Practice,* (Lagos: Dee-Sage Nigeria Ltd. 2007) p. 24

help resolve impending disputes. Some of these offices deal only with employee's problems while others deal with customers or client problems and so on.

2.18 Consensus Building

Consensus Building is an alternative dispute resolution hybrid process used mainly to settle complex, multiparty disputes. It has become widely used in the electoral, environmental, and public policy arena in the Nigeria, but is useful whenever multiple parties are involved in a complex dispute or conflict. The process allows various stakeholders (parties with an interest in the problem or issue) to work together to develop a mutually acceptable solution.

Like a town meeting, consensus building is based on the principles of local participation and ownership of decisions. Ideally, the consensus reached will meet all of the relevant interests of stakeholders, who thereby come to a unanimous agreement. While everyone may not get everything they initially wanted, "consensus has been reached when everyone agrees they can live with whatever is proposed after every effort has been made to meet the interests of all stake holding parties[118]."

It is critical that the definition of success is made clear from the beginning of any consensus-building process. Most consensus-building efforts set out to achieve unanimity. However, sometimes there are "holdouts" who believe their interests will be better served by resisting the proposed agreement. In such cases, it is acceptable for a consensus-building effort to settle for overwhelming agreement that gets as close as possible to meeting the interests of every stakeholder, if some people are not in agreement and might be excluded from the final

[118] L Susskind, 'An Alternative to Robert's Rules of Order for Groups, Organizations, and Ad Hoc Assemblies that Want to Operate by Consensus' in *The Consensus Building Handbook: A Comprehensive Guide to Reaching Agreement*, (eds).L Susskind, et al (Thousand Oaks, CA: Sage Publications, 1999), 6

solution, participants have a duty to make sure that every effort has been made to meet the interests of the holdouts.

2.18.1 Importance of Consensus Building.

Consensus building is important in today's interconnected society because many problems exist that affect diverse groups of people with different interests. As problems mount, the organizations that deal with society's problems come to rely on each other for help, they are interdependent. The parties affected by decisions are often interdependent as well. Therefore, it is extremely difficult and often ineffective for organizations to try to solve controversial problems on their own. Consensus building offers a way for individual citizens and organizations to collaborate on solving complex problems in ways that are acceptable to all.

Consensus-building processes also allow a variety of people to have input into decision-making processes, rather than leaving controversial decisions up to government representatives or experts. When government experts make decisions on their own, one or more of the stakeholder groups is usually unhappy, and in the Nigerian system, they commonly sue the government, slowing implementation of any decision substantially. While consensus building takes time, it at least develops solutions that are not held up in court.

In addition, stakeholders always possess a wide range of understandings or perceptions of a problem. The consensus-building process helps them to establish a common understanding and framework for developing a solution that works for everyone.The process also fosters the exploration of joint gains and integrative solutions and permits stakeholders to deal with interrelated issues in a single forum. This allows stakeholders to make trade-offs between

different issues, and allows the development of solutions that meet more peoples' needs more completely than decisions that are made without such widespread participation.

2.18.2 The Nature of Consensus-Building Problems

Consensus building is employed to settle conflicts that involve multiple parties and usually multiple issues. The approach seeks to transform adversarial interactions into a cooperative search for information and solutions that meet all parties' interests and needs.

One of the most common applications of consensus processes is natural resource conflicts and site-specific environmental disputes[119]. Other types of disputes that can be resolved through consensus building include electoral disputes, political disputes, product liability cases, intergovernmental disputes, and other public policy controversies involving issues such as transportation and housing[120].In addition, there is growing use of consensus-building processes at the international level. As globalization accelerates, so does the level of interdependence between human populations, multinational corporations, governments, and non-governmental organizations(NGOs). Some important issues facing the global community that could potentially be addressed through consensus building are global warming, sustainable development, trade, protection of human rights, and controlling weapons of mass destruction. The Montreal Protocol, an International Environmental Agreement Ratified in 1987 to protect the Earth's Stratospheric Ozone Layer, serves as a prime example of what can be accomplished by using consensus building on an international scale[121].

[119]Over land use, water resources, energy, air quality, and toxics
[120] B Gray, *Collaborating: Finding Common Ground for Multiparty Problems*, (San Francisco: Jossey-Bass Publishers, 1989) p.6
[121] UN's Environmental Program. Available at <www.unep.org/ozone/montreal.shtml?> Accessed September 27, 2018.

Problems that may be effectively addressed with a consensus-building approach tend to share some general characteristics. Some of these characteristics are:

i. The problems are ill defined, or there is disagreement about how they should be defined;
ii. Several stakeholders have a vested interest in the problems and are interdependent;
iii. These stakeholders are not necessarily identified as a cohesive group or organization;
iv. There may be a disparity of power and/or resources for dealing with the problems among the stakeholders. Stakeholders may have different levels of expertise and different access to information about the problems;
v. The problems are often characterized by technical complexity and scientific uncertainty;
vi. Differing perspectives on the problems often lead to adversarial relationships among the stakeholders;
vii. Incremental or unilateral efforts to deal with the problems typically produce less than satisfactory solutions; and
viii. Existing processes for addressing the problems have proved insufficient and may even exacerbate them[122].

[122] B Gray, *opcit* , p. 10

2.18.3 Stages of Consensus Building

Models of Consensus Building vary from three to ten stages, but all address the same set of fundamental issues. We will describe an eight-stage process here, but processes with fewer steps are similar; they just combine certain steps into one.

1. **Problem Identification:** This is the very initial stage where a problem is identified and adecision to consider trying consensus building as a resolution process is made. This decision may be made by one or more of the stakeholders, or by a third party who believes that consensus would be a good way to bring disputants together.
2. **Participant Identification and Recruitment:** Problems that are typically resolved through consensus building have multiple stakeholders. In addition to the obvious parties, there are often people who are "lurking" behind the scenes, but are not vocal, so they are not as visible. Yet they will be affected by the outcome of a decision, and might block a decision if it harms them. Thus, it is important to get such people involved and get their needs met.

Legitimacy of representatives is a second key "stakeholder" issue. Conveners and the parties themselves must make sure that the people involved in the consensus effort really represent who they say they represent, and can speak for that group with legitimacy. Oftentimes one or more of the groups involved is very informal and disorganized, and splinter groups form, breaking away from the original stakeholder group. This complicates the question of who speaks for whom, who can make agreements on behalf of whom, and who should thus be "at the table."

Even after people are identified, getting them to agree to participate is a major issue. Some people may be reluctant to enter a consensus process because they think it will take too long, involve too much of their time, or will force them to "sell out" or give in for too little. They may think they have a better chance of "winning" in another forum, such as the courts. One way to encourage people to try consensus is to explain that it is a very low-risk process. No one is forced to agree to anything, so if things are not going well, they can always back down and pursue their alternative approach to solving the problem[123]. In addition, it can be pointed out that consensus building allows them to stay in control of the process and the decision. Nothing happens unless everyone agrees on it. In a court, it is quite possible that rulings will go against them. Although reluctance is common at the outset of consensus-building efforts, once people get involved, if the process works well, participants usually decide that it is more useful than they expected it to be, and they stay involved. Even when an agreement cannot be reached, the improvement of relationships and trust between groups often makes the process worthwhile.

3. **Convening:** Actually convening the process involves several steps. They include securing funds, finding a location, and choosing a convener and/or mediator or facilitator.
4. **Securing Funds:** Consensus building processes can be expensive, as they involve a lot of people over a long period of time, using multiple facilitators and mediators and often outside technical experts. Thus, significant sources of funds may be needed. Although these funds can be supplied by the participants themselves, often one side is more able to pay than another. If the richer party or parties pays for the facilitator or mediator, there

[123]Frequently called their "BATNA" - "Best Alternative To A Negotiated Agreement".

is a question of impartiality. But it may be very difficult for all sides to pay equally. This is why securing outside independent funding (from a foundation or government agency, for instance) is often helpful.

5. **Finding a Location to Meet:** The location usually should be "neutral," as in, not on any one stakeholder's "home turf." It should also be accessible to all and a large enough location to hold everyone comfortably. It also needs to be available for as long as the group needs to meet, which can be for several months, or even years.
6. **Selecting a Convener, Facilitator, and /or Mediator:** Sometimes these are the same persons or organization, sometimes they are different. In a major consensus building process over water development in the United States West, a process was convened by the Governor of Colorado, who used his personal power to get "all the interest groups to the table. (Who could say "no" to the Governor?) Yet the Governor asked a local mediation firm to provide the facilitation of the process, as that was not his area of expertise. Yet he stayed involved off and on to encourage people to stay at the table and keep working, even when progress seemed discouragingly slow[124]
7. **Process Design:** This is usually done by the person or group acting as facilitators or mediators, although they usually involve the parties to some extent, sometimes to a large extent. At the least they will design a process, present it to the parties, and get their approval on it, Often, the parties will suggest modifications to the proposed process and negotiations will ensue. Decisions will be made, and a process, usually

[124]This process was the Denver Metropolitan Water Roundtable, which was convened by Governor Richard Lamm in 1980. A short case study of this effort appears in Carpenter and Kennedy, Resolving Public Disputes. (San Francisco: Jossey Bass, 1988), 48-49.

including ground rules for participants behaviors will be set.

This actually is an excellent way to start a consensus-building process. The parties can *"practice"* working together and negotiating over "easy" issues before they tackle the emotion-laden issues surrounding the real issues in dispute. Once they have a track record of working together and coming to agreement, they begin to build trust in the mediator, the process, and each other. This then helps them move on to the real issues in a positive frame of mind.

Agenda setting is another key aspect of process design. The initial agenda must be made carefully so no legitimate stakeholders feel their interests are being ignored. It must also include a reasonable timetable. People should not feel rushed to make a decision, butthey should also not feel as if the process is so stow that a decision will not be reached in a timely manner.

One of the key questions that must be decided is the order in which issues should be considered. Should the group tackle the easy ones first, and the harder ones later? Or should they try to tackle the hardest ones first, because if they succeed there, the rest is smooth sailing? Or should they form subgroups and tackle many things at once?

8. **Problem Definition and Analysis:** This goes much farther than the "problem identification" of step one. Rather it identifies all the issues, and all the ways the stakeholders have of "framing" or defining the problem(s) or conflicting issues. Typically, each stakeholder has different interests and concerns, and defines the problem somewhat differently. For example, in an environmental conflict, one side may see the

conflict as being about air and water quality, while another sees it to be about jobs, a third about recreational opportunities. The first might care little about jobs and recreation, while the second and third are less worried about environmental degradation, A more complete picture of the problem will emerge as more stakeholders share their perceptions, and come to understand how all their concerns and interests are interrelated. Recognizing this interdependence is crucial to consensus building. This recognition ensures that each interested party will have at least some power in the negotiation[125].

After everyone explains their views of the situation, re-defining or "reframing" the conflict is usually the next step. Facilitators or mediators usually try to get the disputants to reframe the issues in terms of interests, which are usually negotiable, rather than positions, values, or needs, which usually are not. By re-framing the problem in terms of interests, a variety of options for dealing with the conflict usually appear, which were not apparent before.

9. **Identification and Evaluation of Alternative Solutions:** Before the group decides on any single course of action, it is best to explore a variety of options or alternative solutions. This is extremely important in multiparty disputes, because it is unlikely that any single option will satisfy all parties equally. Parties should be encouraged to develop creative options that satisfy their interests and others'. As more options are explored, parties become able to think in terms of trade-offs and to recognize a range of possible solutions.

[125] B Gray, *opcit*, , p.58

There are various techniques for exploring alternative solutions. One of the most common is brainstorming, when parties are encouraged to think of as many options as possible, without evaluating any of them at first. Sometime this is done as a large group; other times it can be done in small work groups, with different groups of people tackling different issues or different aspects of the overall problem. This way many parts of the problem can be investigated simultaneously. Then the subgroups report back to one another.

An effort is made to develop new, mutually advantageous approaches, rather than going over the same win-lose approaches that have been on the table before. After the parties generate a list of alternatives, these alternatives are carefully examined to determine the costs and benefits of each, from each party's point of view, and the barriers to implementation.

Many consensus-building processes involve technical issues in which scientific facts are in dispute. In this case it often helps to have one or more subgroups involved in some sort of joint fact-finding exercise, designed to replace "adversary science" in which one expert contradicts another expert, with "consensus science" in which the adversaries' experts work together or with a neutral expert to come to some joint agreement on the technical facts in dispute. Although resolving technical facts seldom resolves the agreement, as value issues are still in 'debate', it removes one major stumbling block to resolution.

10. **Decision Making:** Eventually, the choice is narrowed down to one approach, which is fine-tuned, often through a single negotiating text, until all the parties at the table agree. Thus consensus building differs from majority rule decision making in that 'everyone involved must agree with the final decision - there is no vote.

11. **Approval of the Agreement:** The negotiators then take the agreement back to their constituencies and try to get it approved. This is one of the most difficult steps, as the constituencies have not been involved in the ongoing process, and often have not developed the level of understanding or trust necessary to see why this is the best possible agreement they can get. Negotiators need to be able to explain exactly why the settlement was drafted as it was, and why it is to the constituencies' benefit to agree to it. If any one of the groups represented in the consensus-building process disagrees at this stage, they will likely refuse to sign the agreement, and the agreement may well fall apart. Stakeholders may be able to help each other develop strategies for persuading their respective constituencies of the merit of the agreement. However it is done, it is important that stakeholder constituencies understand the trade-offs that were made. If they do not, it is likely that the agreement will be broken sometime down the road. It is also critical that stakeholders gain the support of those responsible for implementing the agreement, often government agencies.
12. **Implementation:** This is the final phase of consensus building. Consensus building often results in creative and strong agreements, but implementing those agreements is an entirely separate task. If careful attention is not given to certain issues during the implementation phase, agreements may fall apart. These issues include building support with constituency who are affected by the agreement, monitoring the agreement, and ensuring compliance. The consensus building group should be involved in this aspect of implementation to be sure that the agreement is being carried out as they envisioned. If it is not, or there are serious obstacles, the group can then come back together to solve new problems. Monitoring often involves some sort of formal structure or organization to be an effective

method of solving future problems[126]. However, a committee including representatives of all stakeholder groups may be formed to address and resolve questions in the future. One of the great benefits of consensus processes is that they improve relationships between the adversaries so much that such monitoring and enforcement committees are usually successful. So although unforeseen problems inevitably develop, they usually can be solved.

2.18.4 Determinants of Success and Criteria for Evaluation

There are four primary determinants of a successful consensus process[127].

- First, the stakeholders must be interdependent so that none of them can achieve on their own what the group will be able to achieve through collaborating. There must be an incentive for people to work together and cooperate. If someone can satisfy their interests without the group, they probably will.
- Second, participants must deal with their differences in a constructive way. That means that differences in values, needs, and interests must be recognized, worked with and respected. This requires "good-faith" participation by stakeholders because destructive attempts to undermine a party's differing-interests will likely cause the process to break down.
- Third, there must be joint or group ownership of the decisions made. Participants in the consensus-building process must agree on the final decisions and be willing to implement those decisions themselves.
- Fourth, consensus building or collaboration must be an emergent process. In other

[126] B Gray, *opcit*, pgs. 57 -91
[127] B Gray,*opcit*

words, the decisions and outcomes of stakeholder collaboration must be carried out in a flexible way. How the group works together must be allowed to evolve over time, so that it does not become a static approach to problem solving. If the collaborative process is successful, new solutions emerge that no single party could have envisioned or implemented on their own.

At a more specific level, there are further criteria by which to evaluate the success and effectiveness of consensus building. These criteria fall into two main categories of assessment - process and outcomes. The criteria serve as ideal guidelines, and will not all be met perfectly by all consensus-building efforts, successful or not. Process criteria focus on the nature of a consensus process, and the more of these criteria a process meets, the more likely it will succeed. Consensus building should also be evaluated by the type and quality of its outcomes it produces. Both short-term and long-term outcomes should be evaluated. Again, the more criteria are met by the outcomes, the more successful a consensus process is considered.

2.18.5 Process Criteria

- The process included representatives of all relevant and significantly different interests;
- It is driven by a purpose that is practical and shared by the group;
- It is self-organized by the participants;
- It follows the principles of civil, respectful, face-to-face conversation;
- It adapts and incorporates high-quality information - personal experiences, facts,

and data;

- It encourages participants to challenge assumptions, be creative, and explore alternatives;
- It keeps participants at the table, involved, and learning; and
- It seeks consensus only after discussions fully explore the issues and interests and significant effort was made to find creative responses to differences[128].

2.18.6 Criteria to Assess Outcomes

- The process produced a high-quality agreement that met the interests of all stakeholders;
- It compared favorably with other planning or decision methods in terms of costs and benefits;
- It produced feasible proposals from political, economic, and social perspectives;
- It produced creative ideas for action;
- Stakeholders gained knowledge and understanding;
- It created new personal, and working relationships and social and political capital among participants;
- It produced information and analyses that stakeholders understand and accept as accurate;
- Learning and knowledge produced within the consensus process were shared by others beyond the immediate group;
- It had second-order effects, beyond agreements or attitudes developed in the

[128] B Gray, *opcit*, p.69

process, such as changes in behaviors and actions, spin-off partnerships, collaborative activities, new practices, or even new institutions;

- It resulted in practices and institutions that were both flexible and networked, which permitted a community to respond more creatively to change and conflict.
- It produced outcomes that were considered fair;
- The outcomes seemed to serve the common good or public interest; and
- The outcomes contributed to the sustainability of natural and social systems[129].

2.18.7 Benefits of Consensus Building

Several benefits can result from properly employing consensus-building processes to address multiparty problems. Probably the most important benefit of collaboration is that it increases the quality of solutions developed by the parties. This is because solutions are based on a comprehensive analysis of the problem. Each party has a different perspective and therefore many more angles are considered than if a few experts or a select few people developed the solution on their own. This variety of perspectives may lead to innovative solutions. In addition, the capacity of the group to respond to the problem is increased as stakeholders car, apply a range of resources to solving it. Bringing in all interested stakeholders can also minimize the chance of impasse or deadlock.

Consensus building guarantees that all parties' interests will be protected. This is possible because participants make final decisions themselves. Each party has a chance to make sure their

[129] B Gray, *opcit*, p. 69

interests are represented in the agreement and are a part of signing off on the agreement. As a result, stakeholders have ownership of the outcome of consensus-building processes.

Other benefits of consensus building include the fact that people most familiar with the problem at hand will be able to participate in solving it. This is often better than having a representative, who is removed from the problem, work on solving it. The ability to participate in the problem-solving process will also enhance acceptance of the solution and willingness to implement it. The participatory process may also help strengthen the relationships between stakeholders that used to be adversaries. Consensus building can also save money that may have been spent on court cases, for example. Lastly, the stakeholder group can develop mechanisms for dealing with related problems in the future[130].

2.19 Coalition Building

A coalition is a temporary alliance or partnering of groups in order to resolve their difference, reach an agreement and achieve a common purpose or to engage in joint activity. Coalition building is an alternative dispute resolution process by which parties (individuals, organizations or nations) come together to form a coalition[131]. Forming coalitions with other groups of similar values, interests, and goals allows members to combine their resources and become more powerful than when they each acted along[132].

The ability to build coalition is a basic skill for those who wish to attain and maintain power and influence. Through coalitions, weaker parties to a conflict can increase their power. Coalition building is the primary mechanism through which disempowered parties can develop

[130] B Gray, *opcit,* p.70

[131] HY Douglas, *The Dictionary of Conflict Resolution*; (San Francisco: Jossey-Bass publishers, 1991) p. 81.

[132] CO Boulder, *Coalition Building: Conflict Research Consortium (1998)*. <http://www.Colorado.edu/confict/peace/problem/coalition.htm> accessed on April 5, 2018.

their power base and thereby better defend their interests. Coalitions may be built around any issue and at any scale of society, from neighborhood issues to international conflict.

The formation of a coalition can shift the balance of power in a conflict situation and alter the future course of the conflict. People who pool their resources and work together are generally more powerful and more able to advance their interests, than those who do not. Coalition members may be able to resist certain threats or even begin to make counter threats. Generally, low-power groups are much more successful in defending their interests against the dominant group if they work together as a coalition. This is certainly more effective than fighting among themselves and/or fighting the dominant group alone.

2.19.1 Building a Successful Coalition.

Building a successful coalition involves a series of steps. The early steps on the recognition of compatible interest. Sometimes this happens naturally. Other times potential coalition members must be persuaded that forming a coalition would be to their benefit. To do this one needs to demonstrate: -

i. That your goals are similar and compatible,

ii) that working together will enhance both groups abilities to reach their goals; and

iii) that the benefits of coalescing will be greater than the cost. This can be demonstrated in either of two ways;

a. Incentives can be offered to make the benefits of joining the coalition high, or sanctions can be threatened making the costs of not joining even higher. For example, the USA offered a variety of financial aid and political benefits to countries that joined its coalition against Iraq in 2003, it also threatened negative repercussions for those who failed to join, and much worse for those who sided with Saddam Hussein.

b. Elimination of alternative to the coalition. Once most of one's allies or associates have joined a coalition, it is awkward… perhaps dangerous not to join oneself. Although people and organizations often prefer non-action to making a risky decision, if they find themselves choosing between getting on board a growing coalition or being left behind, getting on board is often more attractive.

2.19.2 Benefits of Coalition Building.

The benefits of coalition building go beyond increased power in relation to the opposition. Coalition building may also strength the members internally, enabling them to be more effective in other arenas. Some other key advantages to coalition building include:

i. A coalition of organizations can win on more fronts than a single organization working alone and increase the potential for success.

ii. A coalition can bring more expertise and resources to bear on complex issues, where the technical or personnel resources of any one organization would not be sufficient.

iii. A coalition can develop new leaders. As experienced group leaders step forward to lead the coalition, openings are created for new leaders in the individual groups. The new, emerging leadership strengthens the groups and the coalition.

iv. A coalition will increase the impact of each organization's effort. Involvement in a coalition means there are more people who have a better understanding of your issues and more people advocating for your side.

v. A successful coalition is made up of people who have never worked together before. Coming from diverse backgrounds and different viewpoints, they have to figure out how to respect each other's differences and get something big accomplished. They have to figure out how to respect each group and its representatives can make their different but

valuable contribution to the overall strategy for change. This helps avoid duplication of efforts and improve communication among key players.

2.19.3 Disadvantages of working in coalition

i) Member groups can get distracted from other work. If that happens, non-coalition efforts may become less effective and the organization may be weakened overall.

ii) A coalition may only be as strong as its weakest link. Each member organization will have different levels of resources and experience as well as different internal problems. Organizations that provide a lot of resources and leadership may get frustrated with other members' shortcomings.

iii) To keep a coalition together, it is often necessary to cater to one side more than another, especially when negotiating tactics. If a member prefers high-profile confrontational tactic, they might dislike subdued tactics, thinking they are not exciting enough to mobilize support. At the same time, the low profile, conciliatory members might be alarmed by the confrontation advocates, fearing they will escalate the conflict and make eventual victory more difficult to obtain.

iv) Individual organizations may not get credit for their contributions to a coalition. Members that contribute a lot may think they did not receive enough credit.

2.20 The Bottom Line

Deciding whether to join a coalition is both a rational and an emotional decision. Rationally, one must consider whether one's effectiveness and one's ability to attain one's own goals would be enhanced or harmed by participation in a coalition. Emotionally, one must consider whether one likes the other people or groups, and whether cooperating with them would be easy, or more trouble than it is worth. Usually when two people, groups, or organizations'

goals are compatible, forming a coalition is to both groups' benefit. But organizational styles, cultures, and relationships must be considered as well before any choices are made[133].

2.21 Lobbying

Lobbying is the deliberate attempt to influence political decisions through various forms of advocacy directed at policymakers on behalf of another person, organization or group[134]. Lobbying as a dispute resolution process can be used to influence government to affect change, especially in a conflict between the government and the labour congress.

2.22 Role of Judges in Promoting ADR

With the institutionalization of ADR provisions in the new rules of courts, Judges are more willing to allow parties time to seek ways of settling their dispute outside the court system. Judges have found relief in seeing that the number of cases they handled is reduced. There is also joy in seeing that the consent judgment is one that makes both parties happy.

There is a fundamental problem of assistance given by the courts in enforcing arbitral awards. As expected, when parties do not win at the arbitral proceedings, they seek to challenge the composition of the arbitral tribunal or the word in order to frustrate its enforcement. Courts have been known to give such "appeals" the time of the day. The court should refrain from suffocating ADR by unnecessarily grating stay of execution of Arbitral awards. A situation where an arbitral award is challenged all the way to the supreme courts and back is time wasting and does not meet the needs of parties or society.

[133] CO Boulder, *opcit*
[134] Retrieved May 15, 2018, from <www.scu.edu/ethics/lobbying.htm>.

2.23 Role of Lawyers in Promoting ADR

To enable ADR take its pride of place in justice delivery in Nigeria, ADR practitioners must play an encouraging role in providing awareness to litigants and lawyers alike. They have to be professional at all times and not rest on their oars in seeking continuing education on how best to practice their profession.

Associations like the ACAMON (Association of CEDR UK Accredited Mediators) and Settlement House are doing their best to educate the public, lawyers and judges on the place of ADR in Justice Delivery.

2.24 Legal Framework for Mainstreaming ADR into the Civil Justice Sector in Nigeria

Ample legal frameworks exist for use of ADR in the justice sector in Nigeria. Some of these provisions are hereunder: -

i. **Constitution of the Federal Republic of Nigeria, 1999[135]:** The Constitution under its foreign policy objectives provide for respect for international law and treaty obligations as well as the seeking of settlement of international disputes by negotiation, mediation, conciliation, arbitration and adjudication. More, so, Section 38 guarantees Freedom of Thought, Conscience and Religion, and the major religions in Nigeria – Christianity and Islam recognize the use of ADR in dispute settlement. The effect of this provision when read in conjunction with Right to Property is that parties to any case may at anytime settle by way of compromise. Nigerian courts from the lowest to the highest (Supreme Court) have always recognized and promoted the right of parties to a case to settle by other means out of court.

[135] S.19(d)

ii. **Arbitration and Conciliation Act[136]:** This Federal law on arbitration is based on the UNCITRAL Model Law and incorporates the UNCITRAL Model Rules. Also, the Act ratifies and incorporates the New York Convention on the Recognition and Enforcement of Foreign Arbitral Award. Furthermore, apart from the Act, which is a federal law, some constituent states have their respective arbitration laws.

iii. **Federal High Court Act[137]:** This law provides that in any proceedings in the Court, the Court may promote reconciliation among the parties thereto and encourage and facilitate the amicable settlement thereof.

iv. **Matrimonial Causes Act[138]:** This Act provides that it shall be the duty of the court in which a matrimonial cause has been instituted to give consideration, from time to time, to the possibility of a reconciliation of the parties to the marriage (unless the proceedings are of such a nature that it would not be appropriate to do so), and if at any time it appears to the judge constituting the court, either from the nature of the case, the evidence in the proceedings or the attitude of those parties, or of either of them, or of counsel, that there is a reasonable possibility of such a reconciliation, the judge may do all or any of the following, that is to say, he may –

(a) adjourn the proceedings to afford those parties an opportunity of becoming reconciled or to enable anything to be done in accordance with either of the next two succeeding paragraphs;

(b) with the consent of those parties, interview them in chambers, with or without counsel, as the judge thinks proper, with a view to effecting a reconciliation;

[136] Cap A18, LFN, 2004; s. 17
[137] Cap. F12, LFN, 2004; s.11
[138] Cap, M7, LFN, 2004

(c) nominate a person with experience or training in marriage conciliation, or in special circumstances, some other suitable person, to endeavour with the consent of the parties, to effect a reconciliation.

Moreso, the court is prohibited by this law from granting leave for a decree of dissolution of marriage except on the ground that to refuse to grant the leave would impose exceptional hardship on the applicant or that the case is one involving exceptional depravity on the part of the other party to the marriage[139].

v. **Consumer Protection Council Act[140] :** This Act provides for speedy redress to consumers' complaints through negotiation, mediation and conciliation.

vi. **Environmental Impact Assessment Act[141]:** This law provides forreferral to mediation by Federal Environmental Protection Council if the Council of the opinion that a project is likely to cause significant adverse environmental effects that may not be mitigable; or public concerns respecting the environmental effects of the project warrant it, the Council may, after consultation with the Agency [Nigerian Environmental Protection Agency], refer the project to mediation or a review panel in accordance with section 35 of this Act.

vii. **Industrial Inspectorate Act[142]:** This Act provides for arbitration for any person disputing a finding of the Directorate relative to the investment valuation of any matter concerning his undertaking.

viii. **Trade Disputes Act[143]:** This Act provides thatif the attempt to settle trade dispute fails, or if no such agreed means of settlement exists, the parties shall within seven days of the

[139] Cap. M7, LFN, 2004; s.30
[140] Cap. C25, LFN 2004; s.2
[141] Cap. E12, LFN 2004; s. 29
[142] Cap. Cap. I8, LFN, 2004; s. 4
[143] Cap. T8, LFN, 2004; s. 9

failure (or, if no such means exists, within seven days of the date on which the dispute arises or is first apprehended) meet together by themselves or their representatives, under the presidency of a mediator mutually agreed upon and appointed by or on behalf of the parties, with a view to the amicable settlement of the dispute.

ix. **National Health Insurance Scheme Act[144]:** This law provides for the establishment and functions of the State and Federal Capital Territory Arbitration Board which shall be charged with the responsibility of considering complaints made by any aggrieved party against any of the agents of the Scheme; or against an organization or a health care provider.

x. **Nigerian Co-Operative Societies Act[145]:** This law provides that If a dispute touching the business of a registered society arises among present or past members and persons claiming through present or past members and deceased members; or between a present, past or deceased member and the society, its committee or any officer, agent or servant of the society; or between the society and any other committee and any officer, agent or servant of the society; or between the society and any other registered society, the dispute shall be referred to the Director [Federal or State Director of Co-operatives] for settlement.

xi. **Petroleum Act[146]:** This law made provision regulations made thereunder a question or dispute is to be settled by arbitration, the question or dispute shall be settled in accordance with the law relating to arbitration in the appropriate State and the provision shall be treated as a submission to arbitration for the purposes of that law.

[144] Cap. N42, LFN, 2004; s. 26
[145] Cap. N98, LFN, 2004; s.49
[146] Cap. P10, LFN, 2004; s. 11

xii. **Public Enterprises (Privatization And Commercialization) Act[147]:** This law provides for the Establishment of the Public Enterprises Arbitration Panel to handle any dispute raising questions as to the interpretation of any of the provisions of a Performance Agreement; or in any dispute on the performance or non-performance by any enterprise of its undertakings under a Performance Agreement. A dispute on the performance or non-performance by any of the parties to the Performance Agreement, in the case of a commercialized enterprise, lies to the Panel provided that such reference may be made after all reasonable efforts to resolve the dispute have been made and have not been proved.

xiii. National War College Act[148]. This law created the Centre for Peace Research and Conflict Resolution which is charged with the responsibility for conducting research into all facets of peace and proffer solutions to conflicts at both national and international levels. Notwithstanding the provisions of subsection (1) of this section, the Centre organizes and facilitate researches on national, regional and global basis in the fields of conflict sources, conflict monitoring, conflict prevention, conflict resolution, peace-making, peace keeping, peace enforcement, peace building, and capacity building; initiate actions and take such other steps which will enhance the resolution of conflicts, both domestically and internationally.

xiv. National Boundary Commission, Etc. Act[149]. This law created a Commission to deal with, determine and intervene in any boundary dispute that may arise between Nigeria and any of her neighbours or between any two states of the Federation, with a

[147] Cap. P38, LFN, 2004; s. 27
[148] Cap. N82, LFN, 2004; s.2
[149] Cap. N10, LFN 2004; s.3

view to settling such dispute; dealing with any inter-State boundary disputes, with a view to settling such disputes; finding solutions to any inter-State boundary problems; and making recommendations to the President, through the Commission, as regards borders and boundary adjustments, where necessary, between states.

xv. Energy Commission of Nigeria Act[150]:

Section 5 of this Act provides that subject to this Act, the Commission is hereby charged with the responsibility for the strategic planning and co-ordination of national policies in the field of energy in all its ramifications and, without prejudice to the generality of the foregoing, the Commission shall –

• (b) serve as a centre for solving any inter-related technical problems that may arise in the implementation of any policy relating to the field of energy. Note: To this end, Section 3(1) and (2) of the Act establishes a Technical Advisory Committee which consists the Director-General of the Commission and professionals representing the following Ministries and Agencies – petroleum resources; power and steel; science and technology; agriculture and rural development; water resources; finance; defence; industries; communication; environment; National Electric Power Authority [now Power Holding Company of Nigeria]; Nigerian National Petroleum Corporation; Nigerian Mining Corporation, etc. The advice of the Committee can be said to be a process of Expert Appraisal.

[150] Cap. E10, LFN 2004

xvi. Minerals And Mining Act[151].

Section 76 (1) of this Act provides that an applicant for a water license shall inform the Minister [for mines and minerals] of persons likely to be adversely affected by the grant of the water licence and furnish the Minister with their names and such other particulars as the Minister may require.

• (2) The Minister, upon receiving the information required under subsection (1) of this section, shall enter into consultation with all persons likely to be affected by the grant of the water licence and shall reach such necessary agreement with such provisions [sic.] as may be just and proper.

Section 255: Application of Arbitration and Conciliation Act • Unless provided otherwise, the Arbitration and Conciliation Act shall apply to all arbitrations under this Act.

xvii. National Office For Technology Acquisition And Promotion Act[152].

Section 4 provides that subject to section 2(1) of this Act, the National Office shall carry out the following functions –

• (b) the development of the negotiation skills of Nigerians with a view to ensuring the acquirement of the best contractual terms and conditions by Nigerian parties entering into any contract or agreement for the transfer of foreign technology.

xviii. Nigerian Communications Commission Act[153].

Section 4 provides for the functions of the Communications Commission to wit:

[151] Cap. M12, LFN, 2004
[152] Cap. N62, LFN, 2004.
[153] Cap. N97, LFN, 2004

The Commission shall have the following functions, that is –

- (k) the arbitration of disputes between licensees and other participants in the telecommunications industry;
- (l) to receive and investigate complaints from licensees, carriers, consumers and other persons in the telecommunications industry.

xix. Nigerian Dock Labour Act[154].

Section 2: Functions of the Council: (1) The Council [Joint Dock Labour Industrial Council] shall –

- (i) serve as a medium for resolving disputes and complaints among the interest groups in the port and dock industry.

xx. Nigeria Export Processing Zones Act[155].

Section 4 provides for the functions of the Authority to with: In addition to any other functions conferred on the Authority [Nigeria Export Processing Zones Authority] by this Act, the functions and responsibilities of the Authority shall include –

- (e) the resolution of trade disputes between employers and employees in the Zone, in consultation with the Federal Ministry of Employment, Labour and Productivity.

xxi. Advisory Council On Religious Affairs Act[156].

Section 3 provides for the functions of the Advisory Council to wit: The Council shall be charged with the following functions, that is –

[154] Cap. N103, LFN, 2004
[155] Cap. N107, LFN, 2004.
[156] Cap. A8, LFN, 2004

• (b) serving as an avenue for articulating cordial relationship amongst the various religious groups and between them and the Federal Government;

• (c) serving as a forum for harnessing religion to serve national goals towards economic recovery, consolidation of national unity and the promotion of political cohesion and stability.

xxii. Nigerian Investment Promotion Commission Act[157].

Section 26 provides dispute settlement procedures under the NIPC to wit: (1) Where a dispute arises between an investor and any Government of the Federation in respect of an enterprise, all efforts shall be made through mutual discussion to reach an amicable settlement.

• (2) Any dispute between an investor and any Government of the Federation in respect of an enterprise to which this Act applies which is not amicably settled through mutual discussions, may be submitted at the option of the aggrieved party to arbitration as follows –

• (a) in the case of a Nigerian investor, in accordance with the rules of procedure for arbitration as specified in the Arbitration and Conciliation Act [Cap. A18]; or

• (b) in the case of a foreign investor, within the framework of any bilateral or multilateral agreement on investment protection to which the Federal Government and the country of which the investor is a national are parties; or

• (c) in accordance with any other national or international machinery for the settlement of investment disputes agreed on by the parties.

[157] Cap. N117, LFN, 2004

• (3) Where in respect of any dispute, there is disagreement between the investor and the Federal Government as to the method of dispute settlement to be adopted, the International Centre for Settlement of Investment Disputes Rule shall apply.

xxiii. International Centre For Settlement of Investment Disputes (Enforcement of Awards) Act[158].

Section 1: Award of ICSID dispute to have effect as award in final judgment of Supreme Court • (1) Where for any reason it is necessary or expedient to enforce in Nigeria an award made by the International Centre for the Settlement of Investment Disputes, a copy of the award duly certified by the Secretary-General of the Centre aforesaid, if filed in the Supreme Court by the party seeking its recognition for enforcement in Nigeria, shall for all purposes have effect as if it were an award contained in a final judgment of the Supreme Court, and the award shall be enforceable accordingly.

xxiv. Regional Centre For International Commercial Arbitration Act[159].

Section 4: Functions and powers of the Centre: The functions and powers of the Centre are to –

• (a) promote international arbitration and conciliation in the region;

• (b) provide arbitration under fair, inexpensive and expeditious procedure in the region;

• (c) act as a co-coordinating agency in the Consultative Committee dispute resolution system;

[158] Cap. I20, LFN, 2004
[159] Cap. R5, LFN, 2004

• (d) co-ordinate the activities of and assist existing institutions concerned with arbitration, particularly among those in the region;

• (e) render assistance in the conduct of ad-hoc arbitration proceedings, particularly those held under the Rules;

• (f) assist in the enforcement of arbitral awards;

• (g) maintain registers of –

• (i) expert witnesses; and

• (ii) suitably qualified persons to act as arbitrators as and when required; and

• (h) carry out such other activities and do other such things as are conducive or incidental to its other functions under this Act.

xxv. Administration of Justice Commission Act[160].

Section 3: Functions of the Commission: (2) Without prejudice to the generality of subsection (1) of this Section, the Commission shall ensure that –

• (d) congestion of cases in courts is drastically reduced.

xxvi. High Court Act[161].

Section 18: Settlement of disputes • Where an action is pending, the court may promote reconciliation among the parties thereto and encourage and facilitate the amicable settlement thereof.

[160] Cap. A3, LFN, 2004.
[161] Cap. 510, LFN, (Abuja) 1990

xxvii. **Lagos High Court Rules[162],**

High Court of Lagos State (Civil Procedure) Rules 2019 : Order 25 provides for Pre-trial Conferences and Scheduling : 1. (1) Within 14 days after close of pleadings, the claimant shall apply for the issuance of a pre-trial conference Notice as in Form 17.

(2) Upon application by a claimant under sub-rule 1 above, the Judge shall cause to be issued to the parties and their Legal Practitioners (if any) a pre-trial conference notice as in Form 17 accompanied by a pre-trial information sheet as in Form 18 for the purposes set out hereunder:

• (b) giving such directions as to the future course of the action as appear best adapted to secure its just, expeditious and economic disposal

• (c) promoting amicable settlement of the case or adoption of alternative dispute resolution.

xxviii. **High Court of the Federal Capital Territory, Abuja Civil Procedure Rules[163].** Order 17 provides for alternative dispute resolution to wit: 1. A Court or judge, with the consent of the parties, may encourage settlement of any matter(s) before it, by either – (a) Arbitration; (b) Conciliation (c) Mediation; or (d) any other lawfully recognized method of dispute resolution.

[162] 2019
[163] 2004

xxix. Rules of Professional Conduct (RPC) for Legal Practitioners[164].

Rule 15 (3)(d) provides that in his representation of his client, a lawyer shall not fail or neglect to inform his client of the option of alternative dispute resolution mechanisms before resorting to or continuing litigation on behalf of his client. Moreso, Rule 47 provides that a lawyer shall not foment strife or instigate litigation and, except in the case of close relations or of trust, he shall not, without being consulted, proffer advice or bring a law suit.

xxx. Supreme Court Judgments

Owoseni vs. Faloye[165] *; Aribisala vs. Ogunyemi*[166] *:* Where a statute prescribes a legal line of action for the determination of an action, be it an administrative matter, chieftaincy matter, or a matter for taxation, the aggrieved party must exhaust all the remedies in that law before going to court.

[164] 2007
[165] [2005] 14 NWLR (Pt 946) 719, 740;
[166] [2005] 6 NWLR (Pt 921) 212

CHAPTER THREE

CRIMINAL JUSTICE ADMINISTRATION IN NIGERIA: THE CASE FOR ALTERNATIVE DISPUTE RESOLUTION (ADR) IN CRIME DISPOSALS.

3.1 Nigerian Criminal Law and Procedure in Perspective

ADR is simply the acronym for Alternative Dispute Resolution, which generally refers to processes of resolving dispute outside court-room litigation. Major ADR processes include Negotiation, Mediation, Conciliation, Arbitration, Early Neutral Evaluation and other Hybrids. 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.[167]

The notion is very common especially amongst lawyers in Nigeria that litigation is the principal process for dispute resolution and that ADR is secondary or inferior to litigation.

There is no doubt that until recently, the training of lawyers in most jurisdictions focused substantially on the skills for use of litigation for dispute resolution. It is therefore this limited training and skills that is responsible for the wrong perception by lawyers about the nature and value for ADR in justice delivery. Proper review of the nature and dynamics of conflicts will reveal that ADR processes are useful before, during and sometimes even after litigation. Litigation results essentially from breakdown of negotiation and sometimes mediation by the parties. Even where a case is pending in court, the parties can resolve their differences amicably by out of court settlement at any time before judgment.

It is pertinent to remember that parties to a suit can use ADR to terminate the court proceedings at any stage of the case before judgment. Furthermore, even after judgment, the parties can reach some form of settlement outside the terms of the judgment, although the

[167] KN Nwosu, 'Role of Traditional Rulers and Community Leaders in Criminal Justice Administration' in KN Nwosu, (ed), *Dispute Resolution in the Palace*,(Ibadan:Gold Press Limited 2010), p.181

negotiating powers of the parties may not be the same as before the judgment. Logically, if by current practice ADR mechanism can be settle a civil case before, during and even after litigation, one wonders the real basis for the notion that ADR is secondary to litigation.

Another fundamental misconception about ADR is the notion, especially by lawyers in Nigeria, that ADR is another set of judicial or quasi judicial processes. The tendency by legal minds to try to reason our ADR principles from the litigation and adversarial mindset is a major challenge to unlocking the potentials of ADR in justice sector. Most ADR processes in their true nature are not sets of rigid legalistic options for dispute resolution. ADR processes are essentially multi-disciplinary tools for creative problem-solving than a set of legal processes and principles. Although ADR processes and practices are recognized and conducted within the framework of the law, their full potentials cannot be maximized if stakeholders continue to apply them with the same litigation mindset and skills.

Accordingly, where non-lawyer neutrals resolve disputes by ADR their proceedings, practices and outcomes should not be assessed according to strict standards of technical legal principles and procedures.[168]ADR processes are characterized by flexibility, voluntariness and privacy. Their success essentially rely more on the trust and confidence of the parties in the processes and outcome than the adherence to rigid codes of procedure, by resorting to ADR processes the parties to a dispute look beyond the immediate issues on the table to their future relationship. They are more concerned about the future than passing judgment on past errors.[169]

In the effort to locate the place of ADR in the criminal justice system it is important to always appreciate the fact that much of what lawyers regard as ADR is largely the formal packaging of processes that the people use informally without placing any formal tag or name on

[168]*Adeyeri v. Atanda* (1995) 5 SCNJ 157
[169] K.N Nwosu, opcit, p.182

them. Essentially, ADR is the same as what we do in our family(s) and communities in Nigeria where family member or elder intervenes to help parties in their relationships.[170]

Nigeria operates a federal constitutional democracy, with a dual criminal justice system[171]. Regrettably, the primary laws crime at both federal and state 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[172]. In criminal trials, the Nigerian legal system provides for right of appeal from the lowest courts - Magistrates - the highest courts of the land - the Supreme Court. Presently, it takes average of between 3 - 10 years for a case to be tried and disposed of in the courts[173]. Usually, the time frame increases where the parties exhaust their right of appeal up to the Supreme Court. A celebrated case that underscore 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; where the accused spent over 10 years in prison custody awaiting trial[174].

Nigerian prisons are congested and in highly deplorable condition. Current official statistics show that of about 72,500 total prison inmates, 48,798 are awaiting trial detainees,

[170] Elias, T.O, 'Traditional Forms of Public Participation in Social Defence'No. 22, *International Review of Criminal Policy*, (1969) pp. 18-24.
[171] Constitution of the Federal Republic of Nigeria, 1999.
[172] The substantive laws on crime at the federal level and states of the southern region dates back to a colonial Ordinance of 1915 while the northern states operate penal codes whose origin dates back to 1945. Only Lagos, Anambra, Enugu, and Akwa Ibom States are known to have embarked on a reasonable reform and update of its substantial and procedural criminal laws with the enactment of the Administration of Criminal Justice Laws. At the Federal level, however, we now have the Administration of criminal justice Act ,2015.
[173] Accurate official data on this issue is hard to find. In addition to the researcher's samples survey, estimates from works done by others in this area support the position.
[174] *Major Hamza Al-Mustapha v. The State* (2013) LPELR - 20995 (CA)

while 23,702 are actual convicts[175]. Most of the prisons, especially in urban and semi- urban areas, hold population of detainees far in excess of their capacity. Realizing the magnitude of the problem, the federal government has in the past years undertaken several programmes and spent billions of Naira on prison decongestion. Regrettably, these programmes have yielded little dividend as the problem still persisted.

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 mobilizing effective defence to the criminal charge. The socio-economic conditions in the country not only creates a situation where the poor is more likely to breach legitimately by marshalling effective or illegitimately through bribe.

3.2 Nature of Crimes and Criminal Prosecution Under Nigerian Laws.

To fully draw attention to the fundamental roles of ADR in criminal justice administration, it is germane to briefly consider the nature of crimes and criminal prosecution under Nigerian Laws. Crime is inevitable in any human society since some violation or the other of any code of conduct prescribed for the members of a society is bound to occur. Not only is crime inevitable but, paradoxical as it may sound, some sociologists have gone to the extent of saying that crime, to some extent, helps in promoting social solidarity among people constituting the society. The inevitability and universality of the phenomenon of crime has been described by Emile Durkheim[176] in the following words :

> There is no society that is not confronted with the problem of criminality. Its form changes; the acts thus characterized are not the same everywhere; but, everywhere and always, there have been men who have behaved in such a way as to draw upon themselves penal repression... No doubt it is possible that crime itself will have abnormal forms, as for example, when its rate is unusually high. This excess is indeed undoubtedly

[175] Official Statistics obtained from the Nigerian Prisons Service Headquarters, Abuja as at December 30, 2018.
[176] E.Durkheim, *Rules of Sociological Method*, Eastern Book Company, Lucknow, India (1950), p.65

> morbid in nature. What is normal, simply, is the existence of criminality, provided that it attains and does not exceed, for each social type, a certain level... To classify crime among the phenomena of normal sociology is not to say merely that it is inevitable, although regrettable, phenomenon, due to incorrigible wickedness of men, it is to affirm that it is a factor in public health, an integral part of all healthy societies.

According to Durkheim, even a society composed of persons possessing angelic qualities would not be free from violations of the norms of that society with the result that faults which appear venial to the layman will create there the same scandal that the ordinary offence does in ordinary consciousness[177]. Be that as it may, the fact remains that crime is a phenomenon which is of primary concern to every member of the human society. The concern for crimes and criminals is reflected in various forms of curiosity among people. Firstly, there is the idle curiosity in certain minds where the object is not so much to understand something seriously about crime but just to get some sort of thrill or kick out of it. This need is generally catered to by horror comics, movies based on violence and through other means of mass media. There are many who expect spicy crime reporting in their newspapers just as they would expect their breakfast every morning. It is a curious fact of life that crime, something horrible in itself, should provide so much relief and recreation to many when written about in fiction or portrayed in movies or on television. Ever since the dawn of history crime has been with us and it is no exaggeration to say that it is a product of society. But what is a crime? It is often a difficult and an elusive task to give a concise and apt definition of most legal terms.

Thus, section 36(12) of the Constitution of Federal Republic of Nigeria, 1999 provides:

> 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 thereof is prescribed in a written laws; 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 provision of a law.

[177] Ibid

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 punishable under the code, or under this code, or under this code, or under any statute is called an offence"*

The Penal Code which applies in the Northern states also defines offence and illegal conducts as: *"Except where otherwise appears from the context, the word 'offence' includes an offence under any law for the time being in force", while 'illegal' as everything which is prohibited by law and which is an offence or which is an offence or which furnishes ground for a civil action is said to be 'illegal'.*

The Administration of Criminal Justice Act, 2015 defines an offence to mean "an offence against an Act of the National Assembly[178]".

Consequent upon the aforestated provisions, 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 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. More so, in Nigeria it is only offences defined in written laws that are recognized by the Constitution. Written law refers to an Act of the National 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 enacted into a written law. A person in Nigeria cannot therefore be tried and punished for crimes under native laws and customs.

[178] Enugu State Administration of Criminal Justice Law, 2017, s.494 defines offence to mean an offence against any Law or Act including any regulation, order, rule or proclamation made under any Law or Act

For the purpose of our current discourse, the criminal justice trials cover issues before, during and after trials. It concerns issues relating to crime prevention, investigation, trial and post-trial management of victims and offenders. There are major ways of effective adoption and mainstreaming of ADR processes into the criminal justice sector reforms in Nigeria. These are:- Crime Prevention and Management, Prosecutorial Discretion/ Nolle Prosequi, Defence Options, Judicial Discretion, Prerogative of Mercy, Plea Bargaining And Restorative Justice.

3.3 Crime Prevention and Management

ADR processes can help to avert the criminal conduct before some acts or omission constituting crimes are consummated. A good number of criminal cases are midwived from failed interpersonal relationship between the disputants – victim and offender. Crimes are sometimes, to a large extent 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. Some family, neighbourhood, social, political and business disputes can metamorphose into criminal conduct by the parties.

It is pertinent to note that effective deployment of ADR processes in the justice system will go a long way in substantially reducing the recourse to criminal conducts in managing civil relationships. This can be unequivocally achieved by the establishment of Community Justice Centers(CJC). Other ADR programmes can also 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. This will contribute substantially to courts and prison decongestion in addition to reducing crimes and criminality level in Nigeria.

3.4 Prosecutorial Discretion / Nolle Prosequi

The office of the Attorney General of the Federation is provided for in section 174 of the constitution of the Federal Republic of Nigeria, 1999 (as amended) and the office of the Attorney General of a state is equally provided for in section 211 of the same Constitution. The Attorney General of the Federation is the Chief Law Officer of the Federation, while the Attorney General of a state is the Chief Law Officer of the state.

The respective Attorneys General have power to institute, conduct, continue, take over and discontinue criminal proceedings in any court except a court martial[179]. The powers conferred on the Attorney General can be exercised by him in person or through officer of his department.[180] In instituting criminal proceedings, the Attorney General can, after filing information in the court, call upon a private legal practitioner to prosecute the case[181]. In the case of *FRN v. Adewunmi*[182], the Attorney General of the Federation by a letter appointed Emeka Ngige, SAN as prosecuting counsel for the Failed Banks Tribunal Lagos zone and given the fiat to prosecute case arising from the Failed Banks Degree No 18 of 1994. The appellant instituted criminal proceedings against the respondent before the tribunal. Before the trial could be completed, the 1999 Constitution came into force and the Failed Banks Decree No 18 of 1994 was repealed. The charge against the respondent was transferred to the Federal High court which started the matter *de novo.* The respondent raised objection to the charge on the ground among others that if does not comply with the provision of the Constitution. The trial Judge dismissed the objection while the Court of Appeal upheld it. On further appeal to the Supreme Court it was

[179] see CFRN 1999, ss. 174 (1) and 211(1) respectively and Administration of Criminal Justice Act, 2015, ss.107 and 108.
[180] *Ibid*, ss.174 (2) and 211 (2), CFRN 1999.
[181] See *DPP v. Akozor* (1962) 1 All NLR 235; *Nafiu v. The State* (1980) 8 - 11 SC 130; *The State v. Aibangbee* (1988) 3 NWLR (Pt. 84) 548*; Gwonto v. The State* (1983) 3 SC 67
[182] (2007) ALL FWLR (Pt.368) 978

held that Emeka Ngige, a private legal practitioner could validly sign the charge since he had the fiat of the Attorney General to prosecute the case[183].

It is worthy of note that a private legal practitioner who wants to prosecute a criminal case must be equipped with the Attorney General's fiat. The term *'fiat'* in *latin* literally means 'let it be done'. It denotes an order or decree, especially an arbitrary one, as in judicial fiat, a court decree, etc[184]. A private legal practitioner cannot proceed on his own volition without the authorization of the Attorney General. He has an onerous duty to first of all apply for and obtain the fiat of the Attorney General before he can commence the private prosecution of an accused person in a court of law. Where he proceeds on his own volition without the Attorney General's fiat, such proceedings will be declared *null* and *void ab initio* by the court[185]. The Attorney General cannot take over such proceedings instituted by a private legal practitioner without his authorization as there will be nothing to take over by the Attorney General. The defect is beyond mere irregularity which can be cured by the takeover by the Attorney General as it goes to the root of the charge itself[186].

Thus, in the case of *Ikpongette v. COP*[187], the private legal practitioner who held a watching brief for the complainant at the trial filed an appeal against the decision of the trial court on behalf of the complainant. The Court of Appeal held that the Notice of Appeal filed is null and void and consequently there was no appeal for the Attorney General to takeover.

[183] See also *Comptroller Nigerian Prisons Service v. Adekanye* (No.2) (2002) FWLR (Pt.120) 1659; *Adekanye v. FRN* (2005) ALL FWLR (Pt. 252) 514.
[184] See *COP v. Tobin* (2009) ALL FWLR (Pt. 483) 1302.
[185] supra
[186] *Ibid*
[187] (2009) ALL FWLR (pt.471)

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.[188]

Apart from private legal practitioners, the Attorney General may also delegate his authority to other authorities or bodies established by law. In the case of *Amadi v. FRN*,[189] the Supreme Court held that the Economic and Financial Crimes Commission is a common agency for both the Federal and States as such it qualifies as any other authority to institute criminal proceedings and to which the Attorney General may delegate his power under section 211 of the Constitution of the Federal Republic of Nigeria, 1999. The Court held further in that case that any staff of Economic and Financial Crimes Commission can exercise the power delegated to the anti-corruption body.

Nigerian laws recognize the general prosecutorial discretion and in fact give it a constitutional flavor. 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 trials.

Apart from the constitutional caution of upholding public interest, interest of justice and the need to prevent abuse of legal process, we firmly submit that the Attorney General can resolve any criminal case through ADR processes or mechanisms. This may be by negotiation and settlement with the criminal defendant or preferably by initiating victim- offender mediation.

[188]Constitution of the Federal Republic of Nigeria, 1999, ss. 174(3) and 211 (3) (Hereinafter referred to as The Constitution**;** *Adekanye v. FRN* (2005) ALL FWLR (pt 252) 514; *COP v. Tobin* (2009) ALL FWLR (pt 483) 1302 @ 1327-1328

[189] (2009) ALL FWLR (pt.462) 1103

The researcher is not ignorant of the fact that section 127 of Criminal Code creates the offence of compounding felony, but we further argue and submit that this provision is subject to the constitutional powers of the Attorney General to exercise prosecutorial discretion.[190]

Presently, there are no clear prosecutorial policies and guidelines for public prosecutions in Nigeria both at Federal and State levels. We are also of the view that to maximizes the potentials of the 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. Thus this will go a long way in helping to prevent abuse of the powers; ensure protection of public interest, the interest of justice; and the abuse of legal process.

3.5 Defence Options

A criminal defendant has options or alternatives open to him in his defence right from the time an allegation of crime is made to the end of the trials.[191] This criminal defendant can admit at the point of investigation or prior to arraignment in court. If such criminal defendant is penitent, he may decide to fully cooperate and assist the authorities in the investigation of the crime.

The researcher makes bold to say that there is no known legal inhibition whatsoever where the criminal defendant decides to admit the crime prior to arraignment, even where such admission was done in exception of some relief from the persecution. 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 criminal defendant regarding the modalities for disposal of case. ADR processes can be effectively deployed in structuring such arrangement.

[190] The Constitution, s.1(3) provides *"If any other law is inconsistent with the provisions of this constitution, this constitution shall prevail, and that other law shall to the extent of the inconsistency be void".*
[191] Criminal Procedure Act, s.287.

In a situation 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 criminal 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.[192] There is nothing legally or morally wrong with a plea of guilty by a criminal defendant; and such a plea on arraignment may provide a prima facie evidence of some remorse on the part of the offender 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 a 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, ACJA, CPC and CPA provide that an accused can plea guilty to the charge and if satisfied the court can proceed to enter conviction without full trial[193].

Such defence option is not legally available, it is also morally and ethically obligatory for people to admit and repent of their wrongdoing. Interestingly, both the Christian religion[194] and Islam respectively enjoin their followers to admit and confess their sins and ask for forgiveness. 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 altar of legal technicalities.[195]

[192] See CPA,s.218; CPC, s.161(20(3) & 161 (2)(3).
[193] Administration of Criminal Justice Act, 2015, s.274
[194] Matthew 5:25
[195]KN Nwosu, loccit, p.182

The researcher therefore make bold to submit that 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. If this is done, it will help in reducing substantially the criminal case overload in the courts.

3.6 Judicial Discretion

The researcher observed that the 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. ADR can also be very useful 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.[196] Except upon a conviction for capital offence, where Nigerian Law prescribes death as mandatory sentence[197] or where the law provides for a mandatory minimum sentence or order, the court usually has judicial 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 judicial 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 and the offender. Such post-conviction ADR can provide an arrangement that could enable the

[196] This practice is generally referred to as Allocutus

[197] See the case of *Nafiu Rabiu v. The State*(1980) 2 NCR 117

court come to an informed decision as to the appropriate punishment to impose in a particular case.

3.7 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.[198] By the provisions of sections 175 and 212 of the 1999 constitution, the President or the Governor of a State respectively may:

a) grant any person concerned with or convicted of any offence created by any Act of the National Assembly or Law of a State as the case may be 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 punishment imposed on that person for such an offence or any penalty or forfeiture otherwise due to the State on account of such an offence.

The power of the President or the Governor under the above shall be exercised by him after consultation with such advisory council of the State on prerogative of mercy as may be established by the Law of the State[199]. The President or the Governor acting in accordance with the advice of the Council of State, may exercise his power under subsection (1) of this section in

[198] The Constitution, ss. 175 (1) (a) – (d) and 212 (1) (a) – (d)
[199] The Constitution, ss.175(2) and 212.

relation to persons concerned with offences against the army, naval or air-force law or convicted or sentenced by a court-martial[200].

Although, the power of the President or the Governor to grant pardon to a convict extends to conviction for all offences, it is in the case of convictions for all offences that consideration for their exercise invariably arises. Consequently, provisions are made in our Criminal Procedure Act in the case of a sentence of death for an offence in which the power of pardon is vested in the President and in the Criminal Procedure Law of the State for an offence in which the power of pardon is vested in the Governor[201].

Whenever any Judge pronounces a sentence of death on a person, he shall issue, and affix the seal of court on a certificate to the effect that the sentence of death has been pronounced upon the person named in the certificate, and such certificate shall be sufficient and full authory in law for the detention of the offender in safe custody until the sentence of death pronounced upon him can be carried into effect and for carrying such sentence of death into effect in accordance with the provision of the Law[202]

This power to grant pardon can be well utilized to create measures for the effective use of non-custodial options in criminal justice in Nigeria.

3.8 Plea Bargaining

Plea bargain is a major tool for fast track trials and case management in any criminal justice system. Plea bargain is an arrangement between the prosecution and defence where in exchange for a plea of guilty by the defence the prosecutor offers some reliefs to the defendant.

[200] *Ibid*, ss. 175 (3) and 212 (3).
[201] See, The Criminal Procedure Law of Ogun State, ss.317(b) - 317(g) and The Administration of Criminal Justice (Repeal and Re-enactment) Law of Lagos State, 2011, ss. 305 - 310.
[202] *Ibid*, The Criminal Procedure Law of Ogun State, ss.317(b) - 317(g) and The Administration of Criminal Justice (Repeal and Re-enactment) Law of Lagos State, 2011, ss. 305 - 310.

Such reliefs may be in the form of reduced charges in a multiple charge case or recommendation of lesser punishment. The United States Supreme Court affirmed the constitutional validity of plea bargain 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[203].

Despite some of the criticisms[204], 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. 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[205]. 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 victimization in the presence of the defendant and the public[206].

Although plea bargaining is a standard criminal justice practice in the United States of America[207]and some other jurisdiction, its introduction into Nigeria has been very

[203]*Santo Bello v. New York*, 404 U.S 257 (1971).
[204] AW Alschuler, 'The Prosecutors Role in Plea Bargaining', 36 U. Chi. L. Rev. 50, 50 (1968).
[205] R 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)
[206]*Ibid*.
[207] It is widely acknowledged that about 90% of criminal cases in America at both Federal and State levels are settled by plea bargains. See, R A Wright, 'Trial Distortion and the End of Innocence in Federal Criminal Justice' 154 U. Pa. L. Rev. 79 (2005).

controversial[208]. The practice of plea bargaining is expressly provided for by the Economic and Financial Crimes Commission Act[209], Administration of Criminal Justice Laws of Lagos State, 2011[210] and the Administration of Criminal Justice Act, 2015[211].

3.8.1. The Concept of Plea Bargaining.

Plea bargaining may be described as the process whereby an accused person and the prosecutor enter into negotiation towards an agreement under which the accused will enter a plea of guilty in exchange for a reduced charge or a favourable sentence recommended to the judge by the prosecutor.[212] The plea bargain connotes the defendant and the prosecutor working out a mutually satisfactory disposition of the cases subject to court approval. It usually involves the defendant's pleading guilty to a lesser offence or to only one or some of the courts of a multiple indictments in return for a higher sentence than that possible for the full charge.

The plea bargain process is quite similar to the pre-trial settlement of civil cases. Its major advantages relate to the opportunities which it offers to decongest the criminal court and hence expedite justice. There are simply not enough judges, prosecutors, or defence counsel to operate a system in which most accused persons go through a full-blown trial.[213]

The plea agreement, according to the US President's *Commission on Law Enforcement and Administration of Justice* which issued its report in 1967, eliminates the risk inherent in adversarial litigation. No matter how strong the evidence and how well-conducted a prosecution

[208] 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).
[209] EFCC Act LFN, 2004, s.14. This provision was first evoked in the case of *Federal Republic of Nigeria v. Emmanuel Nwude & Anor* (2006) 2 EFCCSLR 145, where the defendants who were charged with defrauding a Brazilian Bank received reduced sentence in exchange for their plea of guilty.
[210] Sections 74 - 76.
[211] Sections 270 - 277.
[212] KN Nwosu, opcit, p.226.
[213] *Ibid.*

is, it is still a matter of chance where a favourable decision will tilt, thus, each side is interested in limiting these inherent litigation risks.[214]

Another advantage to the prosecution is that they are able to use the promise of a reduced charge or sentence to secure the cooperation of suspects, particularly where conviction of a particular suspect is of more priority to the state.

Plea bargaining is quite fundamental in the criminal justice process in view of the options opened to the defendant during criminal trials. These options include: Plea of guilty, Plea of not guilty, Refusal to plead, Standing mute and Objections to the jurisdiction of the court. Given these options, it can be said that there is a close relationship between plea bargains and guilty pleas, with this relationship coming with its varying consequences in the trial process.

In Nigeria, with the enactment of Administration of Criminal Justice Act, 2015, plea deals are now the rule rather than the exception in Nigerian criminal process and all seem accepting of the fact that the spirit of auction had come to dominate the process of justice. Thus:

> Most cases are disposed of by means that seem scandalously causal; a quick conversation in a prosecutor's office or a courthouse hallway between attorneys familiar with only the basics of the case, with no witness present, leading to a proposed resolution that is then sold to both the defendant and the judge. To a large extent, this kind of horse trading determines who goes to jail and for how long. That is what plea bargaining is. It is not some adjunct to the criminal justice system; it is the criminal justice system[215].

3.8.2. Misunderstanding About Plea Bargain in Nigeria.

In recent times the practice of plea bargain has become a subject of so much public discuss in Nigeria with a litany of adverse comments and observation following its trail. One hardly mentions plea bargain without being bombarded with loads of reasons why it does not and

[214] DJ Newman, 'Pleading Guilty for Consideration', in N, S. Johnson, et al; *Sociology of Punishment and Correction*, (London: John Wiley & Sons, 1962), p.167

[215] ES Robert, and WJ Stuntz, 'Plea Bargaining as Contract', 101 Yale L.J. 1909, 1911 - 1912. (1992).

should not apply in Nigeria. Regrettably, since the mass publicity given to the practice by the Economic and Financial Crimes Commission (EFCC) in Nigeria, before the enactment of the Administration of Criminal Justice Act, 2015, most of the criticisms have been borne more out of emotional and sentimental outbursts than any full scale analysis of the legal principle and issues involved. For some odd reasons, lawyers and other criminal justice actors have wittingly allowed themselves to be taught an otherwise basic legal process by journalists and non-lawyers through the mass media. These misunderstandings are hereunder:-

3.8.3 'Plea Bargaining' Or 'Plea Bargain'

The phrase *'plea bargaining'* and *'plea bargain'* are most times used interchangeably. This may lead to some confusion and misconception about the power of the prosecutor and defence to negotiate a plea (plea bargaining) as distinct from the outcome of such negotiation (plea bargain). Technically, 'plea bargaining' can be defined as the process of negotiating a plea between the prosecutor and the accused; while 'plea bargain' refers to the agreement reached between the prosecutor and the accused regarding the plea. Thus, while the former refers to the process - the negotiation / discussions, the latter refers to the outcome - the agreement reached[216]. Basically, there are two words in the practice called plea bargain - (i) plea and (ii) bargain.

'Plea' in criminal justice is the formal response of an accused person to the charge when read to him in court, while 'Bargain' in one context, is the discussions, negotiation or communication between prosecutor and accused regarding the plea and in another context, any agreement reached between the prosecutor and accused regarding the plea[217]. From the above we can offer a working definition of 'plea bargain' that clarifies some of the misconceptions about what the practice truly entails. It is an arrangement between the prosecutor and accused where in

[216] KN Nwosu, op.cit, p.141
[217] Ibid

exchanged for a plea of guilty by the accused upon arraignment the prosecutor offers some reliefs or incentives to the accused. There is no doubt that Nigerian laws preserve the right of an accused person to plead guilty[218] but also our laws provide for the rights of the prosecutor to grants reliefs and incentives to an accused person[219].

3.8.4 Plea Bargain, EFCC and Corruption

Another major misunderstanding about plea bargain in Nigeria is the undue and rather restricted association of the practice with EFCC and the fight against corruption in the country. Although the plea bargaining gained recent popularity in Nigeria through the EFCC, by the application of section 14 of its enabling law, there seem now to be an unfortunate, sentimental and short circuited condemnation of plea bargaining in Nigeria by reference to corruption and EFCC. Regrettably, even lawyers and justice actors in Nigeria, define or describe by reference to corruption and EFCC by some lawyers. While the researcher does not wish to join issues here on the appropriateness or otherwise of the use of plea bargains in corruption cases, the researcher must state without fear of contradiction that there is no reason whatsoever why the legal discussion on plea bargaining in Nigeria should be restricted to cases of corruption. Not infrequently critics of plea bargaining quickly anchor their argument on the public emotions and sentiments regarding corruption and financial crimes in Nigeria. The researcher submits that plea bargaining is a basic tool for case management in the criminal justice system. Nothing in our laws prohibits or limits its use in other cases outside corruption. Plea bargain in criminal justice is just like bail. Surely, lawyers are not taught bail by reference only to its use or misuse in a particular crime, says, armed robbery. It is therefore important that lawyers and justice actors in

[218] The Constitution, s.38 and Administration of Criminal Justice Act, 2015; s.274 (hereinafter called the ACJ Act 2015)
[219] *Ibid*, ss.174 and 211 and Interpretation Act, LFN, 2004, s.10(2).

Nigeria appreciate the fact that plea bargain if well taught and understood can be used in other offences outside corruption.

3.8.5 Plea Bargain is not Codified in our Laws

Another major misunderstanding about plea bargaining in Nigeria by some lawyers is the notion that there are no statutory codes that creates and prescribes its use in criminal cases. Usually critics of plea bargain argue that it is illegal because there are no express provisions in our laws prescribing it. Such critics then go further to suggest the need for legislative intervention to expressly provide for plea bargain in our laws. With respect, this argument betrays the fact that we are yet to fully understand the true legal nature, origin and dynamics of plea bargains in the criminal justice system. Essentially, apart from the fact that plea bargain is now a codified legal process[220], it is a name given to a practice that developed from the exercise of statutory powers and discretions which the major actors in the criminal justice process already possess. Plea bargain is a practice-name given to the interplay of prosecutorial discretion[221], defence option[222] and judicial discretion[223]. Plea bargain is plea negotiation. Its an alternative method of resolving criminal dispute without due court process of litigation. Where an accused pleads guilty by virtue of a prior agreement with the prosecutor, the parties are said to have plea bargained. To underscore this point it may be necessary to refer to other legal practices or procedures that have acquired standard names more from practitioner's usage than by an express statutory appellation. Examples are Allocutus, Resting Defence Case on the Prosecution, No Case Submission, Trial-Within-Trial and Consent Judgement. It is important therefore to restate that just like the above practices,z 'plea bargain' started as a name which American practitioners

[220] ACJ Act, 2015, ss. 270 - 277.
[221] The Constitution, ss. 174 and 211
[222] ACJ Act, 2015; s.301
[223] *Ibid*, s.416.

used to describe a plea of guilty upon arraignment, where there was prior discussion and agreement between prosecutor and accused regarding the plea. Even in America, till today, there are hardly express statutory provisions creating the practice of plea bargain despite its predominance in the American criminal justice system. In Nigeria, the legal reality is that despite Section 14 of the EFCC Act and Sections 75 and 76 of the ACJ Law of Lagos 2011, providing for plea bargain there is now a Federal Law expressly providing same[224].

3.8.6 Plea Bargain is for the Rich Alone

Often some lawyers who are critics of plea bargain argue that it applies only to the rich and influential members of the society alone. Frequently, some analysts try to mock plea bargain by reference to situations like: *"A poor man steals a chicken and he is sentenced to years of imprisonment, but, a rich man steals millions of naira and gets a plea bargain with light sentence".*

By the above statement, they tend to create the impression that plea bargain only applies to "rich offenders". With due respect, much as the above jest may appeal to patrons at a local "beer parlour", it hardly has any legal basis. It is NOT by any legal interpretation, a representation of the true legal nature of plea bargain. Granted that much of the widely publicized instances of the use of plea bargain in Nigeria has been those involving rich and politically exposed persons prosecuted by the EFCC, that is not to say that there is any special legal restriction limiting the use of plea bargain to the rich alone. The fact is that the police, law officers and other prosecutors in Nigeria presently engage in plea bargains with offenders in the routine exercise of their prosecutorial powers. Even if they pretend not be doing it, which is not true, we summit that there is nothing in the laws whatsoever that prohibits them from reaching plea bargains with

[224] ACJ Act, 2015.

the “poor” offenders that they prosecute. Interestingly, if well taught, understood and practiced, one of the major benefits of plea bargain is that it substantially benefits the “poor” citizen who “innocently” commits a crime and would want to dispose the case and move on with his/her life, instead of engaging in protracted technical battle in court that may ultimately do him more harm than good.

On this note, perhaps the story of plea bargains can be compared to that of mobile telephone in Nigeria. Most of us today will easily recall that in the 90s when the mobile phone technology first made its incursion into Nigeria through the 090….. (naught-nine-naught) numbers, the cost of acquiring them were so exorbitant and out of reach that is was considered the exclusive preserve of the rich and mighty in the society. In fact, in the South Eastern part of the country, where we come from, mobile phone was a status symbol elegantly displayed at occasions by the privileged few who could afford it. Such was the case that one public officer then was reputed to have said categorically that “mobile telephone is not for the poor” in defence of public outcry those days that the phones were too expensive. Today, with better knowledge about the true nature of the mobile phone and liberalization of the restrictive policy of government in telecommunications, the reality is that the poor now uses mobile phones more than the rich who perpetually keep their phones on silence mode and are highly selective in the calls they answer. Certainly, in the no distant future, with better knowledge amongst criminal justice actors and the society generally about the true legal nature of plea bargaining it will become the acceptable norm in the criminal justice system. Plea bargain is NOT for the rich alone. If those who prosecute and defend the poor understand its dynamics and use it in their prosecutorial and defence duties, the poor and ultimately the society will be better for it.

3.8.7 Plea Bargain Leads to Light Sentences.

Another confusion often raised by some lawyers who are critics of plea bargain is the "low amount" of fines imposed by the courts in Nigeria, especially in correlation to the amount stolen, misappropriated or otherwise illegally obtained by a convict in financial or economic crimes. Frequently one comes across comments such as this:

> Plea bargain is bad, someone stole millions (or billions) of Naira, and after a plea bargain the court asks him to pay fine of X thousand Naira, he puts his hand in his back pocket, pays the fine and walks away.

Again, while we do not make a defence for some of the sentences imposed by the courts in some of the cases of plea bargain as reported in the mass media, since we are not privy to the specific negotiations involved, we submit respectfully that the attempt to assess the propriety or otherwise of a sentence of fine in correlation with the amount involved in the crime has no basis whatsoever in law. The sentence of fine in the criminal justice system is not the same and should not be confused with compensation, restitution of forfeiture. Where a person is convicted of an offence, whether following a plea bargain or after a full trial, and the court is interested in retrieving any illegally acquired money or property from the offender, the proper disposal measures are compensation, restitution or forfeiture depending on the particular facts of each case. The penalty in the sentence of find lies not so much in the economic acknowledgement and appeasement for the wrongdoing. Fine is not therefore essentially designed to economically enrich the state or as the means for the recovery of stolen property by the state. On the contrary, it serves more as a token of remorse by the offender and an affirmation of the fact that there has been and infringement of the law and a wrong to the state. In any proper plea bargain where the prosecutor desires to (and should in our opinion) recover money or property illegally obtained by

the offender as proceeds of the crime the appropriate measures to deploy are compensation (for the victim), restitution or forfeiture. Where this has been properly done, especially with the cooperation and assistance of the offender in furtherance of a plea bargain, then the court need not assess the amount imposed as fine with the amount involved in the crime. Any attempt to correlate the amount imposed as fine with the amount involved in the crime, much as it may appeal to the sentiments of lay persons, is not be a true legal assessment of the propriety or otherwise of the outcome of a plea bargaining. To underscore the point being made here, we can draw inference from the practice of payment of bride price in marriages in some African cultures. Except in the years past (in some cultures), where there was *schedule of fees* payable in marriages according to the educational qualification and status of the bride, the amount paid as bride price in marriages is essentially a symbolic cultural gesture and acknowledgement of the fact of the marriage having been consented to by the family of the bride. It is not by any means economic compensation. Families of brides interested in deriving economic benefits from their in-laws by the fact of the marriage of their daughter design other means of achieving that goal:

> Plea bargain is bad, someone steals money or other property you do plea bargain with him, let him return some of the money/property and allow him keep the rest. Plea bargain is like a slap on the wrist of an offender.

The above statement captures yet another misconception about the true legal nature of plea bargain. Apart from its faulty restriction of the assessment of the propriety or otherwise of plea bargain to economic and financial crimes, it hardly captures the true essence and dynamics of a plea bargain. The truth is, no prosecutor or court worth the name would under any circumstance in the guise of a plea arrangement allow an offender to retain any traceable proceeds of the crime. A fundamental principle of criminal justice is that an offender should not, under any guise, be allowed to benefit from his crime. Although in a plea bargain the prosecutor

may offer some reliefs or incentives to the accused (and usually for good purpose), such incentives does not in any way include any measure that will allow the offender, with the acquiescence of the prosecutor, to derive any benefit from the crime. Subject to the risk of abuse in any particular case, plea bargain does not require the state to soft pedal on crime; nor does it necessarily require the state to merely give offenders" a slap on the wrist". In any case, where plea bargain may have been misapplied to create the negative impression that it is "a pat on the back" of offenders then such a case should be seen more from the angle of lack of knowledge and skills by the criminal justice actors than any inherent legal defect in the nature of plea bargain.

3.8.8 Court Must Sanction Plea Bargains

Court need not always be involved in a plea bargain and may not even know about the bargains between the prosecutor and defence. It is erroneous to suggest that plea bargains must always be sanctioned by the court. Except where a plea bargain involves the sentence to be imposed by the court, a prosecutor and the accused may conclude and implement a plea agreement without reference to the court[225]. For instance, in count bargains, where a person committed three offences with which he may have been charged but the prosecutor agrees to drop two of the charges on the understanding that the accused pleads guilty to one offence with which he is charged, the court need not know about this arrangement. Therefore, the extent to which the court is or should be involved in a plea bargain is determined by the type of plea agreement. Where it is a 'charge' or 'count' or 'offence' bargain, then the court need not and is not likely to be involved. But, where it is a sentence agreement, then the plea bargain can only

[225] Ibid, s.270 (8)

be effective if sanctioned by the court because sentence after conviction in a criminal case is at the discretion of the court.

3.8.9 Types of Plea Bargain

Having dispelled some of the misconceptions about plea bargains in Nigeria, it is important to briefly highlight the major types of plea arrangements. Essentially plea bargains may be categorized into the following:

- Charge/Count Bargain
- Offence Bargain
- Fact Bargain
- Sentence Bargain

3.8.10 Charge/Count Bargain

A charge or count bargain occurs where the prosecutor offers some charge discount to a multiple offender in consideration for a plea of guilty to the charge(s) on which he is arraigned. This happens where a person would have ordinarily been charged with more than one offence, but, the prosecutor reaches an agreement with the offender to drop some of the charges on the understanding that the offender pleads guilty to the ones he will be charged. For instance, someone committed five offences for which he could have been arraigned in court after investigation, but the prosecutor agrees that if the suspect will plead guilty to two of the offences he (prosecutor) will drop the other three charges. It is important to emphasize that the charges dropped by the prosecutor under the arrangement must be cases that prosecutor would have been legally able to charge the accused with and sustain the charge in count. Charge bargain should

not be used as an avenue for the prosecutor to load the case against the accused in expectation that he will pressure the accused to plead guilty[226].

3.8.11 Offence Bargain

Offence bargain is a situation where the prosecutor accepts to substitute or reduce the charge against the accused and the accused accepts to plead guilty for the substituted offence. For instance, a person actually committed murder with which he could have been charged after investigation, but, the prosecutor agrees to substitute the charge of murder with that of manslaughter.

3.8.12 Fact Bargain

Sometimes the prosecutor may have an agreement with the offender regarding certain facts which the prosecution should not disclose to the court. Accused may agree to plead guilty to a charge on the understanding that the prosecutor shall not disclose certain facts that may be prejudicial to the accused to the court. For instance, facts showing previous conviction may escalate the punishment for subsequent offending. In this case prosecutor may agree that he will not disclose the fact of previous conviction to the court if the accused pleads guilty to the present charge.

3.8.13 Sentence Bargain

A sentence bargain involves an agreement between prosecutor and accused on the margin of punishment to be imposed by the court[227]. In a sentence bargain, accused agrees to plead guilty upon arraignment on the understanding that a certain level of punishment shall follow. As between the prosecutor and defence, a sentence bargain is an inchoate agreement because the punishment for any offence is at the discretion of the court. Essentially, the prosecutor entering a

[226] BU Odoh, loc.cit, p.34
[227] Ibid

sentence bargain merely represents to the accused that he (prosecutor) will support a case made to the court for a particular margin of sentence. A sentence bargain is only operative when sanctioned by the court. Interestingly most of the controversies regarding plea bargain in Nigeria have arisen mostly from poor understanding of the dynamics of sentence bargains. For instance, the notorious case involving the pension scam conviction and the subsequent suspension of Justice Talba of the Federal High Court by the National Judicial Council (NJC), demonstrates the intricacies of sentence bargain and the need for proper knowledge and skills on the practice of plea bargain by all stakeholders in criminal justice. In a sentence bargain, where a Judge is not inclined to act in accordance with the agreement reached by the prosecutor and defence, then he should inform them of his disagreement before imposing sentence. This is to enable the parties reconsider their position. In such a case the accused may decide to withdraw his earlier plea of guilty and the prosecutor may withdraw the charge and re-arraign the accused on the original offence(s).

3.8.14. Advantages and Disadvantages of Plea Bargaining.

Plea bargains are used in criminal cases, in order to avoid a lengthy trial. The defendant and prosecutor work together to reach an agreement, instead of the trial going before a full scale court proceeding. These often include things like pleading guilty in exchange for a lighter sentence, or pleading to a lesser charge. It is highly common, more cases are settled through plea bargains than by trials in the Nigeria. Plea bargaining enables both the prosecutor and defendant to avoid a prolonged court trial under court and enables the defendant to prevent the risk of guilty verdict at court on a more severe sentence[228].

[228] BU Odoh, Loc.Cit, p. 45

In addition, plea bargaining has been carried out as an intentional agreement that leaves the prosecutor and defendant better off – in which the defendant have a variety of substantive and procedural rights. However, by pleading accountable, the defendant trades these rights to a prosecutor in return for concessions that esteem highly than the surrendered rights. It has been debated by some that this kind of act benefits the society by making sure that the guilty party isn't acquitted. The advantages are hereunder:-

1. Plea bargaining aids the State and Court to deal with case loads. In addition, plea bargaining decreases the work load of prosecutors by allowing them to get ready for more serious cases by leaving out minor charges for settlement[229];

2. Plea bargaining is a factor in restructuring the offender by agreeing to the blame for their trial and by voluntarily submitting themselves before law – without having a time-consuming and expensive trial;

3. From a perspective of criminal defense, the most helpful benefit of this kind of agreement is to remove the trial's uncertainty. In helps the defendant to make sure that they will not obtain more serious charges for the charged criminal acts filed against them; and

4. If for instance the prosecution is feeble, or if the court wants proper evidences or witnesses and the outcome is acquittal, the prosecution may have the possibility of finding the accused person guilty[230].

Its disadvantages on the other hand are herewith:-

[229] Federal Republic of Nigeria v. Lucky Igbinedion (2014) LPELR - 22760 (CA), pp. 75 - 76
[230] J Vazquez, 'Due Process - Lets Make a Deal: The Plea Bargain'. Retrieved April 30, 2016 from <www.occupytheory.org> Accessed on April 30, 2016

1. The prosecution is capable of presenting accused with unconscionable pressure. Even though the process pleas as controlled, there are chances of it being coerced;

2. The prosecution is capable of taking full advantage of accepting the criminal act in weakest trials. The more likely the trial ends in acquittal, the more beneficial a guilty claim is for the prosecution;

3. If you know that you are innocent and agree to plead guilty, then you will likely pay a fine or be imprisoned for a criminal act that you did not commit. In addition, you will have a criminal record that can't be erased forever;

4. Plea bargaining doesn't provide benefits to defendants who are innocent. This means that police officers are encouraged to undertake shoddy investigations, and lead criminal defense attorneys to no longer bother to plan and organize a quality case in court; and

5. Since both parties depend on their power to negotiate a deal rather than winning a trial, justice system suffers[231].

3.8.15. The Prosecutors Role in Plea Bargaining

Undoubtedly, the role of the prosecutor in the criminal justice process is quite profound and significant and this is more particularly significant given the wide discretion retained and exercised by the public prosecutor as a major stakeholder in the administration of the criminal justice system. The prosecutor has more control over life, liberty, and reputation than any other person in Nigeria. His discretion is tremendous.

[231] . J Vazquez, 'Due Process - Lets Make a Deal: The Plea Bargain'. Retrieved April 30, 2016 from <www.occupytheory.org> Accessed on April 30, 2016

This obviously is informed by the discretion retained by prosecutors to charge people, decide who to charge, refrain from doing so or utilize the mechanism to prosecute as a bargaining tool – all in the bid to promote the goals of the criminal justice system and enhance public interests perspectives.

In Nigeria, the role of the prosecutors in the criminal justice process is particularly far reaching given the fact that the public prosecution system currently dominates the criminal justice system with the jurisprudence of private prosecutions still evolving as part of our culture. The entrenched practice presently is to consider criminal prosecution as a public good which arguably can best be preserved by the state and this may well explain the rationale for the wide powers granted to states attorney generals and attorney general of the federation on prosecutorial powers with powers to delegate same to appropriate agencies guided by the public interest considerations[232].

The role of the prosecutor in designing and finalizing plea bargaining is crucial for other reasons. Theoretically, judges are prohibited from direct participation in plea negotiations, the rationale being the need to ensure and guarantee the impartiality in the process[233]. This dilemma as well as the difficulty in isolating judges from the process in practical terms may have complicated the process.

Therefore, the overall need to ensure the integrity of the process and forestall abuse and corruption necessarily requires that the prosecutor must play a very fundamental and critical role[234].

[232] CFRN 1999 (as amended); ss. 174 (2) & 211 (2).
[233] ACJ Act; s.270 (8).
[234] The Constitution, ss.174 (3) & 211 (3).

These responsibilities require the prosecutor to be above board and to possess certain innate and practical skills in order to be able to impact positively on the process. One of such skills is integrity as a prosecutor who is found lacking on the moral plane can hardly instill confidence in the process. Secondly, the prosecutor must be highly knowledgeable particularly in the prosecution of criminal matters. This will require ability to thoroughly understand the facts of the case, a good grasp of the issues and relevant principles of law applicable in particular cases. He must have an overview of the facts, the likelihood of success or otherwise in the final outcome, ability to gauge public opinion correctly, ability to balance the interests of the state, the accused person, the victim and that of the society in the negotiating process. The prosecutor must be conscious of his duty to prosecute and not to persecute in every case. More fundamentally, the prosecutor must understand what the public interest in a particular case is and how such public interest would best be preserved and lastly, the process requires a prosecutor with a sense of justice, a sense of fairplay, a sense of balance, a sense of practicality and feasibility and a sense of integrity. All of these skills must be available in sufficient proportion to the public prosecutor if his role is to impact positively on the process.

The prosecutor must be able to recognize and approximate the outcomes of true adjudication at a lower cost given the background that the adversary procedure and the law of evidence may have made trial procedure so costly that it may be inadequate in dealing with serious crimes. The prosecutor must also have detailed knowledge of statistics and data on the prospect of the criminal justice system to handle high volume of criminal cases that is foisted upon it by the demands of industrialization and the rising profile of criminal cases. The prosecutor must be guided by the need to enhance the efficiency of the criminal justice system as a prerequisite for embracing the option of plea bargaining.

Arguably, the prosecutor's role in the process is critical to the extent that he deploys his skills in ensuring that serious offences are effectively prosecuted with results while also decongesting the court's list on less serious offences that can be resolved through diplomatic negotiations. What this requires therefore is the abundance of diplomatic skill and tact by the prosecutor in finalizing the process. The prosecutor also must carry out a cost benefit analysis to save time and avoid unnecessary public trials as well as protect innocent victims of crime from going through ordeals of the trial process that could endanger their privacy and expose them to needless risks. It is important to note, however, that plea bargain is not an alternative to conviction or acquittal, because the defendant must be convicted upon his plea. Plea Bargain only reduces the stress of going into full criminal trials.

3.8.16. The Nature of Plea Bargaining Under the ACJ Act, 2015.

The Act is explicit on the nature of the plea bargain leaving one in no doubt in any particular case whether it is a charge bargain or a sentence bargain or both[235]. Its nature under the Act are

hereunder:-

- **Transparency in Negotiation**

In order to clearly show transparency in the negotiation, the Administration of Criminal Justice Act, 2015 makes it mandatory for the prosecutor to enter into a plea bargain only after consultation with the police officer who investigated the case and further provides that where it is feasible, to consult with the victim of the offence - where there is a victim[236]. In addition, the prosecutor in so entering into the bargain is also enjoined to take into account the nature or

[235] ACJ Act, 2015; s.270
[236] *Ibid;* s.270 (5)(a)

circumstances relating to the offence, the defendant and the interest of the community[237]. The beauty of this provision is that in one breath, the law incorporates the concept of restorative justice into plea bargaining[238]. That is, justice to the state, justice to the accused, justice to the victim of the crime and justice to the community.

The Act also provides that the prosecution shall afford the victim or his representative the opportunity to make representations to the prosecutor regarding the content of the agreement and the inclusion in the agreement of a compensation or restitution order[239].

- **Agreement in Writing**

To avoid equivocation, the Act provides that any such agreement on plea bargain shall be in writing and signed by the parties[240].

- **Participation of the Judge or Magistrate**

Although the judge or magistrate shall not be a party to the agreement, the prosecutor is enjoined to inform the court that parties have reached an agreement and the court shall in turn inquire of the defendant of the correctness of such information and agreement[241]. To further show that the role of the magistrate or judge is not robotic in a plea bargaining process, section 270 (10) provides:

> The presiding judge or magistrate shall ascertain whether the defendant admits the allegation in the charge to which he has pleaded guilty and whether he entered into the agreement voluntarily and without undue influence and may where:

[237] *Ibid*; s.270 (5) (b).
[238] JA Agaba, 'Practical Approach to Criminal Litigation in Nigeria', (1st edn, Abuja: LawLords Publications, 2011), p.602
[239] ACJ Act, 2015; s. 270 (6) (a) & (b).
[240] *Ibid*; s.270 (7)
[241] *Ibid;* s. 270 (8)

(a) he is satisfied that the defendant is guilty of the offence to which he has pleaded guilty, convict the defendant on his plea of guilty to that offence, and shall award the compensation to the victim in accordance with the term of the agreement which shall be delivered by the court in accordance with section 308 of this Act; or

(b) he is for any reason of the opinion that the defendant cannot be convicted of the offence in respect of which the agreement was reached and to which the defendant has pleaded guilty or that the agreement is in conflict with the defendant's right referred to in subsection (6) of this section, he shall record a plea of not guilty in respect of such charges and order that the trial proceed.

- **Defendant's Discretion**

Defendant's discretion remains unfettered from the beginning of the plea process to the point of sentence under the ACJ Act, 2015.Thus, unlike in a conventional trial, the defendant can still change his plea by withdrawing from the plea agreement even after he has been convicted based on his plea and the court can countenance that withdrawal. Because this may sound ridiculous, there is the need to reproduce the said provision which, in our view, are apposite. The relevant subsections here are subsection (11) and (15) of the same section 270 of the Act. Section 270 (11) provides:

Where a defendant has been convicted in terms of subsection (9) (a), the presiding judge or magistrate shall consider the sentence as agreed upon and where he is:

(a) satisfied that such sentence is an appropriate sentence, impose the sentence; or

(b) of the view that he would have imposed a lesser sentence than the sentence agreed, impose the lesser sentence; or

(c) of the view that the offence requires a heavier sentence than the sentence agreed upon, he shall inform the defendant of such heavier sentence he considers to be appropriate.

Subsection (15) goes further to provide thus:

Where the defendant has been informed of the heavier sentence as contemplated in subsection (10) (c) above, the defendant may:

(a) abide by his plea of guilty as agreed upon and agree that, subject to the defendant's right to lead evidence and to present argument relevant to sentencing, the presiding judge or magistrate proceed with the sentencing,

(b) Withdraw from his plea agreement, in which event the trial shall proceed de novo before another presiding judge or magistrate, as the case may be.

Where an accused withdraws out of the agreement as in subsection 15 (b) above, and the Judge or Magistrate orders trial to proceed de novo, the earlier agreement between the parties shall not be tendered in evidence against the accused as same is not admissible against him[242]. In addition, no reference shall be made to the agreement at the accused person's trial[243].

3.9 Restorative Justice

Restorative Justice is a process whereby victims, offenders, and communities are collectively involved in resolving how to deal with the aftermath of an offence and its implication for the future.[244] It is the approach to criminal justice administration that emphasizes creative problem-solving in dealing with a criminal conduct. The current practice is retributive justice. Our present system places much premium on inflicting punishment and pain on the

[242]*Ibid*; s.270 (16)(b)
[243]*Ibid*; s.270 (17)
[244]DJ Omale, *Understanding Restorative Justice: A Handbook for Criminal Justice Stakeholders*, (Enugu: Trinity – Biz Publication, 2005) p.10

offender than any real attempt to reform and reintegrate the offender back into the society. From the time an offence is committed to the trial and judgment all our legal rules is concerned with is proving guilt according to letters of the law. Little or nothing is done about repairing the damage done by the crime. Victims of crime and even the community who suffer the direct impact of the offence are relegated to the background. Hardly does the offender even realize the enormity of the damage done by his conduct to the victim and the community. In fact the law and the current trial process seem to provide some psychological escape and justification to the offender who easily clings 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 altar of legal technicalities. Even where the offender in his conscience knows that he is guilty of the allegations, it is usual for him to resort to the legal rule that "he who alleges must prove" and seek to escape justice by technicalities. Unfortunately, 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 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.

In most cases, this attitude has caused more harm not just to the society at large but even more to the same clients that lawyers seek to protect. The current case overload in the criminal justice system and the consequent of the congestion of the prisons can be attributed largely to this attitude that every case must go through the whole hug of the criminal trial process. Persons, who should have had theircharges 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. Without in 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 option to an accused in a criminal case.

Both the Criminal Procedure Code in the Northern States and Criminal Procedure Act in the South States and The Administration of Criminal Justice Act, 2015, provide that an accused can plead guilty to the charge and if satisfied court can proceed to enter conviction without full trial. 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 respect enjoin their followers to admit and confess their sins and ask for forgiveness, in fact for Christians, the book of *Matthew 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.

With the myriad of problems bedeviling the retributive justice system it has become imperative for stakeholders in criminal justice administration to seek other alternative approaches. One of such alternatives is restorative justice. Restorative justice systems focus more on addressing the problems caused by a criminal conduct than just trial and punishment of the offender, 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:

(i) Reconciliation

(ii) Restitution

(iii) Reintegration

(iv) Restoration

(i) **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 3 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 sense of insecurity if certain issues regarding the crime are not clarified to their satisfaction. 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 of reconciliation in restorative justice is more apparent in cases of crimes between people with 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.

(ii) **Restitution**

A major value of restorative justice is its emphasis on victim compensation. As much as possible, 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 as much

as can be achieved. 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.

(iii) Reintegration

Restorative justice programmes seek to fully reintegrate the offender back into the society in a practical and realistic manner. Restorative justice de-emphasizes 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 be citizen 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

(iv) Restoration

The healing value of restorative justice programmes 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 distort by the crime is redressed and repaired so that society can be rest assured that the people are secured and protected citizens in community of humans.

3.9.1 Victim Remedies as the Kernel of Restorative Justice

Until 1985, to use an international legal benchmark, the contemporary criminal justice system of many countries, including Nigeria and similar Common Law jurisdictions was basically a contest between the state and the offender[245]. The victim's role was invariably limited to that of a witness for the prosecution[246]. The reasons for this include an institutionalized adversarial system whereby the prosecutor was expected to prove his case against the accused who, through counsel, endeavours to defend himself. Consequently, The United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 1985 proved to be a watershed in elevating the victim of a crime to the centre-stage of criminal justice concern. We recall, of course, that as part of the social contract, the individual had voluntarily surrendered his right to avenge crime done to him in exchange for the sovereign's protection. Perhaps as a result, emphasis was on crime and its punishment and away from the crime victim. The 'victims" of crime are persons who individually or collectively have suffered physical or psychological injury and/ or economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws[247]. A person may be considered a victim; regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted

[245] A Ibidapo-Obe, 'Restorative Justice and Plea Bargaining Practices: A Tilt Towards Customary Criminal Justice' in KN Nwosu (ed), *Dispute Resolution in the Palace* (vol.2) (Lagos: Gold Press Limited, 2010) p. 203.

[246] This is why criminal prosecutions are expressed as: The State / Republic / Police Commissioner Versus X. This in turn can be traced to the "Social Contract" theory by which individuals relinquish some of their freedoms in exchange for protection from the state. The theory of social contract is still a useful philosophical justification of victim compensation. A citizen's criminal victimization is thus a symptom of failure by the state to fulfill its own part of the bargain and justifies the demand that it (the state) be primarily responsible for compensating the victim. Such establishment of a state fund from which compensation to victims of crimes is payable is being suggested as part of the functions of the proposed Crime Victim Mediation and Compensation Authority suggested to be established at Federal and State levels.

[247] UN Declaration of Basic Principles of Justice for Victims of Crimes and Abuse of Power, UNGA Resolution 40 / 34, Annex 40 UNGA or Supp (No.53) at 2145 UN Doc. A/40/53 91985), Art.1

and regardless of the familial relationship between the perpetrator and the victim. The term victim also includes the immediate family and dependants of the direct victim and persons who have suffered harm in intervening to assist the victims in distress or to prevent victimization[248].

3.9.2 Principles of Victim Remedies

The principles of victim remedies, in broad strokes are that the victim of a crime should as much as possible be returned to his pre-victimization status. Restitution; Restoration and Compensation are the keys to assuaging a crime. Beyond these quantitative redress, the need has been expressed for the criminal justice system to ensure that victims of crime are treated with compassion and respect for their dignity. They are entitled to access to the mechanisms of justice and to prompt redress, as provided for by national legislation for the harm they have suffered. The crime victim need not await concluded prosecution of the offender, because the criminal justice system should make available judicial or administrative mechanisms for redress through formal or informal procedures which are expeditions, fair, inexpensive and accessible[249]. A responsive victim remedy procedure must inform victims of the role and scope of the applicable laws and allow the views and concerns of the victims to be presented at appropriate stages of the proceedings. It must provide proper assistance throughout the legal process and take measures to minimize inconvenience to victims. It must protect their privacy as well as that of their families and witnesses on their behalf from harm and intimidation[250].

---

[248] *Ibid*, Art. 2

[249] *Ibid*, Art.3 An important component of victim remedies is that a victim of crime should not be obliged to initiate fresh court processes to get appropriate relief for his victimization as implied in *Smith v. Selwyn* (1914) SKB 98 and confirmed in *Ojukwu v. African Continental Bank* (1968) 1 ANLR 40. The principle in Smith v. Selwyn is to the effect that where injuries are inflicted on an individual under circumstances which constitute a felony, that felony cannot be made the foundation of a court action by the victim until the offender has been prosecuted or a reasonable excuse shown for his non-prosecution. The proposed law on victim compensation will allow claims even where no one is prosecuted for the offence. See the case of *Fulani v. Idi* (1990) NWLR (pt. 150) p.312.

[250] A good victim remedy law needs to contain sections on victim / witness protection and guidance through any mediation or trial process. See for example, Arts. 4 - 6 of the UN Declaration of Basic principles for Victims of

3.9.3 Philosophy of Victim Remedies

The retributive philosophy, anchored on the idea that an offender "deserves' to be punished as an act of collective vengeance held sway in the monarchical period in Europe. Retribution was also justified on the religious basis of expiation. A crime against the state, personified in the "divine" monarch, ordained by the Church, was a sin against God and therefore only heaps of punishment imposed by the Church-State alliance could forestall heavier punishment in heaven. Consequently, capital punishment executed in the most horrendous forms (quartering, burning-alive at the stake etcetera) was the prevalent form of punishment.

By the late 18th and early 19th centuries the utilitarian philosophers had started to preach against retribution as a penal philosophy. Championed by Caesare Beccaria, and later, Jeremy Bentham, this school proposed an alternative philosophy of deterrence. The Utilitarian movement thought that punishment should be based on a more rational and practical basis. If, as they suggested, every intending offender weighed the implications of his crime on an imaginary scale and would proceed with the crime where he thought that the advantages outweighed the disadvantages, then a graduated scale of punishment was needed. Thus, the gravity of an offence was signposted by the length of incarceration. Consequently, by the 19th Century, imprisonment became the mandatory disposition method[251].

Now, with the benefit of two and a half centuries of the introduction of imprisonment as penalty, its negative aspects have begun to manifest in the prison sub-culture, predations on prisoner's family, and ultimately, high rates of recidivism. Meanwhile, developments in the social sciences in the 1920s indicated that criminality was not only a function of individual

---

Crimes. See also Arts. 43(b), 75 and 79 of the Rome Statute of the International Criminal Court, 1998, UN Doc A/CONF 183/9, 37 LLM 1999

[251] L Radzinowicz, op cit.

decision but also a product of social determinism. The idea of deterrent punishment began to yield to the rehabilitation and reformation of the offender as social defence imperatives[252].

Social determinism also provided a philosophical anchor for victim remedies: If the seeds of crime area sown by society itself, then the state bears the ultimate responsibility for criminality and the least it could do is to compensate the victim of a crime for its failure to provide security. In this way, social determinism provided the bridge between offender rehabilitation and victim rehabilitation[253]. Rehabilitation and reformation of an offender could therefore only be effective in the context of the restoration of the social equilibrium ruptured by an offence. Such reconciliation, restoration and renewal of social bonds could not be achieved without focusing additionally on the rights and interests of crime victims. The perspective of criminal justice that emerges is "restorative justice".

3.9.4 Survey of Domestic Laws Relating to Victim Remedies/Restorative Justice

The central philosophy of the customary criminal justice system of traditional Africa had always been reconciliation[254]. Every crime amounted not only to a civil wrong against the victim but also the breach of a social taboo which introduced a supernatural dimension. Reconciliation operated at the personal level, involving the offender and victim; and at the communal level, involving the traditional authorities (age-grades, elders and priesthood[255]).

The introduction of English Criminal Law into Nigeria from 1914 effectively truncated traditional criminal law which was centered on reconciliation and was typified by victim

---

[252] See generally: L Radzinowicz and J King, The Growth of Crime, (London: Penguim Books, 1977), pp 143 - 166; EU Olowu, 'In Search of Objectives, Guidelines and Alternatives to Imprisonment', in Y Osinbajo & A Kalu (eds), *Law, Development and Administration in Nigeria*, (1990),p.218

[253] *Ibid*.

[254] TO Elias, 'Traditional Forms of Public Participation in Social Defence' in *International Review of Criminal Policy* No 27 (1969) UN pp. 18 - 24; see also: A Adeyemi, 'Towards Victims Remedies in Criminal Justice Administration in Nigeria' *Cashiers De Defense Sociale* (1989) p.31

[255] A Ibidapo-Obe, *A Synthesis of African Law*, (Lagos: Concept Publishers, 2005), pp.113 -116

remedies such as compensation, restitution, restoration and apology. Whilst the English criminal law continues to apply substantively in the Southern States of Nigeria, the Northern States, since 1958 have adopted a separate Penal Code, and from the year 2000 the Sharia Penal Code in some states. The "received" English laws, applicable in the Southern States and the pseudo-Islamic Penal Code Of the Northern States purported to retain the traditional remedies of compensation, restoration and restitution but quite inadequately.

According to Ibidapo-Obe[256], restitution under the Criminal Procedure Act[257] relates to the return of movable property either stolen or otherwise dishonestly acquired or taken without permission. Restoration, on the other hand relates to repair, rehabilitation or returning the possession of immovable property to a person dispossessed of it by force or other unlawful means. It may be accompanied by an order for damages (compensation). The basic principle that runs through the two disposition methods are the need to prevent any unjust enrichment as a result of criminality and the need to restore the victim to the pre-criminality status quo as much as possible. In practice, however, once the accused is convicted of the offence, the courts, in sentencing him, often ignore other options besides imprisonment. The provisions relating to victim remedies are not usually invoked because the prosecutor Is focused on punishment only, expecting the victim to subsequently seek redress in a civil court.

In the Northern States of Nigeria where the Penal Code is applicable[258] a convict may be ordered to pay compensation either "in addition to, or substitution for any other punishment to the person injured." The vagueness of the provision has raised pertinent questions: why should

[256] A Ibidapo-Obe, opcit, p.212
[257] Cap. C41, Laws of the Federation of Nigeria, 2004; sections 257 and 258.
[258] Criminal Procedure (Northern States) Act, Cap. C42, Laws of the Federation of Nigeria, 2004; s. 78.

compensation be paid in addition to any other punishment? Ideally, compensation ought to be substituted entirely for other punishment[259].

Secondly, compensation should not only be payable to the person injured directly, but where fatal, his family or successors ought to be able to obtain compensation. Thus, the "personal injury" envisaged to be compensated goes beyond what Section provides. Such "injury", in an ideal legislation, should extend to, mental, economic or other forms of injury[260].

Thirdly, Section 365 of the Criminal Procedure Code (CPC) which operates conjunctively with Section 78 of the Penal Code in the North in relation to compensation has disturbing contradictions: For example, Section 365 CPC provides that compensation is payable in addition to a fine, thereby removing the judicial discretion to order payment of fine as a substitute for other punishments.

One is left to wonder how practicable it is for a convict to pay compensation to the victim after paying a fine to the State. This is not satisfactory since the major object of the provision ought to be to assuage the victim and not to raise funds for the State. Another important negative factor of compensation in the Northern States is jurisdiction and statutory limitation of the courts. Since most crimes are cognizable only by the Upper Area Courts, Sharia and Magistrate Courts with limited monetary jurisdiction, the compensation payable is hardly sufficient to meet the injury sustained by the victim except in the most minor cases such as cow theft or minor personal injuries.

As for the Southern States of Nigeria, compensation is virtually unavailable: Section 435(2) of the Criminal Procedure Act (CPA) limits compensation payment to cases concerning

[259] Incidentally, the position of Islamic Law is that compensation should be payable in place of Retaliation: YY Bambale, *Crimes and Punishment Under Islamic Law*, opcit; R Peters, Islamic Criminal Law in Nigeria, (Lagos: Spectrum, 2003) p.62. See also the case of *Jahilei v. Zaria Native Authority* (1963).
[260] See the contrary position upheld in *R v. Tadeo* (1923 -1960) ALR 837

juvenile offenders, their parents being required to pay such compensation on their behalf. Even in such limited circumstances, the value of compensation payable is pegged it *twenty naira*. Furthermore, Sections 456 and 457 CPA provide for compensation to be paid to an accused who has been wrongly charged, presumably, a malicious prosecution. Again, the compensation payable is limited to a paltry sum of twenty naira. Lagos State, in 2008[261] introduced some reform of its criminal justice laws relating to victim remedies, within the rubric of its plea-bargaining process. By its Section 76, the victim of a crime is to be consulted in the plea-bargaining process where reasonably feasible. The complainant/victim may be allowed to make representations to the prosecutor on the contents of the plea-bargaining process where reasonably feasible and the court may award compensation or make a restitution order. Although the Lagos State reform of victim remedies legislation is commendable it is hardly comprehensive.

Also, the Federal Attorney-General recently inaugurated a Board of the Victims of Trafficking Fund[262] to compensate victims of international sexual trafficking. Again, the restricted application to only one class of victims negates the universal need to compensate victims of all manner of all crimes. The picture that emerges of the victim-remedies profile of extant law is one of incoherence and inadequacy. Fortunately it is an area in which international law has made critical intervention with comprehensive leislation and guidance principles.

3.9.5 International Law of Victim Remedies / Restorative Justice

The Declaration of Basic Principles of Justice for Victims of Crimes and Abuse of Power 1985[263] marked a milestone in international concern for inclusion of victim remedies and other types of disposition including support and assistance procedures that should be put in place

[261] Law No. 19, Laws of Lagos State, 2008
[262] Laws of the Federation of Nigeria, 2009
[263] Adopted by the United Nations General Assembly Resolution 40 / 34 of 29 November 1985.

through national legislation. Secondly, the 'Guidelines on the Role of Prosecutors[264], adopted in Havana, Cuba in September 1990, directed state parties to fashion national laws that would compel prosecutors to:

> Consider the views and concerns of victims when their personal interests are affected and ensure that victims are informed of their rights in accordance with the Declaration of Basic Principles for Victims of Crimes.

Subsequently, in 1999, the Economic and Social Council (ECOSOC) of the United Nations adopted a Resolution on the Development and Implementation of Mediation and Restorative Justice Measures in Criminal Justice[265].

Ultimately, the United Nations Declaration of Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters[266] has provided a comprehensive framework which has greatly expanded victim remedies beyond the scope of compensation, restoration and restitution. The declaration provides additionally, a methodology for the implementation of restorative justice programmes that enables civil society groups to be engaged in victim/offender therapies[267]. Finally, on the international plane is the Rome Statute of the International Criminal Court (ICC)[268] which has copious provisions on the protection of victims and witnesses, and reparation to victims from a Trust Fund.

3.9.6 Comparative Law of Victim Remedies/ Restorative Justice

In the United Kingdom, the notion that victims of crimes ought to be compensated for their victimization gained some ground when Margery Fry, a British Sociologist proposed it in

[264] Adopted by Eight United nations Congress on the Prevention of Crime and treatment of Offenders, held in Havana, Cuba, from August 27 to September 7, 1990.
[265] Adopted by ECOSOC Resolution 1999 / 26 of July 20, 1999
[266] See Note 69, supra
[267] Art.13(1)
[268] 1998, UN Doc/A/CONF 183/9,33 ILM 999

the 1940's. It became institutionalized for the first time in the United Kingdom through the Compensation for Victims of Violence Act 1961. The Act established a Criminal Injuries Compensation Board, by 1964, to grant compensation, initially to victims of violence, and, subsequently, to victims of all manner of crime. The Criminal Injuries Compensation Authority has since replaced the Board under further amendments introduced by the Power of Criminal Courts (Sentencing) Act, 2000.

Furthermore, the new law stipulated a standard amount of compensation for various degrees of injury which may be suffered by victims. Additionally, a United Kingdom court which has convicted someone of an offence may require such a person to pay compensation for any personal injury, loss or damage resulting from the offence. The ambit of "personal" injury is expansive and may extend beyond physical injury to include distress and anxiety.

The quantum of compensation varies according to the jurisdictional limit of the court concerned with the Magistrate's Courts being able to award up to GBP 5000.00 (Five Thousand Pounds Sterling[269]). The Act requires the court to have regard to the means of the offender in deciding whether to make a Compensation Order. Thus, the source of compensation is dual: from government and from the offender. Victim-justice provisions along the United Kingdom format or in slightly modified forms exist in Germany, France, Cuba, Mexico and all the fifty States in the United States[270].

As a component of restorative justice, particularly as it relates to reintegration of the offender within his community there has been an increasing trend particularly in the United States to issue sentences of community service. In a community service order, the offender is directed to execute some form of casual labour that directly impacts or serves the community, for

[269] P Ungerford-Welch, Criminal Litigation and Sentencing, (6th edn, London: Cavendish Publishers, 2004) p 725
[270] Ibid

example, street sweeping, refuse clearing, maintenance of community grounds such as parks, halls, and amusement centers etc. As he or she executes these -tasks within the community, it is hoped that the community would recognize the offender's implied atonement and plea for forgiveness and reciprocate by readmitting him/her as a worthy member of the community.

An underrated but effective aspect of restorative justice is the value of an apology and/or token of amends. Increasingly, many countries are recognizing its symbolic value and making gestures of remorse. President Bill Clinton leading a US delegation comprising a sizeable number of high-ranking African-American officials in 1997 visited the Goree Island slave port in Senegal. After an extensive tour of the site, Clinton and his team were so moved with emotion that he issued a statement which deprecated the depths of human depravity that characterized the trade and apologized to Africans for the US role in the trade. Significant also is the public holiday instituted by the United States government to honour Dr. Martin Luther-King's birthday on January 15 of each year. In a country that does not confer such honour cheaply, it was meant to be an "olive branch" to the African American population who had suffered decades of institutional racism[271].

3.9.7 The African Customary Law Origins of Restorative Justice

Reconciliation is the overriding aim of the African Judicial Process including criminal law administration[272]. The purpose is the maintenance of group solidarity, cohesion and social equilibrium. The process of reconciliation and consequently, reconstruction of relationships between the offender and the victim does not stop at the point of adjudication. No offence is too grievous to foreclose reconciliation, even murder. The traditional judicial organs, being an

[271] See generally: CT Rowan, The World of Justice, (London: Thurgood Marshall, Little, Brown & Co, 1993); Similar gestures were made by President Clurac of France when he declared a work free Slavery-Day; and Australian Prime Minister Ken Rudd'd apology to the Aborigines.
[272] AG Karibi-Whyte, *Groundwork of Nigerian Law*, (Lagos:Nigeria Law Publishers, 1986)

outgrowth of the people, were accepted and respected and so were the decisions of the Oba and his Chiefs, the quarter heads and family heads in ascending order of appeal) whenever they adjudicated "disputes" within the chiefly societies. Conversely, the age-grade associations were the primary judicial organs in the horizontal or republican African societies. Since there were no formalized courts entrusted with judicial matters, adjudication (essentially dispute resolution) was merely another level of social interaction and existence[273].

According to Dr. Teslim Elias, the purpose of the traditional criminal justice system is the restoration of social equilibrium negatively affected by the crime. Such reconciliation invariably involved the victim of crime. Restitution, Compensation, Restoration and Apology, as common verdicts of customary adjudicatory organs, ensured the healing process. Fines were usually imposed to offset the cost of the gathering and to compensate the victim for any financial or economic losses.

Thus, like Africa's reconciliation philosophy, the modern restorative justice movement upholds the idea that punishment alone cannot mend the torn fabric of society and that there is therefore a need for informal mechanisms to be introduced in criminal matters whereby the parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future[274].

Both the reconciliation and restorative justice concepts understand the necessity for a process of renewal of damaged personal and communal relationships, because both share a common focus on the victim of a crime and the need to assuage his hurt, both physical, psychological and economic. Both recognize that the process of healing cannot be complete

[273] OA Onwubiko, African Thought, Religion and Culture, (Enugu: Sapp Press Ltd, 1991) p.3; See also: FU Okafor, Igbo Philosophy of Law, (Lagos: Fourth Dimension Publishers,1992) p.13.
[274] M Price: 'Personalizing Crime: Mediating Produces Restorative Justice for victims and Offenders', <http://www.worp.com> Accessed on August 10, 2018

without equal participation in the criminal justice system of the victim and the offender. It is based on an impeccable logic: since a crime is not only against the individual victims but also an infraction of social ethics and an offence against the state, the punishment for the offence should be based on compensatory sanction to quicken the process of communal healing.

Under a restorative justice programme and traditional reconciliation process, the offender and victim are brought face to face in mediated circumstances that lead to the offender showing remorse to gain the forgiveness of the victim. The traditional philosophy of reconciliation through the methodology of Compensation, Restitution and Restoration has been sorely compromised by extant criminal law, as we noted earlier[275]. How can this negative trend be reversed? We proceed to consider the need for normative and institutional restructuring in the next segment.

3.9.8 Normative and Institutional Framework for Restorative Justice

The criminal law of Nigeria has Federal, State and Local Government components and changes will have to be reflected at all levels. The trend of reform has been to pass comprehensive legislation on victim remedies which will bind all sentencers at all levels of the criminal justice process and supersede the inadequate laws in force presently. This could be along the lines of The United Kingdom Power of Criminal Courts (Sentencing Act) 2000 earlier discussed.

A proposed Federal Victim Remedies Act will, for example set policy, establish federal funding for victims and create institutions such as a Victims Compensation Board to administer victim remedies. A similar normative order could be adopted at state level. The methodology of the Lagos State Government in its recent law is not advisable. There under, issues of victim

[275]*Aoko v. Fagbemi & Ano*. (1961) 1 All NLR 400; *Torti v. Uba* (1987) 3NWLR (pt 62)707

remedies are dealt with haphazardly under plea bargain[276], and compensation and restitution orders[277]. Apart from a general law or guidelines on sentencing, empowering and directing the courts to impose victim remedies, there would also be a separate and comprehensive victim remedies statute setting out modalities for obtaining victim remedies and establishing institutions for its administration. Additionally, and in order to take advantage of existing customary (traditional) adjudicatory infrastructure, such as, palace courts, a separate law could be made to apply before them. The immediate advantage would be to standardize victim remedies and control same.

At the level of the Magistrate and High Court Criminal Procedure Rules, Victim-Offender mediation and compensation could take the pre-trial conference hearing format in civil cases under the Lagos and Abuja High Court rules whereby the judge acts as a Mediator who tries to get them to agree on appropriate compensation to the victims of crimes. The envisaged proceedings may be called "Criminal Pre-Trial Mediation." Where such mediation by the judge fails and the victim and offender are unable to agree on adequate compensation, restitution or restoration, then the matter could proceed to trial.

3.9.9 A Crime Victims Mediation and Compensation Board.

The suggested comprehensive victim remedies Act/Law must create a bureaucracy to administer the process. Such institutions exist in many countries, as we have noted. Victims of all manner of crime will have the option of pursuing their claims for compensation for criminal victimization before the board/authority; call it - The Crime Victim's Mediation and Compensation Authority (CVMCA).

---

[276] See s.75 -76

[277] *Ibid*, ss. 289 - 301; Cadbury v. Federal Republic of Nigeria (2005) 5 NWLR (pt 918) 332; Adejumo v. The State (2006) 9 NWLR (pt 986) 627 for settlement of criminal cases.

The Crime Victims Mediation and Compensation Authority would provide an administrative structure for seeking victim compensation. The CVMCA shall have a Mediation Division which shall consist of trained mediators with criminal law bias. The CVMCA become seized of a criminal compensation dispute when offenders and victims agree to accept its jurisdiction in preference to the Magistrate or High Courts criminal processes.

Another division of the CVMCA shall have an equally important mandate to liaise with the civil society groups engaged in other facets of restorative justice programmes to advance its principles and practices. With the institution of the United Nations Development and Implementation and Restorative Justice Measures in Criminal Justice[278] and the UN Declaration of the Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters[279]. Victim Offender Mediation (VOM), Victim-Offender Reconciliation Programme (VORP) and other initiatives have come on stream with various particularities of restorative justice[280].

Some programmes bring offenders face to face with the victims of their crimes with the assistance of trained mediators. One importance of the programme, notes Dele Peters, is that ft affords the offenders the opportunity to learn the human consequences of their action. The victims are afforded the opportunity to speak their minds and their feelings to the-one who should heart hem thereby contributing to the victim's healing. There may be a lot of therapeutic value in such confrontations but evidence indicates that most victims are assuaged by reasonable compensation or restitution of their losses[281].

[278] *opcit*, note 69, supra
[279] *Ibid*
[280] D Peters, *opcit*
[281] *Ibid*

3.9.10 Plea Bargaining and Restorative Justice

The purpose of this segment is to explore the ways in which restorative justice connects with plea bargaining, and how each admittedly independent area of criminal justice can be aligned for optimal advantage[282]. Plea bargaining may be described as the process whereby an accused person and the prosecutor enter into negotiation towards an agreement under which the accused will enter a plea of guilty in exchange for a reduced charge or a favourable sentence recommended to the judge by the prosecutor. The plea bargain process is quite similar to the pre-trial settlement of civil cases. Its major advantages relate to the opportunities which it offers to decongest the criminal court and hence expedite justice. There are simply not enough judges, prosecutors, or defence counsel to operate a system in which most accused persons go through a full-blown trial.

The plea agreement, according to the US President's Commission on Law Enforcement and Administration of Justice which issued its report in 1967, eliminates the risks inherent in adversarial litigation. No matter how strong the evidence and how well-conducted a prosecution is, it is still a matter of chance where a favourable decision will tilt, thus, each side is interested in limiting these inherent litigation risks[283] .Another advantage to the prosecution is that they are able to use the promise of a reduced charge or sentence to secure the cooperation of suspects, particularly where conviction of a particular suspect is of more priority to the state.

Some other studies conducted indicate that plea bargaining is a vital part of the criminal justice system of the United States. Close to 90% (ninety percent) of all convictions emanated from plea bargain. In misdemeanour convictions the percentage is higher. Consequently, despite deep reservations about the practice of plea bargaining, the courts have accepted it as a veritable

[282] N Johnston, *The Sociology of Punishment and Correction*, (London: John Wiley & Sons, 1962) p.167
[283] *Ibid.*

tool of expediting justice. A United States Supreme Court Justice observed in *Santo Bello v. New York*[284] while approving plea bargaining that: *'Plea bargaining contain more advantages than disadvantages, while others have been willing to endure or sanction it only because they regard it as a necessary evil'.*

It may be useful to briefly consider some of the arguments raised against plea bargaining. One of the criticisms is the secrecy which often attends a plea bargain. In Federal cases in the United States, there is ordinarily no formal recognition that the defendant has been offered an inducement to plead guilty. Although, participants and frequently the judge are aware that negotiations have taken place, the prosecutor and the defendant go through a courtroom pre-trial in which they deny that the guilty plea is the result of any threat or promise. As a result, there is no judicial review of the propriety of the bargain - no check on the amount of pressure put on the defendant to plead guilty.

Other questions have been asked: Does plea bargain induce the offender to surrender his right to trial. Thus, plea bargain may look less rational, more subject to chance factors, to undue pressures, and sometimes to the hint of corruption. Where the defendant fails to get the benefit bargained for with the prosecutor, because the judge refused to follow his (prosecutor's) recommendation, there is hardly anything the defendant can do about it.

Lagos State has blazed the trail in the introduction of plea bargaining into the criminal justice system with its passage of a Law on Criminal Justice Administration in the High Courts and Magistrate Courts of Lagos State and for Other Connected Purposes, 2008.

In Lagos State, plea bargain is available to defendants accused of all kinds of offences. This is commendable as the trend has been to exclude plea bargaining in capital offences, rape,

[284] Supra

defilement and offences involving the use of violence. There are two forms of plea bargain available under the Lagos State laws, namely charge bargaining and sentence bargaining. This typology, in our view, covers all the various concessions often offered to a defendant by the prosecution. It may be that the prosecution may offer to reduce the charge from the one alleged in the complaint. This ordinarily occurs in cases where the offence in question carries statutory degrees of severity such as homicide, assault and sex offences. Some accused persons may exchange guilty pleas for the concurrent pressing of multiple charges, generally numerous counts or the same offence of related violations such as breaking and entering and stealing.

In sentence bargaining, a plea of guilty is entered by the defendant in exchange for a promise of leniency in sentencing. Most commonly in the United States, defendants seek to be placed on probation instead of imprisonment.

In practice the prosecutor and defendant engage in discussions before the charge is prepared (or amended) and an agreement in writing ensues. The agreement subsequently is submitted to the judge. The victim of the crime is allowed to make his input to the prosecutor. The prosecutor is not bound to abide by the wishes of the victim since the needs to balance it with the interests of the community. However, the victim's representation to the prosecutor becomes critical when it comes to the issue of compensation or restitution.

The prosecutor in Lagos State is also expected to exercise his powers having due regard to the nature of the offence and the character of the offender. The Defence Counsel, on the other hand is to ensure that his client is properly advised and that he does not plead to a charge without being aware of the implications.

At the Federal level, plea bargaining appears to have been used to settle several high profile corruption allegations levelled against some government officials. In Federal Republic of

Nigeria v. Emmanuel Nwude and Amaka Anajemba[285], the defendant, were given reduced sentences after they pleaded guilty to defrauding a Brazilian Bank of 224 million Naira. Both made restitution of large chunks of the stolen funds and this was taken into account in their prison terms.

3.9.11 Plea Bargaining and Restorative Justice - The Similarities and Differences

Plea bargaining can be described as the negotiation of a criminal charge. Negotiation, as we recall is an important Alternative Dispute Resolution (ADR) tool that brings disputants face to face in order to negotiate a settlement. Where plea bargain occurs in pre-trial sessions as is often the' case, this is consistent with ADR which usually occurs outside the main stream judicial system. Again, when a plea bargain agreement is presented to the court for ratification, this could be said to be in the nature of a submission to mediation whereby a third party is brought in to moderate the dispute. Even though the judge is the "mediator" in a plea bargain we should note that at this stage, he is not wearing his full garb of judge but that of a mediator or adviser as he merely makes suggestions and inputs to encourage the prosecutor and the offender to find a resolution. It is only when he is called upon to now pass sentence that his decision becomes binding, in the same manner as that of the Arbitrator in an Arbitration dispute.

Apart from similarities in procedure and personnel between plea bargain and ADR procedures, there is also a similarity Mi-he penal philosophy of plea bargaining and restorative justice. Retribution and Deterrence have no place in both restorative justice and plea bargain; instead, there is -the ascendancy of Rehabilitation, Reformation, and-Reconciliation. By giving the defendant the opportunity of a lesser sentence or charge in a plea bargain, society is sending a message of mercy and readiness to forgive the defendant, It is expected that the defendant will in

[285] (2006) 2 EFSCLR 145

turn feel less traumatized and ready to re-enter the society that he has scorned with his crime. The road to reconciliation of the offender with the community is thus opened.

Another point of unity between plea bargain and restorative justice is the cardinal role which the victim plays in both. The victim of crime is central to restorative justice, he meets the offender face to face and in the process the crime is forgiven and communal bonds restored. Likewise, in plea bargain in Lagos State, the prosecutor is expected to consult the victim for his views where feasible. Feasibility of getting the victim's input should however not be left to the prosecutor alone to decide. In other jurisdictions, particularly in the US, the victim of a crime has a right to be consulted and to participate in plea bargain hearings. It is suggested that the victim's view should be compulsorily sought and proper record of it made for the judge's consideration. Allowing victim participation in plea bargaining, observes Akeem Bello[286], serves the legitimate purpose of advancing their financial interest in that compensation, restoration or other remedy could then be prescribed as part of the final outcome of plea bargaining. Furthermore, in line with restorative justice ideals, the Lagos Law allows the court to intervene where it perceives that the offence requires a heavier sentence than the one agreed in the plea bargain. This provision surely strengthens social defence and the interests of the community.

3.10 Victim-Offender Mediation

Victim-Offender mediation brings offenders face to face with the victim of their crimes with the assistance of trained mediators. It affords the offenders the opportunity to learn the human consequences of their action. The victims are afforded the opportunity to speak their

[286] A Bello, 'Plea Bargaining and Criminal Justice in Nigeria: Issues, Problems and Prospects', *Current Law Series, Faculty of Law, University of Lagos* (2006)

minds and their feelings to the one who should hear them thereby contributing to the victim's healing[287].

Victim-offender mediation practice is designed to bring victims and offenders together face to face in safe, structured, facilitated dialogue that typically occurs in a community based setting[288]. Before this meeting, it is suggested that a separate pre-conference meetings with both the victim and the offender to explain and access the individual's readiness for the process, and to assist the victim in communicating the physical, emotional and financial impact of the crime to the offender should be conducted by a trained facilitator or mediator[289]. The meeting should enable the offender to take responsibility for his/her offending behaviour, and the victim to receive answers from the offender about "why and how" the crime occurred. Following the sharing of the stories, the victim and offender would together determine an appropriate plan to repair the harm to the victim, which may include material and/or non-material compensation.

On the effectiveness of victim-offender mediation practice, it is suggested by this research that both victims and offenders who participate are more likely to be satisfied with both the process and the outcome when compared to the traditional court processes, Victims who meet their offenders in the mediation process will less likely to fear re-victimization and to receive restitution. Offenders who complete victim-offender mediation programmes will more likely to complete their restitution obligation and less likely to re-offend compared to offenders who went through the traditional courts proceedings.

There are three basic requirements that must be met before victim-offender mediation can be used:

---

[287] BU Odoh, *Alternative Dispute Resolution in Nigeria*, (Germany: LAM Lambert Academic Publishing, 2014), p160
[288] *Ibid*
[289] *Ibid*

i. The offender must accept or not deny responsibility for the crime;

ii. Both the victim and the offender must be willing to participate; and

iii. Both the victim and the offender must consider it safe to be involved in the process[290].

3.11 The Case for Alternative Dispute Resolution (ADR) in Criminal Trials

The discussion of the critical issues in the Nigerian criminal justice system in this study shows that the system is in dire need of reform. Generally, the criminal prosecution process breaches the right of accused persons to speedy determination of charges that are brought against them. The State spends enormous resources and prosecutorial energy on endless prosecutions that ought to be wrapped up in months. The judiciary, that is congested with cases, lose precious adjudicatory time to long criminal trials and determination of appeals thereon. The victims of crimes await perpetually for justice, thereby losing faith in the judicial process. The society that ought to learn a lesson, from speedy determination of criminal trials, that, indeed, there is rule of law and due process in the polity, loses touch with, and interest in winding court proceedings, gets frustrated and comes away with the impression that certain persons are above the law. Certainly, the situation cannot but demand an urgent reform.

As noted in the introductory chapter of this study, there have been several initiatives and interventions by civil societies and state actors for the reforms of Nigeria's criminal justice administration. Not too long ago, an International Conference on Penal Abolition in Nigeria was organized by the International Conference on Penal Abolition and Local Partners. Suggestions were being made that alternative to imprisonment, or non-custodial / institutional treatment of offenders should be the main penal focus of the criminal justice system. Sadly, these initiatives and interventions are yet to result in a comprehensive reform of the criminal justice system.

[290] DJ Omale op cit

Although, several reasons have been cited for the insignificant achievement of the criminal justice administration reform community in Nigeria, including lack of consensus amongst stakeholders on methods for achieving set goals and frustrated collaboration between State and Civil Societies was the major that militated against criminal justice reform. To be fair, it can be said that the necessity of criminal justice reform, nay justice sector reform, is gaining increasing prominence in State actor's policy articulation. What is required to translate this professed necessity into reality is an effective collaboration between civil society actors and state actors in the shared aspiration to bring about an efficient criminal justice system. Nigeria is over ripped for this.

Apart from the benefits of adopting ADR in criminal trials supplied in this chapter, there is a particular benefit that can be derived from the adoption of plea bargaining system in Nigeria: *the side-tracking of the death sentence penalty*. The arguments for and against the abolition of the death penalty are still raging in Nigeria as well as in other jurisdictions. A public interest litigation attempt to make the Supreme Court of Nigeria to rule on the unconstitutionality of death penalty was rebuffed by the full Court in the case of *Onuoha Kalu v. State*[291]. The constitutional issue for determination was whether section 319(1)(a) of the Criminal Code of Lagos State which prescribes a punishment of death for any person who commits the offence of murder was inconsistent with section 31(1)(a) of the Constitution of the Federal Republic of Nigeria, 1979, which stipulated that every individual is entitled to respect for the dignity of his person, and accordingly no person shall be subjected to torture or to inhuman or degrading treatment. In resolving the question, the Supreme Court held that although the Nigerian Constitution guarantees right to life under section 30(1), the right is subject to the exercise of a

[291] (1998) 13 NWLR (pt. 531) at 531

death sentence of a court of law in respect of a criminal offence of which one has been found guilty in Nigeria. Thus, death penalty is constitutional. ADR, therefore can create a paradigm shift from the retributive justice system we have to a restorative justice system we ought to have[292].

In spite of the provisions legislating against the use of ADR in criminal justice in Nigeria, there is ample evidence that ADR is incorporated in the formal criminal justice system. For instance, plea bargaining has been legislated into the criminal justice system of Nigeria[293], Enugu State[294], Anambra State[295] and Lagos State[296]. In Anambra State, the law expressly provides thus:

> Notwithstanding anything in this Law or in any other Law, the Attorney-General of the State SHALL have power to receive, consider and accept a Plea Bargain from any person charged with any offence either directly from that person charged or on his behalf, by way of an offer to accept to plead guilty to a lesser offence than that charged[297].

The provision of s.367 of Enugu State Administration of Criminal Justice Law is hereunder:

> 1. Notwithstanding anything in this Law or any other enactment, the prosecutor may receive, consider and accept that a person charged with an offence pleas guilty for a lesser offence where the prosecutor is of the view that the acceptance of such agreement is in the interest of justice, the public interest, public policy and the need to prevent abuse of the legal process.
> 2. The prosecutor and the defendant or his legal practitioner may before the plea to the charge, enter into an agreement in respect of-
> (a) the terms of the plea bargain which may include the sentence recommended within the appropriate range of punishment stipulated for

---

[292]The adoption of ADR in capital offences will, therefore, serve as a veritable platform for circumventing the death penalty and indeed, create a social consciousness for its eventual abrogation.

[293] Administration of Criminal Justice Act, 2015, ss. 270 - 277.
[294] Enugu State Administration of Criminal Justice Law, 2017, s. 367
[295] Anambra State Administration of Criminal Justice Law, 2010, s.167.
[296] Lagos State Administration of Criminal Justice Law No. 10 of 2007, ss. 74 - 75.
[297] Anambra State Administration of Criminal Justice Law, 2010, s.167 (1)

the offence(s) charged or a lesser offence of which he may be convicted on the charge, and

(b) an appropriate sentence to be imposed by the court if the defendant is convicted of the offence to which he intends to plead guilty.

3. The prosecutor may only enter into an agreement contemplated in subsection (2) of this section-

(a) after consultation with the police responsible for the investigation of the case and the victim, and

(b) with due regard to the nature of and circumstances relating to the offence, the defendant, the victim and public interest.

More so, the Child's Rights Act[298] has also expressly incorporated ADR into the juvenile justice system. The Economic and Financial Crimes Commission is empowered to compound offences in order to obtain practical restitution[299]. In FRN v Cecilia Ibru[300], the EFCC was able to recover 199 assets and N190 billion naira through the plea bargaining process. In this case, Justice Dan Abutu of the Federal High Court sitting in Lagos, convicted Cecilia Ibru, the Former MD of Oceanic Bank Plc, of a three- count charge of authorizing loans beyond her limit,

---

[298] Cap. C50, Laws of the Federation of Nigeria 2004, sections 151, 204, 208, 209 and 223. Section 151 provides thus:

(1) Subject to the provisions of this Act and in addition to such other jurisdiction as may be conferred on it by any other law,the Court shall have unlimited jurisdiction to hear and determine- (a) any civil proceeding in which the existence or extent of a legal right, power duty, liability privilege interest, obligation or claim in respect of a child is in issue; and

(b) any criminal proceeding involving or relating to any penalty, forfeiture, punishment or other liability in respect of an offence committed by a child, against a child or against the interest of a child.

(2) The reference to civil or criminal proceedings in this section includes a reference to a proceeding which originates in the Court and that which is brought by the Court at the High Court level to be dealt with by the Court in the exercise of its appellate or supervisory jurisdiction,

(3) The Court shall, in any matter relating to or affecting a child or a family and at all stages of any proceedings before it-

(a) be guided by the principle of conciliation of the parties involved or likely to be affected by the result of the proceedings, including- .

(i) the child,

(ii) the parents or guardian of the child, and

(iii) any other person having parental or other responsibility for the child; and

(b) encourage and facilitate the settlement of the matter before it in an amicable manner.

[299] Economic and Financial Crimes Commission Establishment Act, 2007, s.14.

[300] FHC/L/297C/2009

rendering false accounts and approving loans without adequate collateral. In adjudicating the case, the prosecution and accused agreed on plea bargain by relying on section 17 of the Federal High Court Act[301], which encourages reconciliation among parties to facilitate amicable settlement in civil and criminal cases. In other cases involving several Nigerians, including Diepreye Alamieseigha, Lucky Igbinedion, Nwude[302] and Tafa Balogun, e[303], the practice was used. That, in our view, is nothing but ADR and restorative justice in action.

The incorporation of the plea bargaining procedure into the Nigerian criminal procedure law have provided a leeway to the justice system to bring about a regime of downward departures from capital punishment and the consequential award of life or long-term imprisonments. In other words, an accused person who enters into a plea agreement with the prosecution to plead guilty to a charge attracting a capital punishment, thereby saving the prosecution from the rigour of prosecution, may have his sentence bargained from death penalty to life imprisonment. The adoption of plea bargaining in will, therefore, serve as a veritable platform for circumventing the death penalty and indeed, create a social consciousness for its eventual abrogation.

Another case where ADR have been used in criminal trial in Nigeria is the Amnesty Programme of the Federal Government for Niger-Delta Militants. It offers another important evidence of ADR in the criminal justice system. Amnesty or pardon is given to somebody who

[301] Cap. F12LFN, 2004

[302] Federal Republic of Nigeria v. Nwude & Ors (Unreported, suit No. ID/92C/2004. In this case, Emmanuel Nwude and Nzeribe Okoli who were standing trial on 91 count charges of defrauding a bank of $242m pleaded guilty to the charges. The counts were reduced from 91 to 16 of which the accused persons pleaded guilty as a result of a plea bargaining entered into by the parties with a view to reach conclusion of the case.

[303] K Kotafe, $ 242 Scam: Nwude, Okoli bag 22 years respectively, Punch Newspapers, November 19, 2005, p. 1; A Adeshina, 'EFCC Breached Pact with Bayelsa Abayomi', Punch Newspapers, December 19, 2005, p. 5; N Odubude and F Makinde, 'Plea Bargain is Corruption I Bola Ajibola', Punch Newspapers, August, 5, 2007, p. 4.

has been tried, convicted and sentenced. But here, they have been a case where pardon is granted even before any arrest or trial. The entire amnesty programme was meant to be preventive, rehabilitative, restitutive as well as restorative. That is ADR in action. The militants involved could have been tried for serious felonies including economic crimes and treasons, but, the matter was approached by alternative means, for good reason and good result.

The amnesty deal by the Nigerian government for militants in the Niger Delta aimed at reducing unrest in the oil-rich region. In this deal, Late President Umaru Yar'Adua in 2009 had offered an unconditional pardon and cash payments to rebels who agreed to lay down their arms and assemble at screening centers over 60 days. The government targeted up to 10,000 militants whose attacks in the six Niger Delta States had cost the country a third of its oil production. A lot of militia leaders and foot soldiers indicated that they were tired of fighting, and wanted to come out.

Sabotage, oil siphoning rackets and kidnappings by criminal gangs and militants who said they were fighting to gain the local population a greater share of the country's oil wealth had hitted Nigeria's economy hard over the years. The government had responded with a two-pronged strategy. In May 2009, the military launched a major ground, air and sea offensive to flush militants out of their camps in the Niger Delta. Late President Yar'Adua then announced the amnesty deal, and freed Henry Okah, a suspected leader of the Movement for the Emancipation of the Niger Delta (Mend), the most active militant group in recent years. Okah accepted the amnesty offer after treason and gun-running charges against him were dropped. Another Mend leader in Bayelsa State, Ebikabowei Victor Ben, aka Boyloaf, also accepted the terms. The Federal Government made an offer that the gunmen who surrender their arms will be

given about £255 a month in cash and food allowances during the rehabilitation period. Mend agreed a 60-day ceasefire with the government and participated in the programme. The amnesty idea was a step in the right direction[304].

Another example of ADR in the criminal justice system in Nigeria is the corporate manslaughter[305] case of Pfizer Pharmaceutical Company. In 2007, criminal proceedings were brought against Pfizer by the Kano State and Federal Government following its illegal administration of Trovan, a broad spectrum anti-biotic, on children in Kano State during an epidemic. The drug had not undergone due clinical trials and resulted in death of 11 children and severe heath challenges of 186 other children. The matter was settled through an out of court settlement. Pfizer agreed to pay amounts ranging from $100,000 to 175, 000 to bereaved families and their survivors[306]. It appears that in Nigeria, ADR is working in the criminal justice system but behind a camouflage of discouraging legislative language.

The case for ADR in criminal trials therefore is that the statutory provisions for plea and sentence bargains under section 270 of ACJA and equivalent sections of sections 75 of ACJL Lagos, 367 of ACJL Enugu and 167 ACJL Anambra are the first robust statutory efforts to codify the practice of ADR in criminal proceedings. Before then, there have always been informal negotiations between prosecutors and the criminal defendants on, not only the charges to be brought but on completely dropping the entire charges, in return for some concessions by

[304] The Guardian Newspaper, August 6, 2009, 2

[305] Corporate manslaughter is an unlawful killing by a corporation or company which does not amount to death. It occurs where the corporation or company causes death under such circumstances that the corporation or company did not intend to kill and did not foresee death as a probable consequence of its conduct but there is some blameworthiness, such as gross negligence, in its conduct. Under section 484 (2) of the Administration of Criminal Justice Act, 2015, a corporation may be charged jointly and tried with individual for any crime.

[306] This Day Newspaper, August 24, 2011, 19.

the defendant, irrespective of the class of the offence charged. Sometimes charges are totally dropped through a victim-offender mediation either at stages of investigation, arraignment or trial, including in cases where the offence was a felony, despite the provisions of sections 127 and 128 of the Criminal Code, which creates the offence of 'compounding felony'.

The provisions of section 14(2) of the EFCC Act, and to some extent, section 180 of CPA were erstwhile statutory opportunities for bargain of the charges. However, there was no basis for sentence bargain until the ACJL regime. Section 180 (1) and (2) of CPA provided that:

> (1) When more charges than one are made against a person and a conviction has been had on one or more of them the prosecutor may, with the consent of the court, withdraw the remaining charge or charges or the court, of its own motion, may stay the trial of such charge or charges.
>
> (2) Such withdrawal shall have effect of an acquittal on such charge or charges unless the conviction which has been had is set aside in which case subject to any order of the court setting aside such conviction, the court before which the withdrawal was made may, on the request of the prosecutor, proceed upon the charge or charges so withdrawn.

Section 14 (2)[307] provides that:

> Subject to the provision of section 174 of the Constitution of the Federal Republic of Nigeria, 1999 (which relates to the powers of the Attorney General of the Federation to institute, continue or discontinue criminal proceedings against any persons in any court of law), the Commission may compound any offence punishable under this Act by accepting such sums of money as it thinks fit, not exceeding the amount of the maximum fine to which that person would have been liable if he had been convicted of that offence.

With the clear provisions of ACJA and ACJL for plea and sentence bargains and restorative justice in criminal proceedings, the criminal offences of compounding felony under sections 127 and 128 of the Criminal Code Act or Criminal Code Law become redundant, ACJA and ACJL

[307] Economic and Financial Crimes Commission (Establishment) Act, 2004

being later in time. The researcher therefore makes bold to submit that ADR is amenable in all criminal proceedings.

However, notwithstanding our submission, we are not oblivious of the need for a comprehensive reform of the criminal justice system. The reforms that are needed to cure the major ills affecting the criminal justice administration will include the compulsory adoption and domestication of the Administration of Criminal Justice Act, 2015 by all the States in Nigeria, with a view to updating and modernizing it; and the reorganization of the police, ministries of justice, the judiciary and the prison. In performing this task, experiences from other common law jurisdictions will be invaluable. Of course, adequate funding will be required to push through the reform process.

3.12 Review of Selected Criminal Cases in Lagos State Where ADR Applied to Capital Offences.

Case 1:

In **The State of Lagos v. Stephen Ndukwe, SUIT NO ID/4623C/2017**, the Defendant herein, Stephen Ndukwe was charged upon information filed on 27/12/17 for the offence of Murder, contrary to section 223 of the Criminal Law, Ch. C. 17, vol. 3, Laws of Lagos State, 2015. Stephen Ndukwe (M), on or about the 21st of July, 2017, at 5:30am, at Nu-Rock Hotel, No. 5/7 Kola Ogundeji Street, Idimu Lagos, in the Ikeja Judicial Division internationally killed one Stanley Lawrence Ebhodogha 'M' aged 31 years by stabbing him in the neck and chest with a knife. The Record of the Court beared out the submission of learned Counsel of the State/Prosecution, Mrs. M. Osibogun that on 25/6/18 date set for arraignment, the court was

informed that the Prosecution had been approached for a Plea Bargain by Counsel to the Defendant.

The Plea Bargain and Sentence Agreement was entered on 11/12/18 and duly executed by the Prosecution (the Hon. Attorney-General) & the Defendant upon an Amended Charge wherein the Defendant was charged for the offence of Conspiring to Murder, contrary to section 223 on the criminal law, ch.c.17, vol3, Laws of Lagos State, 2015.This was a lesser charge to which the Defendant pleaded GUILTY, upon being arraigned in respect of same on the ground that the Defendant has shown remorse. Before being arraigned, this Defendant did answer to the Court in the affirmative when asked if he entered into the said Agreement voluntarily. The Terms of the Agreement were also duly confirm by the Defendant counsel, Mr. A.I. Unegbu.

The said Terms are as reproduced hereunder:

1. The Prosecutor shall amend the present Information dated 24th of November, 2017, pending before the Honourable Court and substitute same with an Amended Information as per attached Exhibit "A".
2. The Amended Information shall contain a one count charge of Conspiring to Murder contrary to Section 233 of the Criminal Law Ch C17, vol. 3, Laws of Lagos State, 2015.
3. The Defendant shall enter a plea of 'Guilty' to a lesser offence contained in the Amended Information formally in open court upon his arraignment on the new charge.
4. The Honourable Court may then convict the Defendant upon his plea to the new charge.
5. The Defendant has agreed to be sentenced to imprisonment for Ten (10) years.
6. The Defendant has been in custody for 1 year.
7. The Prosecution has further agreed that the Defendant will serve a prison sentence of Ten (10) years from the date of conviction.

It was in the light of the foregoing, that Court had no reason to adjust, amend or question the above Terms having perused same carefully. Hon Justice Adenike J. Coker (Mrs) thereafter convicted the Defendant of the lesser offence of Conspiracy to Murder contrary to Section 233 of the Criminal Law of Lagos State 2015 accordingly and in line with the said Plea Bargain and

Sentence Agreement, sentenced him as agreed to a Term of 10 years imprisonment; the time of 1 year haven been spent in custody notwithstanding.

Case 2:

In **The State of Lagos v. Matthew S.O.Eze & 2 Others, SUIT NO ID/46582C/2017,** the 3 Defendants herein, Matthew S.O Eze, John Olajide & Prosper Obi were arraigned on 10/12/18 on an Amended Count Charge of the same date for the offence of Assault Occasioning Harm contrary to Section 173 of the Criminal Law, Ch. 17, Vol. 3, Laws of Lagos State, 2015. Matthew S.O Eze (M), John Olajide (M) & Prosper Obi (M) on about 10th day of March, 2015 at about 0700 hrs at Gowon Estate, Ipaja Road, Lagos in the Ikeja Judicial Division did assault one Abiodun Sunday. The Record of the Court beared out the submission of learned Counsel of the State/Prosecution, Mrs. M. Osibogun that on 10/12/18, the court was informed that the Prosecution had been approached for a Plea Bargain by Counsel to the Defendants.

The Plea Bargain and Sentence Agreement was entered on 10/12/18 and duly executed by the Prosecution (the Hon. Attorney-General) & the Defendants upon an Amended Charge wherein the Defendants were charged for the offence of Stealing contrary to Section 287 of the Criminal Law[308]. This was lesser charge to which they all/each pleaded GUILTY to each of the 2 – Counts.

The plea on the Amended Charge was made & filed respectively pursuant to a Plea Bargain & Sentence Agreement duly executed between the said Defendants and the Hon. Attorney-General of Lagos State: same was also dated 10/12/18. This was made pursuant to an Application made by the Defendant's Counsel after Trial had commenced and 3 Prosecution witnesses PW1 – PW3 taken. The 3 Defendants were each asked by the Court if they entered into

[308]Ch. 17, Vol. 3, Laws Ch. Lagos State, 2015

same voluntarily to which they answered in the affirmative before their plea was taken. The court haven perused the said Terms of the Plea Bargain & Sentence Agreement & agreed with the Terms of same to wit: that the Defendants having shown remorse, have agreed with the Hon. Attorney-General of Lagos State & will serve sentence upon conviction of 5 years from date of remand. The said Terms are reproduced hereunder as follows:

1. The Prosecutor shall amend the present Information dated the 3rd of March, 2017 pending before the Honourable Court and substitute same with amended information as per attached Exhibit "A".
2. The Amended information shall contain a two-count charge of Assault occasioning harm contrary to Section 173 of the Criminal Law, Ch. 17, Vol. 3. Laws of Lagos State, 2015 and Stealing contrary to Section 287 of the Criminal Law Ch. 17, Vol 3, Laws of Lagos State, 2015.
3. The Defendants shall enter a plea of 'Guilty' to a lesser offence contained in the Amended information formally in open court upon their Arraignment on the new charge.
4. The Honourable Court may then convict the Defendants upon their plea to the new charge.
5. The Defendants have agreed to be sentenced to imprisonment for Five (5) years.
6. The Defendants have been in custody for 3 years and 9 months.
7. The Prosecution has agreed that the Defendants will serve a prison sentence of Five (5) years from the date of remand.
8. The Prosecution has further agreed that the term of year spent in custody will be deducted from the term of imprisonment.

The said Agreement also stated that the Defendants had been in custody for 3 year & 9 months as stated by learned state counsel Mrs. Osibogun, leaving a term of 1 year & 3 months to be served. Their learned Counsel, Mrs. E.B Ogbogbo made an allocutus on their behalf that they were remorseful and will not tow the line of crime again.The Court had no reason to doubt the submissions of Counsel in the reared. The Defendants were therefore convicted on their guilty plea accordingly in respect of the Amended Charge of 10/12/18 & sentenced to a 5 years term as agreed.

Having served 3 years & 9 months in custody since remand, Hon. Justice Adnike J. Coker (Mrs) commuted the remainder of their sentence of 1 year & 3 months to 6 calendar months only from that day after which they shall be released & adjoined to go out & sin no more. These 6 months was being given to enable them & their families prepare for their release to prevent them resorting back to a life of crime. The Defendants are further remanded at Kirkiri Maximum Prison to serve out the commuted term.

Case 3:

In **The State of Lagos v. Samson Adenekan, SUIT NO ID/2620C/2016**,the Defendant herein, Samson Adenekan, was arraigned on the Amended Charge for the offence of Neglect to prevent Felony contrary to Section 410 at the Criminal Law[309].Samson Adenekan (M) on the 22nd day of November, 2013 at about 2200 hours at No. 9, Adeniyi Street, Ladi-Lak, Bariga, in the Ikeja Judicial Division knowing that one Mudashimu Abass and others at large had conspired to rob failed to report the same to the Police or any other law enforcement agency, thereby neglecting to Prevent a Felony.

He pleaded GUILTY to same. This was pursuant to a Plea Bargain Agreement dated 5/12/18 duly applied for by his counsel, Mr. W. Obuagbuka & executed between the prosecution and Defendant.

The said Terms of same are reproduced hereunder:

1. The Prosecutor shall amend the present Information dated 21st of March, 2018, pending before the Honourable Court and substitute same with an Amended information as per attached Exhibit "A".
2. The Amended Information shall contain a one count charge of Neglect to prevent Felony contrary to Section 410 of the Criminal Law Ch C17, Vol. 2 Laws of Lagos State, 2015.

[309]Ch. C17, Vol 3, Laws of Lagos State, 2015

3. The Defendant shall enter a plea of 'GUILTY' to a lesser offence contained in the Amended Information formally in open court upon his arraignment on the new charge.
4. The Honourable Court may then convict the Defendant upon this plea to the new charge.
5. The Defendant has agreed to be sentenced to imprisonment for 2 years.
6. The Defendant was in custody for 3 years and 2 months
7. The Prosecution has further agreed that the term of years remand in custody will be deducted from the term of imprisonment.

The Plea Bargain Agreement shows that the Defendants was duly advised of his rights having shown remorse as stated in the said Agreement & he conformed before the Court that he entered into same voluntarily. It was in the light of the foregoing, that Defendant was thereby found guilty as pleaded & convicted for the said offence in the Amended Charge accordingly. The sentence recommended was adopted by the Court & he was sentenced to a term of imprisonment of 2 years. However, the Defendant having spent 3 years & 2 months in custody upon remand & before the grant of bail by the court, the court found that he had served more than the sentence ordered. In this wise, he was served his sentence & no further time in custody was required.

Case 4:

In **The State of Lagos v. Emmanuel Okinedo, SUIT NO ID/4870C/2017,** the Defendant/Applicant Emmanuel Okinedo was charged upon Information before the Court for the offences of Assault contrary to section 171 of the Criminal Law of Lagos State, 2011 and Damage to Property contrary to section 348 of the Criminal Law of Lagos State, 2011.

Before the arraignment the Counsel to the Defendant, Mr. Dapo Opakunle pointed out to the court that the charge is the same for which the Defendant had been tried & convicted at the lower Court by Magistrate M.O. Osibain & submitted that the proper procedure for the Court to adopt relying on the case of *EDU v. C.O.P* (1952) 14 WACA 163 is to arraign the Defendant &

upon being called upon to enter his plea, the Defendant is to enter into a Bar Plea as per his Affidavit of 4/4/18 previously filed & served on the Prosecution to which the copies of certified true copies of proceedings & judgment at the lower court were attached, service was duly confirmed by State Counsel, Mrs. E.Y Dipe.

The court agreed that it is the proper procedure, citing the case *Ogenyi v. Police* (1957)NRNLR 140, where it was held that a Plea in Bar must be made after the charge is read and before he pleads. Once he pleads he has submitted to the trial and his Plea in Bar will no longer avail him". See *R.v. Pategi* (1957) NRNLR 41. Consequently, the Defendant was arraigned and he made a Bar Plea as per the above. The certified True Copies of the said proceedings & judgment were duly sighted by the Prosecution & this Court. Learned Counsel for the Defendant submitted relying on the 1999 Constitution (as amended) that the law is settled that a person cannot be tried for the same offence charged and urged the court to dismiss the charges.

The Prosecution Counsel, Mrs. E.Y. Dipe left the matter to the discretion of the court. The Court considered the above submissions vis-à-vis the Bar Plea affidavit of the Defendant & evidence sighted to wit certified True copies of the Proceedings & Judgment in respect of this Defendant at the lower court which the court had perused thoroughly. The charges were the same before the court as were brought in the lower court against this same Defendant.

The facts, circumstances & evidence in respect of the case fell within the settled position of the concept of Double Trial which is provided for in section 36(9) & (10) of the 1999 Constitution (as amended). No person who shows that he has been tried by any court of competent jurisdiction or Tribunal for a criminal offence either convicted or acquitted shall again

be tried for that offence or for a criminal offence having the same ingredients as that offence, save upon the order of a superior court. The Court cited the cases of:

1. AGAGAMAGA V. F.R.N. (2007) 2 NWLR (Pt. 1019) 586.
2. ABACHA V. F.R.N (2006) 4 NWLR (Pt. 970) 239
3. STATE V. DUKE (2003) 5 NWLR (Pt. 113) 394
4. NAFIL AABIU V. STATE (1980) NSCC 291.

The Court also citied S. 238 (1) (a) of Administration of Criminal Justice Law of Lagos State 2015 (Act) 2015 which provides thus:

> (1) Without prejudice to Section 226 of this Act, a Defendant charged with an offence is not liable to be tried for that offence where it is shown that he has previously been:
> (a) Convicted or acquitted of the same offence by a competent court.

In the light of the above, the court held that the proper order for the court to make is to decline jurisdiction to retry the Defendant on the same charges having not taken his plea due to the Constitutional Bar Plea which avails him & dismiss the charges against the Defendant. The said charges were therefore dismissed accordingly and the Defendant discharged.

The above reviewed classes are classic examples of the applicability of ADR to capital offence. If is applicable in Lagos State it should also apply in the other States of the Federation.

CHAPTER FOUR

NON-CUSTODIAL MEASURES FOR CASE DISPOSAL : THE NEW MODEL[1]

4.1 The New Model

The New Model of criminal justice administration is an integrated and harmonized blend of retributive justice, restorative justice and African customary justice systems. The model essentially aims at promoting effective crime management, caseload reduction and prison decongestion through the mainstreaming of Non-Custodial Measures / Options, and Case Diversion Measures into the Nigerian criminal justice system.

It is the first attempt to professionally and exhaustively present to stakeholders in Nigeria the dynamics of these mechanisms beyond the current (largely uninformed) public debate about their suitability or otherwise for Nigeria. In addition to establishing the legal basis for use of these mechanisms in Nigeria.

4.2 Non- Custodial Measures / Options

The development of non-custodial measures or options reflects the search in Nigeria for non-prison punishments. The desire for such punishments has been justified by arguments based on cost-effectiveness, on a just deserts philosophy, on the basis of the need for reform and rehabilitation rather than punishment and on the recent enactment of Administration of Criminal Justice Act, 2015, which provides interalia for Probation services, Community sentences and Parole.

[1] This New Model was introduced by **Late Kevin Nwosu, a Former Director (Academics), Nigerian Law School**. He was the legal draftsman who introduced Non-Custodial Measures into the Administration of Criminal Justice Law of Lagos State, 2011. He was also one of the drafters of the Administration of Criminal Justice Act, 2015. His notable contributions towards justice sector reforms in Nigeria informed why the researcher recommended this new Model as a way of immortalizing him. Kevin Nwosu is the proponent of this Model in Nigeria and this model has been remarkably durable and still describes important facts of the practice and politics of criminal justice in Nigeria.

Probation was affected severely by the pessimism of the 'nothing works' era in Nigeria, but a new optimism has surrounded recent emphases on 'what works' in community sentences, and on implementing programmes aimed at reducing the likelihood of an offender re-offending, signalling a return to rehabilitative methods on the grounds that they can best have an impact on recidivism. This informed the enactment of the Administration of Criminal Justice Act, 2015. This research work seeks to explore the extent to which non-custodial approaches and measures has become the modern trends in the offender reform agenda of the new millennium and how it can contribute to the current efforts at criminal justice reforms in Nigeria, and other jurisdictions with similar legal history. In doing this, the paper shall highlight and consider suitable appropriate legal and institutional framework for mainstreaming non-custodial measures in criminal justice in Nigeria. It will then take an excursion into the administration of probation services, community sentence and parole under the Administration of Criminal Justice Act, 2015, thereafter, it will explore current thinking about how community sentences can be delivered effectively and some of the ways in which the effectiveness of community sentences can be evaluated.

4.3 Probation Services in Nigeria.

The idea that offenders can be dealt with in the community has a long history. In the nineteenth century many juvenile offenders were saved from prison by missionaries who agreed to be responsible for them - the forerunners of the probation service.

Probation as a concept is of recent origin. It could be traced back to the 19th century in the United State of America when Mr. John Augustus at Boston, a cobbler, stood bail for a drunkard in 1841. The drunkard was ordered to return to court after three weeks for sentencing. The drunkard, while under Augustus' supervision was taught the art of shoe making and started

to show signs of reform. The offender returned to court as a sober man, accompanied by Augustus. It was a surprise to everyone present as his appearance and demeanour have changed [2] Within the following year, it was on record that Augustus had supervised close to 2000 offenders[3]. Augustus soon became an institution whose works later constitute a large percentage of the practice of probation globally. His successful practice gained so much recognition that in 1878, the first probation statute in the United State was passed after the death of Augustus[4].

Whatever the emphasis in probation, a court cannot order probation without the existence of an appropriate service infrastructure. The probation service must provide the court with the information it needs. These may be known as the social inquiry reports to which the Tokyo Rules refer. Such reports describe the background of offenders, detail the circumstances of their lives relevant to understanding why they committed their offences, and recommend sentencing alternatives, such as treatment for substance abuse, which may help the offender change the behaviour that triggers offending. They must also include information about how the offender is likely to cope in the community as well as with any conditions or restrictions the court might consider imposing. Most importantly, the probation service must be able to implement the probation order of the court by providing the service support and supervision of other conditions of probation that the court imposes.

[2] AO Yekini, and M Salisu, 'Probation as a Non-Custodial Measure in Nigeria: Making a Case for Adult Probation Service', *African Journal of Criminology and Justice Studies: AJCJS,* vol. 7, Nos 1 & 2, (2013), p.105
[3]*Ibid.*
[4] *Ibid*.

In England, the earliest form of probation service has been traced to the work of police court missionaries founded in 1876 by the Church of England Temperance Society (CETS). The fundamental duties of the CETS appointed missionary workers was to bail offenders and placed them under the supervision of the society. They reclaimed the lives and souls of offenders.

It is pertinent to note that the success of Mr. John Augustus pioneering work gained so much recognition for the appointment of a salaried probation officer. Thereafter, Massachusetts gave a statutory recognition to the service by enacting the first probation law in United States in 1878. Other states in the US followed suit, while in England, the country had its first probation law in 1878 when parliament passed the Probation Offender Act of 1878. Since then, the growth of the practice became phenomenal and has spread quickly across the globe. Nigeria also caught unto the trend when she first included in her Criminal Procedure Act, provisions for probation in sections 435 - 440 in 1945.

Subsequent to this Act, various states adopted the provisions of the Act when states were first created in 1967[5]. Apart from the provisions of the CPA, probations of juvenile offenders was also specifically provided for the Children and Young Persons Law in 1946. Currently, the national law providing for probation in Nigeria is sections 453 - 467 of the Administration of Criminal Justice Act, 2015[6].

It's quite heartbreaking that in exercising their wide discretionary powers, Nigerian judges tends to adopt a patently punitive and retributive approach despite this existing legal

[5] CPL of Lagos State.
[6] Hereinafter refers to as The Act.

provisions that encourage the use of non-custodial measures[7]. Even the policy makers in Nigeria have acknowledged this fact when a government representative stated thus:

> Nigeria has the statutory provisions for probationary sentences, but the administrators of justice hardly ever employ such provisions. Yet evidence shows that on the basis of the statutorily offenders presently sent to prison should have qualified for such sentences. This situation...may be explained by the colonial heritage and training of our justice administrators, their belief in deference, and their tendencies to take the part of least resistance to imprisonment and / or fine[8].

4.3.1 The Concept of Probation under the New Legal Regime

The word *'probation'* has different meanings, depending on how and when the term is used and by whom. Probation can refer to a sentence; a convicted offender is placed and maintained in the community under the supervision of a duly authorized agent of the court[9]. It can also connote a statute or process; the individual on probation is subject to certain rules and conditions which must be followed in order to remain in the community. Probation can also refer to an organization; the probation department manages, supervises, and treats offenders and carries out investigations for the court. Although the term has many meaning, it usually indicates a non-punitive form of sentencing for convicted criminal offenders and delinquent youth, which emphasizes maintenance in the community and treatment without institutionalization or other forms of punishment.

---

[7] MI Edokpayi, 'Suspended Sentence: Its Desirability in Nigeria'. Retrieved 6/7/16 from <www.docplayer.net > Accessed on July 6, 2016.
[8] *Ibid*.
[9] JJ Senna, and LJ Siegel, *Introduction to Criminal Justice*, (2nd edn, New York: West Publishing Company, 1981), p.446.

The philosophy of probation is one which believes that average offender is not actually a dangerous criminal or a menace to society. Advocates of probation suggest that when offenders are institutionalized instead of being granted community release, the prison community becomes their new reference point, they are focused to interact with hardened criminals, and the ex-con label prohibits them from making successful adjustments to the society[10]. Probation provides offenders with the opportunity to prove themselves, gives them a second chance, and also allows them to be closely supervised by trained personnel who can help them to reestablish proper forms of behaviour in the community.

In actual practice, probation usually involves the suspension of the offender's sentence[11] in return for the promise of good behaviour in the community under the supervision of the probation department. Under the Act, probation implies a contact between the court and offenders in which the former promises to hold a prison term in abeyance while the latter promises to adhere to a set of rules or conditions mandated by the court. If the rules are violated, and especially if the probationer commits another criminal offense, probation may be revoked; this means that the contract is terminated and the original sentence enforced. Thus, section 454 of the Act provides:

1) Where a defendant is charged before a court with an offence punishable by law and the court thinks that the charge is proved but is of opinion that having regards to:
    a) the character, antecedent, age, health, or mental condition, of the defendant charged;

[10] *Ibid*
[11] Usually replacing a term in an institution, though minors can simply be placed on probation without the threat of detention.

b) the trivial nature of the offence; or

c) the extenuating circumstances under which the offence was committed, it is inexpedient to inflict a punishment or any order than a nominal punishment or that it is expedient to release the defendant on probation, the court may, without proceeding to conviction, make an order specified in subsection (2) of this section.

2) The court may make an order under subsection (1) of this section:

a) dismissing the charge; or

b) discharging the defendant conditionally on his entering into a recognizance, with or without sureties, to be of good behaviour and to appear at any time during such period not exceeding three (3) years as may be specified in the order.

If an offender on probation commits a second offence which is more severe than the first, he or she may also be indicted, tried, and sentenced on that second offence. Probation may be revoked simply because the rules and conditions of probation have not been met[12], however, it is not necessary for an offender to commit further crime.

Each probationary sentence is for a fixed period of time[13], depending on the seriousness of the offence and the statutory law of the jurisdiction. Probation is considered served when the

[12] The Act, s. 459 (1) of the Act provides: *"Where the court before which a defendant is bound by his recognizance under this Part to appear for conviction or sentence is satisfied by information on oath that the defendant has failed to observe any of the conditions of his recognizance, it may issue a warrant for his arrest or may, if it thinks fit, instead of issuing a warrant in the first instance, issue a summons to the defendant and his sureties, if any, requiring him or them to attend at the court and at such time as may be specified in the summons".*

[13] The Act; s.454 (2) (b) provides : *"The court may make an order under subsection (1) of this section discharging the defendant conditionally on his entering into a recognizance, with or without sureties, to be of good behaviour and to appear at any time during such period not exceeding three (3) years as may be specified in the order".*

offender fulfills the conditions set by the court for that period of time; he can then live without interference from the state.

4.3.2 Conditions of Probation

A probation sentence is usually viewed as an act of clemency on the part of court, and is reflective of the rehabilitative aspects of the Nigerian criminal justice system. Yet, there are two distinct sides to the probationary contract drawn up between the offender and the court; one side involves the treatment and rehabilitation of the offender through regular meetings with trained probation staff or other treatment personnel; and the other reflects the supervision and enforcement aspects of probation. Probation under the Act saddles the probationer with rules and conditions which may impede achievement of the stated treatment goals of the probation department by emphasizing the punitive aspects of criminal justice.

When probation is fixed as a sentence, the court sets down certain rules as conditions for qualifying for community treatment. The Act mandates that certain conditions be applied in every probation case; usually, the sentencing judge maintains broad discretion to add to or lessen these standard conditions on a case-by-case basis[14].

A presiding judge may not, of course, impose capricious or cruel conditions, such as requiring an offender to make restitution far beyond financial capacity. For example, Senna & Siegel[15] opined that a condition of probation which:

i. had no relationship to crime of which the offender was convicted;

ii. related to conduct which was not itself criminal; and

[14] The Act; section 455 (1) - (3).
[15] JJ Senna, and LJ Siegel opcit. (n) 8.

iii. required or forbade conduct which was not reasonably related to future criminality, did not serve the statutory ends of probation and was therefore invalid.

Probation conditions vary from jurisdiction to jurisdiction and among age groups of offender. The Administration of Criminal Justice Act, 2015, did not provide comprehensive standard conditions which reflect the conflict of inherent in the control verses treatment approach to probation. It is recommended in this paper that the American Bar Association's Standards for Probation Conditions should be adopted in Nigeria to fill the lacunae such omission in the Act created. These are:

1. It should be a condition of every sentence to probation that the probationer lead a law-abiding life during the period of his probation. No other conditions should be required by statute; but the sentencing court should be authorized to prescribe additional conditions to fit the circumstances of each case. Development of standard conditions as a guide to sentencing courts is appropriate so long as such conditions are not routinely imposed.
2. Conditions imposed by the court should be designed to assist the probationer in leading a law-abiding life. They should be reasonably related to his rehabilitation and not unduly restrictive of his liberty or incompatible with his freedom of religion. They should not be so vague or ambitious as to give no real guidance.
3. Conditions requiring payment of fines, restitution, reparation, or family support should not go beyond the probationer's ability to pay.
4. The performance bond now authorized in some jurisdictions should not be employed as a condition of probation.

5. Probationers should not be required to pay the costs of probation.
6. Conditions may appropriately deal with matters such as the following:
    a) cooperating with a programme of supervision;
    b) meeting family responsibilities;
    c) maintaining steady employment or engaging or refraining from engaging in a specific employment or occupation;
    d) pursuing prescribed educational or vocational training;
    e) undergo available medical or psychiatric treatment;
    f) maintaining residence in a prescribed area or in a special facility established for or available to persons on probation;
    g) refraining from consorting with certain types of people or frequenting certain types of places;
    h) making restitution of the fruits of the crime or reparation for loss or damage caused thereby.

It is pertinent to note that judges may amplify or restrict the aforesuggested comprehensive conditions as befits a particular case. The offender who has a drinking problem may be required to participate in Alcoholics Anonymous or a similar treatment programme. According to a common practice in the juvenile sector, a judge may assign work projects to youthful probationers; they may help charitable organizations or even aid the victims of their crimes. Indigent adults who cannot make any financial restitution, or cannot afford to pay a fine, may also be assigned work projects. It is not unusual for juveniles involved in vandalism or other acts of willful destruction of property to be required to clean up and repair the targets of their actions.

4.3.3 Duties of Probation Officers

A probation officer shall, subject to the directions of the court:

a) where the person on probation is not actually with the probation officer, visit or receive reports on the person under supervision at such reasonable intervals as may be specified in the probation order or subject as the probation officer may think fit;

b) see that he observes the conditions of his recognizance;

c) report to the court as to his behaviour; and

d) advise, assist and befriend him and when necessary to endeavour to find him suitable employment[16].

Outside the aforestated statutory duties[17], there are four primary duties of probation officers:

i. **Investigation**: In the investigation stage, the probation officer conducts an inquiry within the community in an effort to discover the factors related to the criminality of the offender. This investigation is conducted primarily to gain information for judicial sentences, but in the event the offender is placed on probation the investigation becomes a useful testimony on which to base treatment and supervision.

ii. **Intake**: Intake is a process by which probation officers interview cases which have been summoned to the court for initial appearance. Intake is most common in the juvenile justice process but may also be employed in adult misdemeanant case. In some jurisdiction, during juvenile court intake, the petitioner and complainant may work with the probation officer to determine an equitable solution to the case. The probation officer

[16] The Act, s. 457 (1)(a)-(d)
[17] The Act, s. 457 (1) (a)-(d)

may settle the case without further court action, recommend restitution or other compensation, initiate actions that results in a court hearing, or recommend unofficial or informal probation.

iii. **Diagnosis**: This is the analysis of the probationer's personality and the subsequent development of a personality profile which may be helpful in treating the offender. Diagnosis involves the evaluation of the probationer, using information from an initial interview or intake or the pre-sentence investigation, for the purpose of planning a proper treatment schedule. The diagnosis should not merely reflect the desire or purpose of labeling the offender neurotic or psychopathic, for example, but should codify all that has been learned about the individual, organized in such a way as to provide a means for the establishment of future treatment goals.

iv. **Treatment Supervision**: Finally, the probation officer participates in treatment supervision. Based on knowledge of psychology, social work, or counseling and diagnosis of the offender, the probation officer plans a treatment schedule which hopefully will allow the probationer to fulfill the probation contract and make a reasonable adjustment to the community. The treatment function is a product of both the investigative and diagnostic aspect of probation. It is based on the probation officer's perceptions of the probationer, including family problems, peer relationships, and employment background. Treatment may also involve the use of community resources. For example, a probation officer who discovers that a client has a drinking problem may help to find a detoxification center willing to accept the case, while a chronically underemployed offender may be given job counseling or training. Or, in the case of

juvenile delinquency, a probation officer may work with teachers and other school officials to help a young offender stay in school.

A probation officer may at any time be relieved of the above duties or in case of the death of the probation officer named, another person may by consent be substituted by the court before which the defendant is bound by his recognizance to appear for conviction or sentence[18].

4.3.4 Probation and Suspended Sentence - Distinguished.

Although probation to some extent has its historical roots in suspended sentence and both of them are closely linked with court procedure but the two materially differ in many aspects. All suspended sentences are not probation. The probation must carry with it some degree of supervision which is not necessary in case of suspended sentence. As regards the suspended sentence, judges are restricted by statute in invoking it. In some cases, *imposition* of sentence is suspended while in other its *execution* is suspended. As to the desirability of one of these forms over the other, general view is that out of the two, the suspension of imposition of sentence is preferable. This is because of the fact that in this case, there is lesser stigma attached on the offender. Commenting on the suspended sentence, *Paranjape*[19] observed that suspended sentence is vestige of the era of retributive justice and should either be abolished or reinterpreted in the light of the newer philosophy of probation. In his view, when certain jurists began to place restriction on the quasi-freedom of the recipients of the suspended sentence, the rudiments of probation began to emerge.

Distinguishing probation from suspended sentence, *Paranjape* observed that probation is far more ambitious and adaptable idea than discharged or suspended sentence. Under probation, the court prescribes no sentence but instead, requires the offender to be under supervision of a

[18] *Ibid*; s. 456.
[19] NV Paranjape, *Criminology and Penology*, (14th edn Allahabad: Central Law Publication, 2010), p. 483.

probation officer and maintain contact with him for a prescribed period. In England, this period may vary from one to three years and in parts of United States it may be upto five years. The probationer becomes liable to sentence for original crime only when he fails to keep the requirements or commits another offence[20]. In Nigeria, the period shall not exceed three years[21]. Probation is essentially selective, designed only for those who have prospects to reform.

4.4 Community Sentence or Order.

Community sentence is a form of punishment wherein an offender, usually in cases of minor offenses and/or a first timer, is given a social responsibility in lieu of a jail term. This form of social responsibility ranges from an array of options but is best guided by the needs of the locale in question:

- It could be sanitation wise, farming and helping out in other lacking government functions;
- Cleaning roadside verges;
- Helping the elderly in nursing homes;
- Helping the local fire or police service;
- Helping out at a local library;
- Tutoring children with learning disabilities;
- Cleaning nursing home gardens; and
- Cleaning streets, drainages in local areas[22].

[20] *Ibid.*
[21] The Act, s. 454 (2) (b).
[22] The Administration of Criminal Justice Law of Lagos State, 2011; s.3 (a) - (c).

The sole purpose of community sentence is to properly rehabilitate offender as well as teach a moral of statesmanship. The Act makes provisions for community sentence as a form of punishment for minor offences and misdemeanor. Sections 460 provides:

1. Notwithstanding the provision of any other law creating an offence, where the court sees reason, the court may order that the sentence it imposed on the convict be, with or without conditions, suspended in accordance with the conditions of the suspension.
2. The court may, with or without conditions, sentence the convict to perform specified service in his community or such community or place as the court may direct.
3. A convict shall not be sentenced or suspended to suspended sentence or to community service for an offence involving the use of arms or offensive weapon, or for an offence which the punishment exceeds imprisonment for a term of three (3) years.
4. The court, in exercising its power under subsection (1) or (2) of this section shall have regards to the need to:
    a) reduce congestion in prisons;
    b) rehabilitate prisoners by making them to undertake productive work; and
    c) prevent convict who commit simple offences from mixing with hardened criminals.

There exists an array of instances where community services would be apt as an alternative to prison or jail term. For example, recently, a resident of Lagos state, Nigeria was sentence to two-day jail term for refusing to pay transit toll fees at the Lekki-Epe expressway. We wondered if a more reasonable punishment couldn't have been employed. We know only too well what our prison system achieves; the extreme opposite of rehabilitating offenders and this seems to be the aim by every indication. If the government posits that the contrary is the case in terms of reformation, why therefore was this sentence passed? It our humble submission that such jail term is mindlessly crude and should not be repeated. If there is one thing that has been proven, it is that passing harsh punishment does not deter the crime. It would only lead to the commission of other crimes by the offender to avoid being apprehended.

In community sentence, people convicted of crimes are required to perform certain services that would be beneficial to the community or to work for certain public agencies that need man power for service delivery. For instance, a fine may be reduced in exchange for a prescribed number of hours of community service. Sometimes the sentencing is specifically targeted to the convict's crime, for example, a litterer may have to clean a park or roadside, or a drunk driver might appear before school groups to explain why drunk driving is a crime.

The relationship between the offence and the sentencing would encourage proper rehabilitation as offenders would understand from first hand education what behaviours are ethically and morally acceptable. This is achieved while the community service sentence is being carried out.

There is also a win-win situation at play when adopting community sentence as the services would be beneficial to society rather than punishment for its own sake. A good example of the benefits is seen in offenders that are professionals who would have to exercise their skill to gaping needs in society. A lawyer in this case would have to offer pro bono legal services while a doctor engaged in field and community health care services. Offenders that are not specialist could also be sentenced to assisting with cataloging case files at ministries and police stations etc. There is also a gain in the reduction of the cost of incarceration. Community sentence also provides flexibility as minor offenders that are in school that pick select days (weekends especially) to serve out their sentence as long as the sentenced hours handed are met.

Under the Act, the Chief Judge in every judicial division has the statutory duty of establishing Community Service Center to be headed by a Registrar[23] who shall be responsible for overseeing the execution of community sentence in that division[24]. The Registrar shall be assisted by suitable personnel who shall supervise the implementation of Community Service Orders that may be handed down by the courts[25]. The functions of the Community Service Center include:

a) Document and keeping detailed information about convicts sentenced to community service including the:
    i. name of the convict,
    ii. sentence and the date of the sentence,

[23] In Lagos State, a Community Service Officer is appointed in each Magisterial District in the State by the Attorney-General of the State after consultation with the Commissioner for Social Development.
[24] The Act; s. 461 (1).
[25] *Ibid*; subsection (2).

iii. nature, duration and location of the community service,

iv. residential address of the convict,

v. height, photograph, full fingerprint impressions, and

vi. other means of identification as may be appropriate;

b) providing assistance to the court in arriving at appropriate Community Service Order in each case;

c) monitoring the operation of community service in all its aspect;

d) counseling offenders with a view to bringing about their reformation;

e) recommending to the court a review of the service of offenders on community service who have shown remorse;

f) proposing to the Chief Judge measures for effective operation of Community Service Order;

g) ensuring that supervising officers perform their duties in accordance with the law; and

h) performing such other functions as may be necessary for the smooth administration of Community Service Orders[26].

4.4.1 Performance of Community Service Order

The Community Service Order (CSO) is performed for a period of not more than six (6) months and the convict is not allowed to work for more than five (5) hours a day[27]. The convict

[26] The Act, s. 461 (3) (a) - (h).

is always under the supervision of a Supervising Officer or Officers or Non-Governmental Organizations as may be designated by the Community Service Centre[28]. The Community Service Order contains such directives as the court may consider necessary for the supervision of the convict[29], while the Registrar of the court making the Community Service Order forwards to the Registrar of the Community Service Center a copy of the Order together with any other documents and information relating to the case[30].

4.4.2 Default of Convict in Complying with Community Service Order

Where at any time during the community service period, the Registrar of the Community Service Center informs the court of the default of the convict in complying with the directives of the Community Service Order, the court will issue a summons requiring the convict to appear before it[31]. Where the convict fails, refuses or neglects to appear in obedience to the summons, the court will issue a warrant of arrest[32] and where it is proved to the satisfaction of the court that the convict has failed to comply with any of the requirements of the Community Service Order, the court will vary the order to suit the circumstances of the case or impose on the convict a fine not exceeding one hundred thousand naira, N100, 000 or cancel the order and sentence the convict to any punishment which could have been imposed in respect of the offence, but the period of community service already performed may count in the reduction of the sentence.[33]

---

[27] *Ibid*; s. 462 (1).
[28] *Ibid*, s. 462 (2).
[29] *Ibid*, s. 462 (3).
[30] *Ibid*, s. 462 (4).
[31] The Act; s. 463 (1).
[32] *Ibid*, s. 463 (2).
[33] *Ibid*, s. 463 (3) (a) & (b).

4.4.3 Commission of Further Offence by a Convict Under Community Sentence.

Where a convict has been ordered to undergo community service on conviction by an original court but has committed another offence during the period of community service, the subsequent court will add to the sentence or impose a term of imprisonment which might have been passed by the original court and cancel the order of community service; the subsequent court will also take into account the period of community service served in reduction of the term of imprisonment[34].

In a case where the original court is a High Court and the subsequent court is a subordinate court, the subordinate court will send the copy of the proceedings to the High Court and on receipt of the proceedings from the subordinate court, the High Court shall proceed but where the original court is a subordinate court and the subsequent court is a High Court dealing with the matter at first instance or on appeal, the High Court shall proceed under section 464 (a) & (b)[35].

4.5 The Concept of Parole

Historically, parole is a concept known to military law and denotes release of a prisoner of war on promise to return. These days parole has become an integral part of the Nigerian criminal justice system[36], inter-twined with evolution of changing attitudes of the society towards crime and criminals. It is viewed as an act of grace on the part of the Nigerian criminal justice system. It represents an actual manifestation of the policy of returning the offender to the community. There are two conflicting sides to parole, however; on one hand, the paroled

[34] *Ibid*, s. 464 (a) & (b).
[35] The Act.
[36] *Ibid*, s. 468 (1) - (3).

offender is given a break and allowed to serve part of the sentence in the community; on the other hand, the sentiment exists that parole is a privilege and not a right and that the parolee is in reality a dangerous criminal who must be carefully watched and supervised. The conflict between the treatment and enforcement aspects of parole has not yet been reconciled by the Nigerian criminal justice, and the parole process still contains elements of both orientations.

Parole, therefore, is the release from a penal reformative institution, of an offender who remains under the control of correctional authorities, in an attempt to find out whether he is fit to live in the free society without supervision[37]. It is thus the last stage of correctional scheme of which probation may probably be the first. The life in a prison is so rigid and restrictive that it hardly offers any opportunity for the offender to rehabilitate himself. It is, therefore, necessary that in suitable cases the inmates should be released under proper supervision from the prison institution after serving a part of their sentence. This may serve a useful purpose for their rehabilitation in the society. This object is accomplished by the system of parole which aims at restoring the inmate to society as a normal law abiding citizen.

The ultimate significance of parole lies in the fact that it enables the prisoner a free social life yet retaining some effective control over him. Every prisoner is carefully watched and one who shows potentiality for correction and responds favourably to the disciplined life inside the prison, is allowed considerable liberty and finally released to join the society conditionally. Thus, parole is essentially an individualized method of treatment of offenders and envisages a final stage of adjustment of the incarcerated prisoner to the community. The conditional release from prison under parole may begin anytime after the inmate has completed at least one-third of the

[37] VN Paranjape, opcit, p.464.

total term of his sentence but before his final discharge. The object is to adjudge the adjustability of responsive inmates to normal society by offering them suitable opportunity to associate themselves with outside world.

Under the Act, where the Comptroller-General of Prisons make a report to the court recommending that a prisoner, sentenced and serving his sentence in prison is of good behaviour[38] and has served at least one third of his prison term, if he is sentenced to imprisonment for a term of at least fifteen (15) years or where he is sentenced to life imprisonment, the court can, after hearing the prosecution and the prisoner or his legal representative, order that the remaining term of his imprisonment be suspended, with or without conditions, as the court considers fits, and the prisoner shall be released from prison on the order[39].

A prisoner released under section 468 (1) of the Act is expected to undergo a rehabilitation programme in a Government facility or any other appropriate facility to enable him to be properly reintegrated to the society[40] and the Comptroller-General of Prisons shall make adequate arrangement, including budgetary provision, for the facility[41].

4.5.1 Parole and Probation Compared

Although parole, like probation is based on the principle of individualization of treatment of offenders and both include a programme of guidance and assistance to the delinquents, yet the

[38] The Act; s. 468 (1) (a).
[39] *Ibid*, paragraph (b)
[40] The Act, s. 468 (2).
[41] *Ibid*, (3)

two differ in many aspects. The fundamental points of difference between parole and probation are noted hereunder:

i. As to their historical evolution, the system of probation owes its origin to John Augustus of Massachusetts, Boston, USA who around 1841, tried to convince the Judge of the Magistrate's Court that certain offenders would respond well to his supervision if committed to his care rather than jailed. The parole, on the other hand, came into existence much later somewhere around 1900. In Nigeria, both probation and parole came into statutory existence in 2015[42].

ii. A prisoner can be released on parole only after he has already served a part of his sentence in a prison or a similar institution. Thus, it essentially involves an initial committal of offender to a certain period of imprisonment and a conditional release subsequently after serving a part of the sentence. But in case of probation, no sentence is imposed, or if imposed, it is not executed. This, in other words, means that probation is merely the suspension of sentence and is granted as a substitute for punishment whereas parole is granted to a prisoner when he has already lived in prisons or a similar institution for a certain minimum period and has shown propensity for good behaviour.

iii. Probation is the first stage of correctional scheme while parole is the last stage of it.

iv. Probation and parole also differ from each other from the point of view of stigma or disqualification attached therewith. There is no stigma or disqualification attached to an offender who is released on probation of good conduct, but a prisoner released on parole suffers stigmatization as a convicted criminal in the society.

[42] The Act, ss.453 and 468, respectively.

v. A probationer is considered as if undergoing *'treatment'* while he is under the threat of being punished if he violates the conditions of probation; but a parolee is considered to be in *'custody'* undergoing both *punishment and treatment* while under threat of more severe punishment, *i.e.,* return to the institution from which he has been released[43].

vi. Probation is a judicial function while parole is a quasi-judicial in nature. Probation implies a procedure under which a person found guilty of an offence is released by the court without imprisonment subject to conditions imposed by the court and subject to supervision of the probation officer. In case of parole, a prisoner is released from prison to the community prior to the expiration of his term of sentence.

4.5.2 Parole Distinguished from Furlough

Undoubtedly, parole and furlough are parts of the penal and prison system for humanizing prison administration but the two have different purposes. Although the Act did not provide for furlough, furlough is a matter of right but parole is not. Furlough is to be granted to the prisoner periodically irrespective of any particular reason merely to enable him retain family and social ties and avoid ill-effects of continuous prison life. The period of furlough is treated as remission of sentence. Parole, on the other hand, is not a matter of right and may be denied to a prisoner even when he makes out sufficient case for release on parole if the competent authority is satisfied on valid grounds that release of a prisoner on parole would be against the interest of society or the prison administration. Thus, it could not be contended that a prisoner released on

[43] NV Paranjape, opcit., p.466

parole and surrendering later, is qualified for furlough only and he is not qualified for parole. His application has to be considered on merits and cannot be rejected at the threshold[44].

In distinguishing parole from furlough, the Indian Supreme Court held that:

> ...These two have two different purposes. It is not necessary to state reasons while releasing the prisoner on furlough, but in case of parole, reasons have to be indicated. Again, release on furlough cannot be said to be an absolute right of the prisoner. It is allowed periodically under the Rules irrespective of any particular reason merely with a view to enabling the prisoner to have family association and keep up family and social ties and avoid ill-effects of continuous prison life. It is treated as a period spent in prison. But as against this, the period spent on parole is not counted as remission of sentence. Since the furlough is granted for no particular reason, it can be denied in the interest of society, whereas parole is to be granted only on sufficient cause being shown[45].

The Administration of Criminal Justice Act, 2015, have provided the needed legal framework for mainstreaming non-custodial measures into our criminal justice system. Notwithstanding these provisions, there is still an urgent need for the full adoption of these measures as alternative to incarceration to provide the necessary relief. Non-custodial measures, though statutorily provided for under the Act is not comprehensive. The Act only provided for three forms of non-custodial options: probation, community service order and parole. There is urgent need for an amendment of the Act to provide for more options such as: furlough, shock

[44]*Bhikhabhai Devshi v. State of Gujarat*, AIR 1987 Guj. 136
[45]*State of Maharashtra and another v. Suresh Pandurang Darvekar* AIR (2006) SC 247

incarceration, restitution, fines, half-way houses and house arrest; Parole Board, eligibility for parole, parole revocation and pre-release programes;Half-way Houses for ex-convict for assistance in resettlement challenges for ex-convict; anda form of compulsory savings schemes for convicts involved in prison work. A matching grant or a percentage of the amount saved should be given to a prisoner when due for release. This will assist in resettlement of the convict.

4.6 Verbal Sanctions

Verbal sanctions such as admonitions, reprimands, warnings or unconditional discharges accompanied by a formal or informal verbal sanction are some of the mildest responses that a court may upon a finding of guilt or legal culpability. Where the appropriate legal frameworks are in place, such a sentencing disposition may be imposed without further ado. Although they are formally sanctions, they have the effect in practice of ensuring that the criminal justice system is not further involved in the matter. They require no administrative infrastructure.

4.7 Conditional Discharges

Conditional discharges are also easy to impose. However, authorities may need to set up some mechanism in the community to ensure that the conditions that a court may set when discharging the offender without imposing a further penalty are met. If authorities task the existing police force with this responsibility, they should recognize the additional administrative burden it entails.

4.8 Status Penalties

Status penalties deny the offender specified rights in the community. Such a penalty might, for example, prevent someone convicted of fraud from holding a position of trust as a lawyer or director of a company. It might prevent a doctor convicted of medical malpractice

from continuing to practice medicine. Status penalties should relate the loss of status to the offence and not impose restrictions on offenders that are unconnected to the offence committed. On their face, status penalties are also less expensive alternatives to imprisonment. The court can impose them easily if it has the relevant information about the status of the offender. Status penalties, however, can have hidden costs. They may prevent the offender from earning a livelihood, and, if the offender's skills are scarce, the whole community may suffer from his/her professional ban.

4.9Economic Penalties

Economic penalties are among the most effective alternative in keeping many offenders out of prison. Fines also appear relatively simple to use, but the imposition of fines and their implementation require some administrative support. Some believe that setting fixed fines for specified offences avoids difficult questions about what the amount of the fine should be in a particular case. However, a fixed fine hits the poor much more harshly than the rich. Courts should therefore reserve fixed penalties for relatively petty offences for which imprisonment would not normally be considered or where it may be assumed that all offenders have some income from which to pay the fines. Speeding fines—where the amount of the fine is linked directly to the extent to which the speed limit was exceeded—are examples of the latter.

4.10 Confiscation or an Expropriation Order

This Order is mentioned by the Tokyo Rules as a type of sentencing case disposition. However, many jurisdictions do not regard this as a sentence to be imposed by a court at all, but merely as a consequence that follows a crime. In some jurisdictions, the confiscation and forfeiture mechanisms may reside beyond the jurisdiction of the criminal courts. The statutory framework, wherever it resides, may direct that authorities confiscate the proceeds of crime and,

upon liquidation of non-monetary assets, forfeit the money to the state. To implement confiscation orders fairly, however, courts need detailed evidence showing that particular monies found in the possession of an offender are the product of the crime rather than legitimate income from other sources.

Expropriation orders must be linked closely to the crime or they can become problematic. In fact, expropriation is more comparable to a fine paid in kind rather than in money. For an expropriation order to be proportionate to the crime, a careful investigation must be made in the same manner as for a day fine (above). The attendant effort in assessing the material position of the offender is similar, but the state has the added burden of dealing with the goods or property that might be expropriated from the offender.

4.11 Restitution to the Victim or a Compensation Order

Restitution to the Victim or a Compensation Order both overlap to some extent with a fine in that, from the perspective of the offender, they are economic penalties. They are also subject to similar challenges in determining an amount proportionate to the ability of the offender to pay. Research in Nigeria and other African countries shows that there is a long tradition of paying compensation to victims in lieu of other punishment for even the most serious of crimes. Often such compensation is simply paid outside the formal legal process and the criminal law is not invoked at all. In part, this happens because the criminal law is not flexible enough to recognize the need for compensation. Additional provision for such orders is required, which would also help avoid situations where offenders privately buy their way out of publicly taking responsibility for their crimes[46].

[46] AA Adeyemi, 'Personal Reparation in Africa: Nigeria and Gambia" in Zvekic (ed.), opcit. pp. 53-66.

From a wider perspective, restitution and compensation fulfill other important criminal justice goals. Experts recognize provisions for victims as an important objective of criminal justice. Of particular significance in this regard is the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, which provides that, where appropriate, offenders should make restitution to victims, their families or dependants. Such restitution, the Declaration explains, *"should include the return of property or payment for the harm or loss suffered, reimbursement of expenses incurred as a result of victimization, the provision of services and the restoration of rights"*[47]

The Tokyo Rules do not define compensation orders; however, compensation orders can be taken to refer to victim restitution as well, in particular in a sentencing order in which a payment is required to be made to a state-run victim compensation fund. In this manner, the victim is guaranteed redress without having to wait for the offender to complete payment of the order.

The *Handbook on Justice for Victims* elaborates on the general value of restitution and compensation, pointing out that this is a socially constructive sentence that also offers "the greatest possible scope for rehabilitation".[48] From the specific perspective of alternatives to imprisonment, the court must pay careful attention to the assessment of victim loss when imposing restitution, whether directly or by formal compensation order to which the state must contribute. It can do this in various ways. The *Handbook on Justice for Victims* suggests the following:

> In some jurisdictions, the prosecutor negotiates directly with the defence counsel, after substantiating all losses with the victim. In other cases, assessments of the

[47] The Declaration of Basic Principles of Justices for Victims of Crime and Abuse of Power, Article 8
[48] *Ibid*, Article 8

> loss may be made solely by the probation officer as part of the pre- [trial] *sic* sentencing investigation. No matter how the process occurs, the victim is generally required to present receipts or other evidence to substantiate the actual losses suffered. In Canada, the Criminal Code provides that restitution can be ordered as an additional sentence to cover "readily ascertainable" losses.[49]

4.12 Suspended or Deferred Sentences

Suspended or Deferred Sentences are dispositions that a court can impose without much difficulty. The suspended sentence, where a sentence of imprisonment is pronounced, but its implementation suspended for a period on a condition or conditions set by the court, is ostensibly an attractive alternative to imprisonment. The threat of imprisonment is made (and heard by the public) and, it is hoped, has a deterrent effect, but ideally the sentence will not need to be imposed because the conditions have been complied with by the person under sentence. Even suspended and deferred sentences create some extra administrative obligations at the implementation stage. If the conditions of suspension or deferral are not met, an administrative structure must ensure that the suspended or deferred sentence is imposed, including the scheduling of a hearing to determine whether the terms have been violated. While this may seem relatively simple, a degree of sophistication is required in the procedures when sentence is imposed for a subsequent offence, if that is also the basis for the revocation of the deferral or suspension of sentence. The administrative structure must take steps to ensure that, if necessary, earlier suspended sentences are brought to the attention of the court or the earlier process of sentencing that may have been deferred is revived. Suspended sentences should, however, not be triggered automatically; the authorities should decide in each instance whether imposition of the

[49] Handbook on Justice for Victims, p. 47

sentence is appropriate. If the conditions of suspension or deferral are more complex, an entire bureaucracy may be required to ensure that infringement of such conditions is brought to the attention of the court so that it can decide whether to bring the suspended sentence into effect or impose a sentence where it has earlier deferred from doing so.

4.13Referral to an Attendance Centre

This is a facility where the offender spends the day, returning home in the evenings. Attendance centers, also known as Day Reporting Centers, may provide a centralized location for a host of therapeutic interventions. Many offenders have considerable need for therapy or treatment, with drug addiction the predominant need in many jurisdictions. Other programmes such a centre could offer a range from anger management to skills training. Offenders are more likely to respond positively to such programmes when they are conducted under the relative freedom of attendance centers in communities as compared to a prison setting. Use of Attendance Centers by the courts assumes foremost that a jurisdiction has invested in an infrastructure of attendance centers that offer the range of programmes determined to be necessary. Judges need to be regularly informed and updated as to what such centers offer, whether programmes have vacancies, are at capacity, or have waiting lists, as well as what may be available in a particular community. Finally, in order to require a particular offender to attend a centre, judges need particular information about the offender and his or her needs, which may require a medical and/or psychological assessment in addition to an investigation of the offender's social history.

4.14House Arrest

House arrestis a relatively harsh sentence, but it is still less intrusive than imprisonment. Homes of offenders vary enormously. In some countries, many live on the streets, others in

grossly overcrowded conditions. If house arrest were imposed for the full 24 hours of the day, it would place an intolerable burden on the offender's many housemates. It would also mean that an offender's home would become his prison, except that, unlike prison, he would be responsible for meeting his own basic needs. To avoid excesses, the court can restrict the hours of house arrest. This could, for example, allow an offender to remain gainfully employed during the day but leave him confined to his house at night. With a supply of good information, the court should be able to distinguish between cases where house arrest may be imposed without too severe a disruption to the lives of other inhabitants of the same house. It can also tailor enforcement measures accordingly.

4.15Other Modes of Non-Institutional Treatment

Other modes of non-institutional treatment are allowed by the Tokyo Rules. They give states the flexibility to develop new forms of non-institutional treatment or to reinvigorate customary alternatives that may have fallen into disuse. Such alternatives must not infringe on fundamental human rights standards. They should also be articulated clearly in law.

4.16Some combination of the measures listed above

Some combination of the measures listed above is a common sense indication that a court is not limited to a single disposition. In practice, courts often set a list of conditions that may refer to more than one category. The important principle is that the overall punitive effect should not be excessive

4.17 The Prospects of ADR in Pre - Trial Case Disposal Measures

Generally, many important decisions about what happens to a criminal defendant occur prior to trial. Pre-hearings and hearings are held to determine if sufficient facts exist to charge

the accused with a crime. If so, the defendant is arraigned; enters a plea; is informed of constitutional rights, particularly the right to the assistance of counsel; and is considered for pre-trial release. The use of money bail and other alternatives, such as release on recognizance statutes, allow most defendants to be free pending their return for trial.

The issue of discretion plays a major role at this stage of the criminal process. Since only a small percentage of a criminal cases eventually go to trials, many defendants agree to plea negotiation or are placed in diversion programs. The criminal justice system in Nigeria may not able to try every defendant accused of a crime since not enough judges, prosecutors, defence attorneys, and courts exist for this purpose. As a result, subsystems such as decriminalization, pre-trial detention alternatives and diversion strategies should be mainstreamed as essential ingredients in the administration of our justice system.

4.17.1 Pre- Trial Detention

The detention of persons who are presumed innocent is a particularly severe infringement of the right to liberty. The question of what justifies such detention is very important. While Rule 6.1[50] is somewhat vague in this regard and its qualifications incomplete, it is reinforced by the International Covenant on Civil and Political Rights (ICCPR), which provides guidance for those involved in a criminal process but who have not yet been convicted or sentenced. Article 9.3 of the ICCPR provides that: "*It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment."*

In addition, Article 14.3 of the ICCPR stipulates that those tried on a criminal charge are entitled to a trial without undue delay. Requiring a speedy trial minimizes the period of pre-trial

[50] United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules) Adopted by General Assembly resolution 45/110 of 14 December 1990 (hereinafter refers to as The Tokyo Rules)

detention. In addition, accused persons may only be detained before trial where there is reasonable suspicion that they have committed an offence and where the authorities have substantial reasons to believe that, if released, they would abscond or commit a serious offence or interfere with the course of justice. The criminal justice system should resort to pre-trial detention only when alternative measures are unable to address the concerns that justify the use of such detention.

Decisions about alternatives to pre-trial detention should be made at as early a stage as possible. When the decision is to keep a person in pre-trial detention, the detainee must be able to appeal the decision to a court or to another independent competent authority[51]. Authorities must also regularly review the initial decision to detain. This is important for two reasons. First, the conditions that initially made detention necessary may change and may make it possible to use an alternative measure that will ensure that the accused person appears in court when required. Second, the longer the unjustified delay in bringing a detainee to trial, the stronger such a detainee's claim for release from detention and even for dismissal of the criminal charges against him or her. The decision to detain an accused person awaiting trial is essentially a matter of balancing interests. The suspect has a right to liberty[52], but the combination of circumstances described above may mean that the administration of justice might require its temporary sacrifice. The longer the suspect is detained, the greater the sacrifice of that fundamental right. In applying constitutional or statutory guarantees of fundamental rights, including freedom and speedy trial, a reviewing body may well decide that continued detention is no longer justified and order a detainee's release or that the case be dismissed in its entirety.

[51] Tokyo Rules, Rule 6.2
[52] The Constitution, s.35

In many States in Nigeria, unacceptably large numbers of prisoners continue to await trial and sentence inside prison. A highly effective way to reduce their numbers is to ensure that their right to a speedy trial, which is guaranteed in various international instruments, is observed in practice or the placing of offenders into noncriminal diversion programs prior to their formal trial or conviction.

4.17.2 How Best can this be Achieved in Nigeria?

Nigeria need to review trial procedures to make the system function more efficiently. The early disclosure of the prosecution case, for example, may eliminate many delays. Speedy trials depend on inter-agency cooperation. Police and the prosecuting services must communicate at the earliest possible stage of the criminal process. In some cases, judges, too, need to become involved at that earliest possible stage. Administrative liaison can achieve a great deal, States in Nigeria may also need to amend the rules of criminal procedure to eliminate bottlenecks.

Finally, judicial control of the criminal justice process allows the judiciary to ensure the right to a speedy trial by applying procedural rules strictly. Postponements of cases for further investigation or long delays in bringing them to trial should be the rare exceptions when the suspect or accused person is detained in custody.

4.17.3 Alternatives to Pre-Trial Detention

The focus up to this point has been avoiding unnecessary pre-trial detention without necessarily putting anything in its place. In many instances, however, avoiding pre-trial detention requires that alternative measures replace it. Such measures ensure that accused persons appear in court and refrain from any activity that would undermine the judicial process. The alternative measure chosen must achieve the desired effect with the minimum interference with the liberty of the suspect or accused person, whose innocence must be presumed at this stage. Those

deciding whether to impose or continue pre-trial detention must have a range of alternatives at their disposal[53]. Tokyo Rule 6.2 mentions the need for alternatives to pre-trial detention but neither the Rules nor the official commentary explains what such alternatives might be.

Possible alternatives include releasing an accused person and ordering such a person to do one or more of the following:

i. to appear in court on a specified day or as ordered to by the court in the future;
ii. to refrain from: interfering with the course of justice, engaging in particular conduct, leaving or going to specified places or districts, or approaching or meeting specified persons;
iii. to remain at a specific address;
iv. to report on a daily or periodic basis to a court, the police, or other authority;
v. to surrender passports or other identification papers;
vi. to accept supervision by an agency appointed by the court;
vii. to submit to electronic monitoring; or
viii. to pledge financial or other forms of property as security to assure attendance at trial or conduct pending trial[54].

4.17.4 Considerations in Implementing Alternatives to Pre-Trial Detention

Alternatives to pre-trial detention do restrict the liberty of the accused person to a greater or lesser extent. This burden increases when authorities impose multiple alternatives simultaneously. Those deciding must carefully weigh the advantages and disadvantages of each

[53]UNODC Handbook of Basic Principles and Promising Practices on Alternative to Imprisonment (UN Publications, Vienna) 2007, p19
[54] Ibid

measure to find the most appropriate and least restrictive form of intervention to serve as an effective alternative to imprisonment.

In cases where a person is known in the community, has a job, a family to support, and is a first offender, authorities should consider unconditional bail. In all cases where the offence is not serious, unconditional release should be an option. Under unconditional release, sometimes known as personal recognizance, the accused promises to appear in court as ordered (and, in some jurisdictions, to obey all laws). Sometimes a monetary amount may be set by the court that would be paid only if the court determines that the accused has forfeited what is known in some jurisdictions as an "unsecured personal bond" by failing to appear in court or committing a new offence while in the community pending trial. In other cases, pre-trial release may be predicated upon additional requirements. Courts may require the accused, a relative or a friend to provide security in the form of cash or property, a measure designed to ensure that the accused has a financial stake in fulfilling the conditions imposed regarding court appearance and behaving in other specified ways. This form of bail affords an immediate sanction if the accused fails to obey the conditions set for releasing him from pre-trial detention: the bail money or property is forfeited to the state.

In many countries, this security takes the form of monetary bail, or money that the accused pays to a court as a guarantee that he or she will conform to the conditions set for pre-trial release. Variations on this are possible. For example, the accused may not necessarily have to pay the money over directly to the court (or in some instances to the police), but rather provide a so-called bail bond or surety that guarantees that he, or someone acting on his behalf, will pay the money if called upon to do so. Authorities should confirm that the accused person is able to meet the requirements that are set. If not, it is likely that the accused person will return to pre-

trial detention. The following should be considered when evaluating the various requirements that might be imposed:

i. A requirement to appear in court as ordered may appear on its face a minimal requirement. Even so authorities should ensure that required court appearances are not excessive in number and that the scheduled hearings are meaningful in that they move a case toward completion. Long delays in finalizing cases are unacceptable even when the accused is not in pre-trial detention;

ii. While common law countries in particular make widespread use of monetary bail as a precondition for release, it can be argued that the measure unfairly discriminates against the poor. Well-to-do accused persons are better able to post bail than the poor. Courts can help minimize this potential unfairness by setting realistically proportionate bail amounts to the accused person's means, where bail is considered necessary to ensure the appearance of the accused for trial. In practice, however, courts tend to set the amount of bail with the seriousness of the offence in mind, so that those facing a long term of imprisonment may receive a higher bail requirement than they are able to meet financially. The result is that a court may decide that an accused person should be released subject to the posting of a bail, but in practice that person remains in jail, unable to meet the stipulated bail, even where the amount may seem modest but exceeds the accused person's means. This undermines the court's finding that, in principle, the accused person is not some- one who needs to be kept in prison pending trial;

iii. Orders restricting certain activities of the accused may effectively counter specific threats posed by the accused person in the com- munity. However, they may also hinder the accused person's legitimate activities. An order to refrain from certain forms of

conduct or to stay away from a specific location or district, may, for example, make it difficult or impossible for the person to work while awaiting trial. Authorities should avoid such restrictions whenever possible or tailor such restrictions as narrowly as possible. If necessary, they should search for a way to compensate for the loss of the ability to earn a living;

iv. A requirement to surrender identity documents such as passports is an effective tool to prevent the flight of an accused person. Such a requirement may cause unintended consequences. Authorities should consider whether the accused needs the documents to work, withdraw money, or interact with the state bureaucracy. In some countries, courts may order that the defence counsel for the accused take possession of such documents, with leave to allow their appropriate use;

v. Direct supervision in the community by a court-appointed agency gives the authorities considerable control over the accused person, but it is an intrusive alternative that greatly limits freedom and privacy. Direct supervision is also expensive, as the agency that performs it has to provide a resource intensive service;

vi. Electronic monitoring serves as an additional means of surveillance that can monitor compliance with other measures. It can determine, for example, whether a person is obeying an order to remain at a specific address or to keep away from a specific district. It is, however, relatively intrusive, requires considerable technological sophistication to implement, and can be subject to legal challenges as to its proper functioning in the event of data associated with violations being used as the basis of revocation of pre-trial release;

vii. Finally, the collision of long trial delays with a lack of public understanding of pre-trial release and of the presumption of innocence prior to trial as fundamental rights may produce, among states and elsewhere, the misapprehension that an accused has "gotten away" with the crime and will go unpunished. This has unfortunately led to some in the community to take justice into their own hands when the accused has been released pre-trial—sometimes with fatal results. In addition to the prompt and meaningful resolution of pending criminal cases, public education regarding pre-trial release and the presumption of innocence is essential to promote safety in the community[55].

4.17.5 Infrastructure Requirements for Alternatives to Pre-Trial Detention

The advantages and disadvantages of various alternatives to pre-trial detention are often debated in the abstract, as if the deciding authority could choose freely among various options. But for alternatives to function properly, the state must first create the appropriate framework. For some alternatives, the state needs only a formal legal authorization that allows their use; in other cases, it must set up a more elaborate infrastructure.

For a limited number of alternatives to pre-trial detention, a legislative framework is all that is needed. With that in place, an authority can release an accused person pending trial on the basis of a pledge that he or she will appear before a court. Similarly, no supervisory mechanisms are needed to impose requirements that the accused person not interfere with the course of justice, not engage in particular conduct, not leave or enter specified places or districts, not meet specified persons or remain at a specific address.

[55] UNODC Handbook of Basic Principles and Promising Practices on Alternative to Imprisonment (UN Publications, Vienna) 2007, p.22

In most cases, however, the authority that makes the decision to release a person into the community will want to ensure that there are mechanisms in place to assure compliance with the conditions set. These mechanisms also help reassure and protect victims of crime. Each of the following conditions for release needs some development of infrastructure:

i. Reporting to a public authority requires that the authority—the police or the court, for example—is accessible at reasonable times to the accused person and that it has in place an administrative structure that is capable of recording such reporting reliably.

ii. Surrendering identity documents also requires a careful bureaucracy that can ensure that such documents are safely kept and returned to the accused when the rationale for retaining them is no longer supported by the circumstances.

iii. Direct supervision requires that there be an entity that can conduct such supervision. Electronic monitoring requires a considerable investment in technology and the infrastructure to support it.

iv. Provision of monetary security requires sophisticated decision- making to determine the appropriate level of security as well as a bureaucracy capable of receiving and safeguarding monetary payments.

4.17.6 Who Should Act?

The involvement of the following individuals and groups is essential:

i. **Law Enforcement Officials** typically have the first contact with the suspects. They have a particular duty to keep any detention as short as possible. By conducting investigations speedily, they can ensure that the time for which suspects and persons awaiting trial are incarcerated in kept to a minimum.

ii. **Prosecuting Authorities** also have an important role in ensuring speedy trials and thus minimizing pre-trial detention. They act as the link between the police and the courts, which puts them in a crucial position to speed up the criminal process and to suggest or urge, where appropriate, the use of alternatives to pre-trial detention.

iii. **Defence Lawyers** have the obligation to advocate vigorously on behalf of their clients and to assert their clients' rights, including pre-trial release and prompt resolution of the investigation and any resulting charges against them. Where fully qualified defence lawyers are not readily available to represent criminal suspects and the accused, paralegals may perform this function.

iv. **The Judiciary** must foster recognition of the right of accused persons to the presumption of innocence; that pre-trial detention should be the exception rather than the norm; and where detention is ordered, that the status of detained defendants and suspects must be reviewed; and finally that the conduct of criminal trials and related proceedings be expeditious, as required by law.

v. A**dministrators** have a crucial role to play in creating both an infrastructure that makes it possible to implement suitable alternatives to pre-trial detention and a case management system that provides sufficient resources for the timely and meaningful resolution of criminal.

4.18 Pre-Trial Diversion Programs

Diversion Program is also another Pre-trial Case Disposal Measure. The programs involve suspending formal criminal proceedings against an accused while that person participates in a community treatment program under court supervision. These programs may vary in size and emphasis, but generally possess the same goal: to constructively bypass criminal

prosecution by providing a reasonable alternative in the form of treatment, counseling, or employment programs.

For example, in United States of America, Project DeNovo in Minneapolis, Minnesota, offers counseling, employment placement, and educational opportunities to juveniles and adults offenders, excepting those accused of violent crimes[56]. In San Diego, California, the County Probation Department runs a Juvenile Narcotics Project. This program offers drug education in lieu of prosecution; it not only emphasizes drug rehabilitation and education for juvenile offenders and their parents, but also seeks to improve communication between them[57].

In Philadelphia, Pennsylvania, the Pre-Indictment Probation Program concentrates on diverting first offenders charged with non-violent crimes. The offender is given a conditional probation prior to indictment with the charges and criminal record will be eliminated. The program also provides the offender with social, medical, educational and employment services. The Baltimore Pre-Trial Intervention Project is a 90-day program specifically designed for juveniles between the ages of 15 and 17. It offers an in-house education program in addition to counseling and job placement services[58].

The Dade County, Florida Pre-Trial Intervention Project deals with first offenders between the ages of 17 and 25.This three-to-six-month program places heavy emphasis on counseling and personal services, community health, and welfare agency services[59]. Nigeria should replicate this in her jurisdiction.

---

[56] JJ Senna and LJ Siegel, opcit, p. 344
[57] Ibid
[58] Ibid
[59] See generally Note, "Pretrial Diversion from the Criminal Process", Yale Law Journal 83: 827 (1974); National Pretrial Intervention Service Centre, American Bar Association, Portfolio of Descriptive Profiles on Selected Pretrial Criminal Justice intervention Programs (1974); A.B.T Associates, Pretrial Intervention Program of the Manpower Administration, (U.S Department of Labour,1971 - 1972).

4.18.1 The Diversion Process

Many pre-trial diversion programs have similar operating processes and procedures, yet each maintains its own unique characteristics. All existing diversion programs have criteria which control the selection of clients. Without exception, diversion priority is given to first-offender misdemeanants. Age, residency, and employment status should also be considered as criteria for acceptance of diversion candidates. Typical requirements are as follows:

1. The defendants may be either male or female;
2. They should be between 17 - 22 (with variations) years of age;
3. They are either unemployed or underemployed or persons whose employment would be terminated if convicted;
4. They are residents of the program area and have verifiable addresses;
5. They are not identified as drug-dependant persons;
6. They cannot be charged with felonies that do not fall under the jurisdiction of the courts and;
7. They should have no more than two prior adult convictions[60].

The involvement of the diversion program usually begins after the arrest and arraignment of the individual but before trial. the selected, accused individual is released on a continuance to the diversion program - that is, the trial is postponed - if the relevant court personnel[61] and the program representative[62] agree on the potential of the accused for the program. During this initial period, the program's staff teams with the potential client to assess the individual's suitability for

[60]American Bar Association Portfolio of Descriptive Profiles on Selected Pretrial Criminal Justice Intervention Program, 1974. These requirements should be built into Nigeria Justice System.
[61] Judge, Probation Officer, Lawyer or Arresting Officer.
[62] Usually called a screener

the program. Acceptance may begin with a long continuance[63] without entry of a plea, and upon the written waiver by the defendant of the right to a speedy trial.

Services rendered by most adult pre-trial diversion programs can be classified into three complementary units:

1. Counseling is undertaken by an advocate who conducts individual and group sessions for clients throughout the initial period.
2. Employment services are executed by a career developer who evaluates and implements career goals in a team effort with the client and the advocate.
3. Human services are provided, including health care, educational programs, emergency housing, and a variety of testing to assess needs and capabilities.

An exit disposition may be held near the end if the initial continuance at which the client's participation is assessed by the client's staff team. During the evaluation, one of the three things may occur:

i. Charges may be dismissed upon successful completion of the program.
ii. The continuance may be extended if project members are unsure of the client's progress.
iii. The client's participation in the program may be terminated due to failure to comply with program guidelines and structures. In the event of the third decision, the court may be notified in writing and the normal court process of trial and disposition takes place.

4.18.2 The Goals and Purposes of Diversion Program

The following have been identified to be the goals and purposes of the typical diversion program:

[63] This time limit varies from program to program.

i. To divert selected individual from trials to fruitful training, employment, and counseling experience;

ii. To provide the court and legal systems with much-needed resources;

iii. To help the court system become more aware of its rehabilitative role;

iv. To help break a beginning cycle of crime and pattern of failure;

v. To sensitize employers to offender's needs and to help alter restrictive hiring practices;

vi. To utilize existing state resources in a comprehensive and coordinated manner to counter fractionalized and piecemeal efforts;

vii. To create effective resources where none exist;

viii. To assist in the reintegration of potential offenders into the total community;

ix. To train and utilize paraprofessionals in the program who have interests and abilities in the human service field, and to establish their competence and professional roles;

x. To help establish pre-trial diversion as a permanent part of the state's criminal justice system;

xi. To develop and implement a system of staff selection and training, and a system of resource development which has applicability in a variety of service fields; and

xii. To attempt to open restricted civil service jobs to offenders[64].

4.19 Alternative to Imprisonment of Special Categories of Prisoners

Prisons primarily detain adults who are awaiting trial on criminal charges or who are serving sentences of imprisonment, but they may also detain mentally ill adults, those who are

[64] UNODC Handbook of Basic Principles and Promising Practices on Alternative to Imprisonment (UN Publications, Vienna) 2007, p.24

addicted to drugs, or children involved in crime or delinquency. Such persons may be in prison as a result of formal proceedings. However, where this is not the case, their imprisonment poses grave human rights concerns. Whatever their legal status, prisons are particularly poorly placed to provide the care these prisoners need. Accordingly, there is an urgent need to develop alternatives to imprisonment for these special categories of prisoners.

4.19.1 Children

The United Nations Convention on the Rights of the Child[65] underlines the urgency of finding alternatives to the imprisonment of children by providing:"The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as *a measure of last resort and for the shortest appropriate period of time*."[66] The Convention, together with other instruments such as the United Nations Standard Minimum Rules for the Administration of Juvenile Justice[67], also indicates how this can be done in all the major areas.

The Convention defines a child as a person under the age of 18. Other United Nations Instruments use the term *"juvenile"*. This research work shall use the term interchangeably with *"child".* The principles under discourse in this research work may also apply to young adults older than 18 years. The children most at risk of imprisonment are those who are seen as criminally responsible, who are suspected of committing crimes, or who have been convicted of offences that are crimes when committed by adults. The decriminalization of such offences should, at a stroke, reduce the number of children in prison. However, authorities can address the *decriminalization* of children in two other ways. They may address the question of whether

[65] Adopted and opened for Signature, Ratification and Accession by General Assembly Resolution 44 / 25 of 20 November 1989. Entry into force 2 September, 1990
[66] Article 37 (b)
[67] United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules") Adopted by General Assembly resolution 40/33 of 29 November 1985

children are criminally responsible. A radical approach would adjust the minimum age of criminal responsibility. Legal systems set a minimum age below which children are not held responsible for what they do. These minimum ages vary enormously[68], from the age of seven in countries such as Ireland or South Africa, to 14 in Germany, Japan and Vietnam, to 18 in Brazil and Peru[69]. No international standards exist that establish the minimum age of criminal responsibility, but the Beijing Rules stipulate that the age should not "be fixed at too low an age level bearing in mind the facts of emotional, mental and intellectual maturity[70]". If authorities raise the minimum age to 13 years from seven, they automatically exclude a number of children from the criminal justice system who therefore cannot be legally held in a prison. Authorities must also ensure that children who are not subject to the criminal law are not held in other institutions, which, although technically not prisons, are equally harsh.

In a more graduated approach, legislation on criminal responsibility can require that, for children of a certain age group, the individual child's capacity to understand the difference between right and wrong be assessed. For this age range, the state would bear the burden of

---

[68] In Nigeria, the age of demarcation for absolute lack of criminal responsibility follows that set at common law for capital offences, and latter serious felonies. The governing rule was that an infant under the age of seven years could not be guilty of felony. Thus, the Criminal Code, S.30, provides: *"A person under the age of twelve years is not criminally responsible for any act or omission unless it is proved that at the time of doing the act or making the omission he had the capacity to know that he ought not to do the act or make the omission." ;*

- The Penal Code, S.50, provides that no act is an offence which is done:

a. By a child under 7 years of age;
b. By a child above 7 years of age but under 12 years of age who has not attained sufficient understanding to judge the nature and consequence of such act.

- Sections 26 (1), 27 and 28 of the Child Rights Act, 2003 provides that where a child under the age of 7 commits an offence, he is to be brought before the Juvenile Court. Section 2 of the Act describes a child as "a person under fourteen", and young persons between 14 and 17 are subject to special procedures.

[69] United Nations Implementation of United Nations Mandates on Juvenile Justice New York, 1994
[70] Rule 4(1)

proving that the child had the capacity to differentiate between right and wrong at the time of the offence and was able to conform his or her behaviour to that understanding. This solution is attractive, because it allows for the consideration of the child's capacity and does not rely on an arbitrary cut-off point. The practical danger is, however, that authorities might too easily presume the child's criminal responsibility and children continue to fall within the criminal justice system. Where authorities adopt this approach, the standard of proof must be enforced.

Authorities may decriminalize some conduct by children that is regarded as criminal when committed by adults. On the other hand, in many societies, authorities criminalize conduct by children that is not considered criminal when committed by adults. Truancy from school, runaway and, more vaguely, anti-social behaviour, are so-called status offences in which children may be prosecuted under criminal law. There is also a danger that such children are detained but never prosecuted. In the case of status offences, detention is used improperly as the substitute for what is too often an inadequate or non-existent social welfare system. Sometimes the criminalization is indirect. Children who commit status offences may subject of a court order forbidding them from repeating the conduct underlying the status offence. If they then re-offend, they are prosecuted for violating the court's order (contempt of court). They then fall within the criminal justice net and may eventually go to prison. Authorities should take action to guard against this indirect criminalization and to keep children out of prison.

Diversion of offenders from the criminal justice system is a strategy that is particularly applicable to children. The Beijing Rules provide specifically that "consideration shall be given,

wherever appropriate, to dealing with juvenile offenders without resorting to a formal trial[71]". The police and the prosecution or other agencies are directed to ensure that this occurs[72].

The Beijing Rules also provide that those involved in dealing with children who may be in conflict with the law should have as much discretion as possible in making decisions about how to deal with them[73]. The authorities can then direct children away from the criminal justice process when it would be in the children's best interests to do so. The authorities must exercise such discretion, however, in a fair and accountable manner[74].

Further, the Rules emphasize the importance of obtaining the child's and his or her parents' or guardian's consent for such diversion in order to protect them from being pressured into admitting offences that he or she may not have committed[75]. Finally, community-based programmes should be developed to provide sufficient capacity to provide children with the appropriate treatment and services they may require[76].

4.19.2Alternatives for Children in the Criminal Justice System

The Beijing Rules are explicit about the approach to be adopted regarding the pre-trial detention of children*: "Detention pending trial shall be used only as a measure of last resort and for the shortest possible period of time[77]."* This Rule is identical to the one to be adopted for adults and is underpinned by the same thinking: the presumption of innocence and other procedural safeguards, with the added emphasis that the detention of children is inherently harmful to them.

[71] The Tokyo Rules, Rule 11 (1)
[72] *Ibid*, Rule 12 (2)
[73] *Ibid*, Rule 6 (1)
[74] *Ibid*, Rule 6 (2)
[75] *Ibid*, Rule 11 (3)
[76] *Ibid*, Rule 11 (4)
[77] *Ibid*, Rule 13 (1)

As in the case of adults, authorities must search for alternatives to pre-trial detention, but they have additional alternatives at hand for children. The Beijing Rules provide that *"whenever possible, detention pending trial shall be replaced by alternative measures, such as close supervision, intensive care or placement with a family or in an educational setting or a home*[78]*."*

These additional alternatives share a common feature: an adult authority figure, who may possibly, but not necessarily, be a parent or foster parent who takes responsibility for the child. Authorities must ensure that when they place children in some form of supported accommodation[79], that this is not incarceration under another name. An educational institution, for example, may seem a harmless enough alternative to imprisonment, but, if the institution fundamentally restricts the liberty of the child, it might share many of the shortcomings of imprisonment. On the other hand, a prison for adults, even if children are kept in a separate section, is never a desirable place for children while they await trial. Other secure accommodation may be the lesser of two evils where detention of a child is essential.

Parsimony, or the sparing use of imprisonment, is a particularly important principle for children. Authorities should reach for alternatives whenever possible. The Beijing Rules clearly limit the offences for which children can be incarcerated following a finding that they have committed the offence:

> Deprivation of personal liberty shall not be imposed unless the juvenile is adjudicated of a serious act involving violence against another person or of

[78] *Ibid*, Rule 13 (1)

[79] See Article 17 of Recommendation (2003) 20 of the Council of Europe concerning new ways of dealing with Juvenile Delinquency and the Role of Juvenile Justice, which recognizes this alternative to remand in custody.

persistence in committing other serious offences and unless there is no other appropriate response[80].

When authorities imprison children, they should do so for the shortest period possible, even for the serious offences. Again, children should never be housed with adult prisoners. The Convention on the Rights of the Child forbids sentencing children to life imprisonment without the prospect of release. Courts should not subject children to indeterminate sentences, but if they do so, they should also set a nearby date at sentencing to consider the child's release. The courts should review the sentence regularly as the child's moral sense is developing. The Beijing Rules make it quite clear that the institutionalization of children should be avoided. Apart from human rights concerns, it is often counterproductive as a measure to re-educate children[81]. The Rules list various dispositions that can be applied to children. They are essentially similar to the specific non-custodial sentences for adults discussed in chapter 5 of this research work. However, they also emphasize "care, guidance and supervision orders" as well as "orders concerning foster care, living communities or other educational settings[82]". These dispositions underline the particular importance of welfare-oriented alternatives to sentences of imprisonment in the case of children. Authorities can relatively easily justify the early release of children, and young offenders generally, on the basis that they deserve another opportunity to live a crime-free life in the community. They may apply general amnesties, for example, in the case of children without too much public outcry. The Beijing Rules provide specifically that "conditional release from an institution shall be used by the appropriate authority to the greatest possible extent and shall be

[80] *Ibid*, Rule 17(1)(c)
[81] *Ibid*, Rule 18 (1)
[82] *Ibid*, Rule 18 (1)(c)

granted at the earliest possible time[83]". Children who are released must be prepared adequately for life outside prison. Both the state authorities and the wider community should provide them with support[84].

4.19.3 Who Should Act?

The involvement of the following individuals and groups is essential:

Key players mentioned with regard to adults can also act to reduce child imprisonment as the alternatives cover the full range of strategies used for adults. The imprisonment of children is an emotive issue and campaigns aimed at alternatives often have more purchase when the focus is on children.

The work of **Civil Society Organizations** may lend support to national initiatives led by children's charities and advocacy groups to mobilize national opinion in favour of children's release from prison.

4.19.4 Drug Offenders

Offenders imprisoned for drug-related offences make up a large proportion of the prison population in most Nigeria. In Nigeria, The NDLEA is responsible for prosecuting offenders of drug-related offences[85]. In part this stems from national and international efforts to combat the trafficking in illicit drugs. Many, if not most of these offenders, are not major players in the drugs trade, and often addicted to illicit drugs themselves. Alternatives to imprisonment targeted at these lower level drug offenders could deal more effectively with these offenders' issues.

---

[83] Rule 28(1)
[84] Rule 28 (2)
[85] The National Drug Law Enforcement Agency (NDLEA) is a Federal agency in Nigeria charged with eliminating the growing, processing, manufacturing, selling, exporting, and trafficking of hard drugs. The agency was established by Decree Number 48 of January 1990. The NDLEA is present in international airports, seaports and border crossing. It tries to eradicate cannabis by destroying plantings. The NDLEA also targets the leaders of narcotics and money laundering organizations.

The major national[86] and international instruments, including the 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances[87] and the Guiding Principles on Drug Demand Reduction of the General Assembly of the United Nations[88] recognize this. Their focus is combating drug trafficking, but they also call on governments to take multidisciplinary initiatives[89]. Alternatives to imprisonment are a key part of these.

Alternatives to imprisonment in the context of drug users should follow the same general reductionist strategies as for other crimes, albeit with different emphases:

1. *Decriminalization* is a controversial strategy in the drugs sphere. As an analogy, some states have prohibited alcohol in the past, then, as social attitudes changed, substituted more nuanced controls for the total ban. Sometimes, states may decriminalize partially, by downgrading a drug to a less dangerous status compared to others, or by decriminalizing possession but still considering trafficking an offence[90].
2. *Diversion* has a major role to play as an alternative to imprisonment. Authorities recognize that many offenders who violate drug laws, and indeed many offenders who commit other criminal acts, commit their crimes because they are themselves addicted to drugs. Authorities find that treating offenders for their addictions is more effective than processing and eventually punishing them through the criminal justice system[91].

Diversion of drug users can take different forms. It can follow the same pattern as other offences where police and prosecutors use their discretion not to arrest or prosecute suspects. In these cases, offenders may need to take part in a drug education or a more formal treatment programme.

[86] National Drug Law Enforcement Agency Act, 2004
[87] United Nations Doc. E/CONF. 82. 15
[88] A/RES/S-20/3 of 8 September 1998
[89] See in general Neil Boister, Penal Aspects of the United Nations Drug Conventions, Kluwe, The Hague 2001.
[90] UNODC Handbook of Basic Principles and Promising Practices on Alternative to Imprisonment (UN Publications, Vienna) 2007, p.28

[91] *Ibid*

In a number of countries, drug treatment courts formalize the diversion process[92]. These "drug courts", as they are widely known, are part of the criminal justice system but they operate as a diversion strategy. Offenders may be required to plead guilty in order to have their cases considered by a drug court, although this is not necessarily the case in all legal systems. The class of offenders who are targeted by drug courts may vary. In the United States of America, where the drug court movement originated over 15 years ago, participants initially were mostly first-time offenders, though most programmes now focus on far more involved substance abusers[93]. Similarly, in Australia, drug treatment courts are intended for drug-addicted offenders who have a long history of committing property offences. These latter drug courts are used as a final option before incarceration.

Instead of imposing a conventional sentence of imprisonment, the drug court requires a comprehensive treatment programme for the addiction and other issues confronting the participant, and backs it with monitoring and support of the offender. To aid this monitoring process, the court receives reports on offenders' progress. From the perspective of the offender, such treatment, which does not necessarily take place in a closed institution, is a desirable alternative to imprisonment. Offenders, particularly those who plead guilty in order to have their cases dealt with by drug courts, need to have good legal advice on the nature of the process before they consent to an order for their compulsory treatment. Initial results suggest that drug

[92] See for example J Scott-Sanford and BA.Arrigo, 'Lifiting the Cover on Drug Courts: Evaluation Findings and Policy Concerns',49 *International Journal of Offender Therapy and Comparative Criminology* (2005) pp. 239 -259 on Drug Courts in the USA; Australian Institute of Criminology, "Drug Courts: Reducing Drug-Related Crime" AI Crime Reduction Matters No. 24, 3 June 2004; S.Ely et al. "The Glasgow Drug Court in Action: The First Six Months" Crime and Criminal Justice Research Programme Research Findings No. 70/2003 of the Scottish Executive and an online brochure Drug Treatment Court: Programme Information by Public Safety and Emergency Preparedness Canada at http://www.prevention.gc.ca/en/library.\/features/dtc/brochure.htm. Accessed on 30 August, 2017.

[93] What is a Drug Court? Website of the National Association of Drug Court Professionals, <http://www.nadcp.org.> Accessed September 30, 2017.

court programmes are more effective in preventing re-offending than imprisonment and that while they are resource-intensive, cost less than imprisonment in many jurisdictions. Nigeria should queue into this development.

4.19.5 Alternatives for Drug Users in the Criminal Justice System

While drug courts are powerful tools for making use of alternatives to imprisonment, there are also other methods to ensure that drug addicts who enter the criminal justice system are not imprisoned unnecessarily. This is important because, despite authorities' best efforts, drugs are often freely available inside prisons. Courts must bear this reality in mind when they decide whether or not to remand a vulnerable suspect into prison. When imposing sentence on offenders who are addicted, ordinary courts must also consider that drug treatment in the community is more effective than that offered in prison. In marginal cases, this could become a key factor in deciding whether to impose a conditional sentence of imprisonment or a community penalty in which submitting to drug treatment is a condition of sentence. Conditional release of sentenced prisoners should also make provision for treatment and monitoring of drug addicts after their release.

The alternative strategies for dealing with drug-addicted offenders outside prison all depend on the availability of treatment for addicts in the community. This presupposes a network of *drug counselors* and treatmentcentres staffed by specialist *medical practitioners* and *psychologists* to whom they can be referred. These experts need to work closely with key criminal justice actors—the police, prosecutors, judges and probation officers—in providing appropriate treatment for addicted offenders. Clearly, government must play a key role both in providing services and in coordinating them. The volunteer sector can assist too, not least by

ensuring that services for drug addicts that are available in the community can be accessed by the criminal justice system, too.

4.19.6 Mental Illness

In general, mentally ill persons are better treated outside than inside prison. Ideally, they should remain in their community, a principle recognized by the United Nations Principles for the Protection of Persons with Mental Illness[94]. Should they require treatment in a mental health facility, it should also be as near to their homes as possible. It should never be a prison. Mentally ill persons sometimes commit criminal acts, some of which may pose a threat to society. If no other procedures are in place, they end up in prisons, which are not designed to care for them. What can be done to avoid this?

Keeping the mentally ill out of the criminal justice system. Decriminalization of the actions of the mentally ill raises many complicated questions about their criminal responsibility. Diversion of the mentally ill raises wider issues than determining criminal responsibility. Many persons suspected or convicted of criminal offences suffer from mental illness. Authorities may find that the illness is not severe enough to free them from responsibility for their criminal actions, but the mental illness must be taken into account in deciding how to deal with such offenders. The police and the prosecuting authorities should make special efforts to divert persons in this intermediate category from the criminal justice system entirely.

The courts have a particularly important role to play here. The United Nations Principles for the Protection of Persons with Mental Illness encourage the creation of a legislative framework that allows the courts to intervene where the sentenced prisoners or remand detainees

[94] The Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care (MI Principles), Principle 7.1, were adopted by the United Nations General Assembly in 1991. They provide agreed but non-legally-binding basic standards that mental health systems should meet and rights that people diagnosed with mental disorder should have.

are suspected of having a mental illness. Such legislation "may authorize a court or other competent authority, acting on the basis of competent and independent medical advice, to order that such persons be admitted to a mental health facility"[95] instead of being held in prison.

Mentally ill offenders who remain within the criminal justice system should, as a matter of routine, be given special consideration to determine whether they would not be better placed outside prison. This is an especially an important factor when alternatives to pre-trial detention are being considered. Similarly, a community sentence with a treatment element for the offender's mental illness should be considered in appropriate cases. It should also be recognized that the mental health of offenders may change over time. The mental health of prisoners should be a factor when deciding whether to release them before the completion of their sentences.

The involvement of the following individuals and groups is essential:

1. **States** need mental health systems that provide treatment both in closed mental health facilities and in the community.
2. **Psychiatrists** and **Psychologists** who specialize in the treatment of mental illness need to work closely with the police, prosecutors, judges and probation officers in providing appropriate treatment for mentally ill offenders.
3. **Government** must play a key role both in providing and coordinating mental health services. The volunteer sector can also assist, not least by ensuring that the criminal justice system can access services for the mentally ill in the community.

4.19.7 Women

In all prison systems, women are a minority of the inmates. This may create the impression that there is relatively little need to press for alternatives to imprisonment for them,

[95] *Ibid*, Principle 20.3

but that would be false. In many countries, the number of woman prisoners is increasing rapidly. The Seventh United Nations Conference on the Prevention of Crime and the Treatment of Offenders recognized this reality as far back as 1985. It also noted that programmes, services and personnel in prisons remained insufficient to meet the special needs of the increased number of women prisoners. It therefore invited criminal justice authorities "to examine the alternatives to the confinement of female offenders at each stage of the criminal justice process[96]."

As in the case of other groups, *decriminalization* has a particular role to play in reducing the number of women in prison. Some non-violent offences committed mostly by women or that apply specifically to women may be decriminalized. Focusing a decriminalization strategy on such offences will significantly reduce the number of women in prison.

Diversion strategies for women operate best when they seek to offer social assistance both to the women and to their families. Many women who come into contact with the criminal justice system are responsible for young children, so that their detention in prison will cause great disruption of those vulnerable lives as well.

Overall crime patterns of women differ from those of men. Women are often used as drug couriers to smuggle drugs across international borders. Although technically guilty of drug trafficking, authorities need to understand the pressures that may have been brought to bear on them to commit the crime and should adjust their sentences accordingly.

4.19.8 Alternatives for Women in the Criminal justice system

The disproportionately severe effects of women's imprisonment require additional efforts in finding alternatives to imprisonment at all stages of the criminal justice process. The

[96] Seventh Congress on the Prevention of Crime and the Treatment of Offenders; See G Alfredson and K Tomasevski, 'A Thematic Guide to Documents on the Human Rights of Women', (Hague: Mirtinus Nijhoff Publishers, 1995) p.348.

techniques at authorities' disposal are similar to those recommended for others. However, courts may find that some alternatives are easier to apply to women than to other groups. For example, a high percentage of women are detained for non-violent offences, thus making it easier to release them conditionally prior to trial. Courts must bear in mind the position of women in society when considering alternatives to sentences of imprisonment. The requirements of community sentences may require modification to meet their needs and to allow them to cope with responsibilities for child rearing. As women tend to be poorer than men overall, particular attention may need to be focused upon ensuring that, if they default on fines, they do not end up in prison automatically.

Women are often good candidates for early release, be it conditionally or unconditionally. Systems that use amnesties or pardons by the head of state may give them special consideration.

The involvement of the following individuals and groups is essential:

1. **The criminal justice system** as a whole needs to work to find and implement alternatives to imprisonment for women.
2. **Governmental and non-governmental organizations** that focus on women's issues should be encouraged to consider the issue of women's imprisonment and to contribute to discussions on how alternatives to it can best be found.

4.19.9 Over-Represented Groups

In addition to the groups discussed above, the over-representation of certain other groups in prisons raises the question about whether authorities should pay special attention to providing alternatives for them. In some societies, two of these groups are indigenous minorities and foreign nationals.

Indigenous Peoples: In some countries, indigenous minorities are grossly over-represented in the criminal statistics and in prisons. Canada and Australia, for example, have adopted formal strategies for dealing with this issue. They include diversion and the provision of alternatives that make more use of these communities' traditional punishments. For example,

> The Canadian Criminal Code *requires "that all available sanctions other than imprisonment that are reasonable in the circumstances, should be considered for all offenders, with particular reference to the circumstances of Aboriginal offenders."*
>
> This established the principle of imprisonment as last resort, particularly for Aboriginal offenders, a group that is over-represented in prisons. While comprising some three percent of the Canadian population, Aboriginal persons represent 15 and 17 percent, respectively, of the population of provincial and federal correctional institutions. In some provincial correctional facilities in the country's western regions, Aboriginal persons compose 60 to 70 per cent of institutional populations.
>
> This sentencing principle was reaffirmed by the Supreme Court of Canada in the case of *R. v. Gladue* [1999] 1 S.C.R. 688. Subsequently, an Aboriginal Persons Court was created in Toronto, Ontario. The Ontario Court of Justice deals exclusively with bail hearings, remands, trials and sentencing of Aboriginal offenders. Convening twice a week, the court deals with the cases of Aboriginal persons charged in downtown Toronto. The judge, Crown (prosecutors), defence lawyers, court clerks, and court workers are all Aboriginal. In processing the

cases, the court makes every attempt to explore all possible sentencing options and alternatives to imprisonment[97].

Foreign Nationals: Foreign nationals make up a large percentage of the prison population of several countries. For various reasons, it is sometimes assumed too easily that alternatives to imprisonment are not applicable to them. There may be an assumption, for example, that all foreign prisoners present an escape risk and that therefore none can ever be granted conditional release. Such blanket assumptions should be avoided; each case should be treated on its particular characteristics.

[97]CT Griffiths, *Canadian Criminal Justice: A Primer*, (3rd edn, Toronto: Thomson Nelson, 2006); Forthcoming; Criminal Lawyers' Association, "Gladue (Aboriginal Persons) Court, Ontario Court of Justice—Old City Hall, Fact Sheet." Retrieved from <www.criminallawyers.ca/gladue.htm>. Accessed September 30, 2017.

CHAPTER FIVE

A SURVEY OF THE APPLICABILITY OF ADR TO CRIMINAL TRIALS IN SOME SELECTED COUNTRIES.

5.1 Overview of the Selected Countries

The mainstreaming of alternative dispute resolution (ADR) in civil justice administration is a common and accepted phenomenon. 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[1]. The scope allowed for ADR in the criminal justice context appears to be strictly limited to minor offences. This chapter shall take a survey of selected jurisdictions like Canada, Australia, USA, Netherland, New Zealand, Germany and Nigeria.

5.2 Canada

Canada appears to have taken the lead in the use of ADR in the criminal justice delivery. In Canada, it would appear that the whole spectrum of ADR in the criminal justice delivery finds expression. These include Restoration Justice, Victim - Offender Mediation, Plea Bargain, Sentence Circles, Group Conferencing and Community Crime Prevention Programmes.

In fact, in Canada, legislation recognizes the role of ADR in the criminal justice process. The Canadian Criminal Code[2] legislated the recognition of innovative sentencing practices, such as healing and sentencing circles, and aboriginal community council projects which share a common underlying principles: that is, the importance of community based societies. This section provided thus:

[1] KN Nwosu, 'Role of Traidional Rulers and Community Leaders in Criminal Justice Administration' in KN Nwosu, (ed), *Dispute Resolution in the Palace*, (Ibadan: Gold Press Ltd., 2010), p.181

[2] The Canadian Criminal Code, 1985, section 718 (2)(e)

> Available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particulars attention to the circumstances of aboriginal offenders[3].

The *Gladue Case* was the first to interpret or consider the meaning of the above provisions of section 718 (2) (e). The accused, an aboriginal woman, pleaded guilty to manslaughter for the killing of her common law husband and was sentenced to three (3) years' imprisonment. On the night of the incident, the accused was celebrating her 19th birthday and drank beer with some friends and family members, including the victim. She suspected the victim was having an affair with her older sister and, when her sister left the party, followed by the victim, the accused told her friend, "He's going to get it. He's really going to get it this time". She later found the victim and her sister coming down the stairs together in her sister's home. She believed that they had been engaged in sexual activity. When the accused and the victim returned to their town house, they started to quarrel. During the argument, the accused confronted the victim with his infidelity and he told her that she was fat and ugly and not as good as the others. A few minutes later, the victim fled their home. The accused ran toward him with a large knife and stabbed him in the chest. When returning to her home, she was heard saying "I got you, I got you… bastard" there was also evidence indicating that she had stabbed the victim on the arm before he left the townhouse. At the time of the stabbing, the accused has a blood-alcohol content of between 155-165 milligrams of alcohol in 100 milliliters of blood. At her sentencing hearing the judge took into account many aggravating factors including the fact that the offender was not afraid of the victim. The court also took into account several mitigating factors such as her youth, her status as a mother and the absence of any serious criminal history. She was sentenced to three (3) years imprisonment. Her appeal to the court of Appeal for British

[3] See also *R.v. Gladue* (1999) I.S.C.R 688

Columbia was dismissed. Her further appeal to Supreme Court of Canada was further dismissed. However, the case is held in high esteem for the dicta made by the Supreme Court in the case.

Justices Cory and Iacobucci held that the courts below erred in taking an overly narrow approach of section 718 (2) (e). The purpose of this provision is to address the historical over-representation of aboriginals in the criminal justice system. This applied to aboriginals, regardless of place of residence or lifestyle. However, the court ultimately dismissed the appeal, finding that the sentence was fit given the seriousness of the offence. According to the court, the sentencing judge may have erred in limiting the application of section 718 (2) (e) to the circumstances of aboriginal offenders living in rural areas or on –reserve. Moreover, he does not appear to have considered the systemic or background factors which may have influenced the accused to engage in criminal conduct, or the possibly district conception of sentencing held by the accused, by the victim's family, and by their community. The majority of the Court of Appeal, in dismissing the accused's appeal, also does not appear to have considered many of the relevant factors. However, the Supreme Court held that three (3) years imprisonment in her circumstances was not unreasonable.

According to Rudin:

> The court said that S. 718 (2) (e) offered sentencing judges a chance to address these issues by looking to more restorative sentencing options when sentencing Aboriginal people. In order to change the way Aboriginal people were sentenced, the court needed to know about the particular circumstances that brought the Aboriginal offender before the court and the types of options that might be available when passing sentence. The decision of the supreme court was seen as a groundbreaking one that provided some hope that the over-representation of Aboriginal people in prisons might finally be addressed[4].

[4] J Rudin, 'A Court of our Own: More on the Gladue Courts'. <http://www.namlegal.on.ca/npload/documents/acourt-of-our-own-more-on-gladue-courts.paf> accessed on July 6, 2017

There is now established in Canada, what is known as Gladue Court, taking its name from the Gladue case. Such courts deal with Aborigines in the criminal justice system following the principles outlined by the Supreme Court in Gladue Case[5].

5.3 Australia:

It is pertinent to note that Australia is very pro-active in the use of ADR in criminal trials. The response of the Australian legal system to the use of ADR in criminal disputes includes "The Wagga Wagga Program in New South Wales, Victim - Offender Mediation, Family Group Conferencing, Community Conferencing and Re-integrative Shaming Experiment (RISE)[6]. The significant thing about Australia is that all of the six states except Victoria have statutory-based schemes which provides for ADR in the criminal justice system by way of conferencing as an element in the hierarchy of response to youth crime. The Australian capital territory has enacted The Crime (Restorative Justice) Act 2004. The overarching purpose of such legislative schemes is to divert young people from the formal justice system, to contribute to the development and re-integration of offenders, and to develop a response to crime which meets the needs of both the victim and the offender[7]. Hence, in Australia, the focus has been very much on developing more effective ways to deal with offenders, particularly youth and indigenous offenders[8].

[5] *Ibid*
[6] P Condliffe, 'Putting the Pieces Together: The Opportunity for Restorative Justice in Victoria', *Law Institute Journal*, 79 (8), 35
[7] M Lewis, and L McCrimmon, 'The Role of ADR Processes in the Criminal Justice System: A View from Australia. A Paper delivered at the Association of Law Reform Agencies of Eastern and Southern Africa (ALRAESA) Conference, held at Imperial Resort Beach Hotel, Entebbe, Uganda, on September 4-8, 2005.
[8] *Ibid*

5.4 The United State of America

The moment it is conceded or understood that plea bargaining ie, plea negotiation is ADR par excellence in the criminal justice system, then, there would be no arguments as to whether the American legal system recognizes ADR in the criminal justice system, because it does[9].

The United States Supreme Court affirmed the constitutional validity of plea bargaining in America in the following words:

> The disposition of criminal charges by agreements 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 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[10]

Consequently, plea bargaining is an entrenched part of the American criminal justice system. It is so entrenched that less than ten percent of criminal cases go to trial while over 90% are settled under plea bargaining[11]. Thus, the US criminal justice system countenances ADR. According to the university of Denver Sturm College of Law: The criminal justice system is one of the most recent ADR adopters and has been gaining popularity in many parts of the US and around the world as an alternative to traditional retributive justice...

In several decisions, the Supreme Court of the United States has affirmed that plea bargaining is an intrinsic part of the country's criminal justice system. In the case of *Santobello v. New York*[12], the Supreme Court stated that plea bargaining 'is an essential component of the administration of justice', adding that "If every criminal charge were subjected to a full-scale

---

[9] CA Ogbuabor, et al, 'Using ADR in the Criminal Justice System: Comparative Perspective', *International Journal of Research in Arts and Social Sciences*, (2014), vol 7, No 2

[10] *Santobello v. New York*, 404 US 257 (1971)

[11] MH Steinberg, 'Plea Bargains: Why, When and How they are Made'. <http://www.hmichaelsteinberg.com/pleabargaining.htm> Accessed on July 10, 2017.

[12] 404 U.S 257, 260 (1971)

trial, the States and Federal Government would need to multiply by many times the number of judges and court facilities.

In affirming plea bargaining as stated above, however, in *Hughes v. United States*[13], the Federal Government in 2013 charged Erik Hughes with four counts of drug and firearm offenses. Subsequently, Hughes and the government reached a plea bargain whereby Hughes plead guilty to two counts, conspiracy with intent to distribute and possession of a firearm as a felon, in exchange for a sentence of 180 months in prison.

The district court then conducted a sentencing hearing to evaluate the plea bargain and determine whether Hughes's plea conformed with the United States Sentencing Guidelines. The district court calculated Hughes's sentencing range to be between 188 and 235 months and upheld the plea bargain under Federal Rule of Criminal Procedure 11(c)(1)(C). Rule 11(c)(1)(C) permits a court to accept a plea bargaining that lists a sentencing recommendation outside of the Sentencing Guidelines, but the court becomes bound by the recommendation once the court accepts the bargain. Thus, applying the plea bargain, the district court imposed a 180-month sentence on Hughes.

Less than two months after Hughes's sentencing, the Sentencing Commission modified the Sentencing Guidelines via Amendment 782. Amendment 782 reduces the offense levels of some drug offenses and applies to cases previously decided under that portion of the Guidelines. Offense levels are a factor in the sentencing range calculation; a reduction in offense level decreases the sentencing range produced by the Sentencing Guidelines. Hughes submitted a motion to reduce his sentence based on this amendment and the statute guiding the determination

[13] 584 U.S (2018)

of terms of imprisonment. The statute, 18 U.S.C. s. 3582(c)(2) states that a court may modify an individual's imprisonment term when that individual was sentenced "based on a sentencing range that has subsequently been lowered." The combination of s. 3582(c)(2) and Amendment 782, Hughes argued, entitled Hughes to a sentence reduction resulting in a sentence of between 151 and 188 months.

Applying the Supreme Court's decision in *Freeman v. United States*[14], the district court rejected Hughes's motion. The Court in *Freeman* split 4-1-4 on whether sentences pursuant to plea agreements were "based on" the Sentencing Guidelines and therefore amendable under s. 3582(c)(2). *Marks v. United State*[15]s suggests that the holding of a split decision is the position on the "narrowest grounds." Circuit courts have split on the interpretation of *Marks*. A minority of courts apply a "logical subset" rule, requiring the holding to be the rule which fits into the broader opinion. The majority hold the "narrowest" position to mean the least far-reaching position which still, when applied to other cases, produces results that are agreeable to a majority of justices. In *Freeman*, Justice Sotomayor, concurring, and the plurality agreed that plea bargaining could be within s.3582(c)(2); although, Justice Sotomayor stated that only those plea bargaining which use the Guidelines' sentencing range or cite the Guidelines as part of the rationale for the sentencing recommendation qualify. Therefore, the district court applied Justice Sotomayor's concurring opinion and held that Hughes could not be resentenced because his Rule 11(c)(1)(C) plea did not refer to the Sentencing Guidelines. The Court of Appeals upheld the district court's ruling, holding that (1) Justice Sotomayor's concurring opinion was the determinative rule, and (2) Hughes was ineligible for resentencing under Amendment 782

[14] 09-10245 U.S (2011)
[15] 430 U.S 188 (1977)

because his plea bargaining was not "based on" the Sentencing Guidelines. The United States Supreme Court granted certiorari on December 8, 2017.

Thus, aside from plea bargaining, ADR has also extended other forms of its mechanisms to the criminal justice system in the US. These include the VOM[16] and FGC[17]. According to the Victim-Offender Reconciliation Program Information and Resources Centre:

> Victim – Offender Reconciliation Program (VORP) is a restorative justice approach that brings offenders face-to-face with the victims of their crimes with the assistance of a trained mediator usually a community volunteer...VORPs have been mediating meaningful justice between crime victims and offenders for over twenty years; there are now thousand of such programs worldwide. Remarkably, consistent statistics from a cross-section of the North American programs show that about two-thirds of the cases referred resulted in a face-to-face mediation meeting; over 95% of the cases mediated resulted in a written restitution agreement; over 90% of those restitution agreements are completed within one year. On the other hand, the actual rate of payment of court-ordered restitution (nationally) is typically only from 20-30%[18].

5.5 Netherlands

The Dutch Prosecutors have for a long time had other alternatives available to deal with criminal behaviour than just presenting a case for trial before a judge. Already in the 19th century the practice of waiver of prosecution, on grounds related to expediency, was utilized by

[16] Victim- Offender Mediation
[17] Family Group Conferencing
[18] VORP Info & Resources Centre, 'About Victims-Offender Mediation and Reconciliation'. <http://www.vorp.com.> Accessed on July 17, 2017.

prosecutors on a local level but it has only been since the 1960s that one can really talk of a directed "policy" regarding waving of prosecution[19]. In the Netherlands, the Public Prosecution Service has the authority to impose penalties for a number of common criminal offences. The OM may not impose custodial (i.e. prison) sentences. Municipal authorities and special enforcement officers also have the authority to impose penalties of this kind. They can issue an administrative penalty for antisocial behaviour; for instance, they can fine someone for noise nuisance. They can also issue a 'police penalty' for so-called 'P offences', which are offences like speeding that used to be punished with on-the-spot fines. Increasingly the Openbaar Ministerie (OM) disposes of criminal cases through various processes whereby the accused is *"Penalised"* without the need to bring the matter before a judge. With a penalty is meant a juridical reaction to a transgression of law that affects the transgressor's interests.

These armoury of alternatives are sepot or waiver of prosecution (both technical as well as policy waivers) which can be either unconditionally, or subject to the accused complying with some condition decided by the prosecutor[20]. Another frequently used method of disposal is the *Transactie* which resembles a formalized conditional waiver. The *transactie* was first introduced in 1921 and initially had limited application but subsequent legislative amendments have greatly increased the usability and effectiveness of this method to dispose of a variety of criminal cases speedily, without going to court[21]. In essence a *transactie* is a written offer to the accused to comply with the proposed conditions[22] in which case no further prosecution will follow. The

[19] AM Anderson, 'Alternative Disposal of Criminal Cases by the Prosecutor: Comparing the Netherlands and South Africa (2014). <https://www.narcis.nl> Accessed on July 8, 2017.
[20] *Ibid*
[21] *Ibid*
[22] Payment of a Fine, Compensation to the Victim, Community Service

transactie offer usually amounts to 20% less of what the suggested sentence would be if the matter goes to trial.

Where the accused chooses not to accept the *transactie*, summons would be issued and the matter would go to court. *Transactie* has also been extended to other areas of law and even the police were authorized to offer the accused a *transactie*[23]. Another way to finalize cases is found in the *Voeging Ad Informandum Practice*. The prosecutor "adds" some (similar) charges to the charge- sheet and, if the accused acknowledges it[24], the prosecutor will request the judge to take these *"acknowledged"* charges into action for purpose of sentencing. If this is done, no further prosecution can result on those charges. In the Netherlands there has been huge developments regarding administrative law, creating in essence a separate administrative criminal law[25]. Administrative fines, later often replaced with administrative *transacties*, took the place of criminal prosecution[26].

Another alternative method is *Wet Administratiefrechtelijke Handhaving Verkeersvoorschriften (WAHV)*[27]. This noble concept is an administrative adjudication of traffic offences which entail that the offender is not only given a notice of a "suggested" penalty like in the case of a *transactie*, or a conditional *sepot*, but the transgression notice actually indicates that the offender is deemed to be guilty of the offence unless (s)/he takes timely steps to protest the matter (to court). The fine itself must first be paid before the case is heard. Jurisprudence from both the (Dutch) Supreme Court of Appeal, as well as the European Court of Human Rights, have ruled that such procedures are not an infringement of the accused's right to a fair trial since

[23] AM Anderson, *opcit*
[24] There is no plea of guilty in the Dutch system
[25] There is no plea of guilty in the Dutch system
[26] *Ibid*
[27] *Ibid*

the choice remains for the person to contest the matter in court. Informal methods of dealing with criminal conduct such as mediation, negotiation, restorative justice, etc are also a continuous issues.

Since the success of these alternative disposal methods depended on the cooperation of the alleged offender and the out-of-court efforts of the prosecutor could easily be frustrated by the offender simply ignoring it, it was deemed necessary to established the most recent development in alternative disposal by the prosecutor namely the *Strafbeschikking*[28]. The *strafbeschikking* is intended to replace the *transactie* and is rather contentious since the prosecutor not only suggests a possible penalty which the offender can decide to accept or not, but the *strafbeschikking* in fact amounts to an act of prosecution which becomes final, and is equated to a conviction and sentence by court, if the offender does not timely oppose the matter by insisting to be tried before a Judge. Prior to the *strafbeschikking* ,the alternative methods were indeed a way to avoid prosecution and relied on consensus, whereas the *strafbeschikking* is regarded as an act of prosecution which does not require consensus. There is, however, considerable political enthusiasm for this development and *strafbeschikkingen* can also be imposed by bodies other than the prosecuting authority.

5.6 New Zealand

Alternative dispute resolution (ADR) has been statutorily mainstreamed to crime disposal in New Zealand. Family group conferencing (FGC) is reputed to have originated in New Zealand where it arose from Maori Tradition; and was subsequently legislated as the standard way to deal with juvenile crimes[29]. There is therefore no question as to whether the New Zealand criminal justice system countenances ADR in its processes. The New Zealand Children, Young Persons

[28] Punishment Order
[29] P Condliffe, *opcit*, p.36

and their Family Act of 1989 deals with youth justice. It begins with a statement of principles which makes use of criminal proceedings as a matter of last resort if there are alternative available. It emphasizes keeping young persons in their communities, and recognizes the interest of victims of offences. These principles are followed with an express prohibition of prosecution of children and young persons until a family group conference has been convened.

The emphasis on diversion is reinforced in the statute by a series of principles of Youth Justice as set out in s. 208 of The New Zealand Children, Young Persons and their Family Act, 1989, five of which are as follows:

> (a) The principle that, unless the public interest requires otherwise, criminal proceedings should not be instituted against a child or young person if there is an alternative means of dealing with the matter:
>
> (b) The principle that criminal proceedings should not be instituted against a child or young person solely in order to provide any assistance or services needed to advance the welfare of the child or young person, or his or her family, whanau, or family group:
>
> (c) The principle that any measures for dealing with offending by children or young persons should be designed - (i) To strengthen the family, *whanau, hapu, iwi,* and family group of the child or young person concerned; and (ii) To foster the ability of families, *whanau, hapu, iwi,* and family groups to develop their own means of dealing with offending by their children and young persons:
>
> (d) The principle that a child or young person who commits an offence should be kept in the community so far as that is practicable and consonant with the need to ensure the safety of the public....

(f) The principle that any sanctions imposed on a child or young person who commits an offence should -

(i) Take the form most likely to maintain and promote the development of the child or young person within his or her family, *whanau, hapu,* and family group; and ;

(ii) Take the least restrictive form that is appropriate in the circumstances.

Thus the statute emphasizes that criminal proceedings are a last resort and encourages a community-based solution whereby families, *whanau* (extended families), *hapu* (sub-tribes), and *iwi* (tribes) and family groups take prime responsibility for dealing with their own young people. It should be stressed that this legislation applies to all racial groups in New Zealand. Although the Act is sensitive to certain values embedded in Maori and Pacific Island culture (e.g. the need to address the position of the victim, the value of an apology, and the importance of consensus rather than majority decisions), I have never heard it suggested in my seven years as a Youth Court Judge that the value of the FGC process is limited to those cultural groups.

Significantly, s 208 is followed immediately by provisions dealing with warnings and formal police cautions which are encouraged as first steps in dealing with young offenders. What is not mentioned in the statute but is also significant is an informal system of police diversion which operated before the Act came into force and continues to operate alongside the formal diversionary FGC system. Informal police diversion usually involves a police visit to the young person's home and, with agreement of the parent(s) and the victim, giving the young person certain tasks to attend to in the community such as community work and payment of restitution. While this practice has no explicit statutory backing, it is seen to be simply part and

parcel of the police discretion in the prosecution of offenders and from a legal point of view its authority relies upon its consensual nature. It is said that many more young people are dealt with by such informal means than are referred to diversionary FGCs under the Act, but unfortunately no figures are available to determine the exact proportions. The estimate of a senior police officer is that 80-85% of offences committed by children and young persons do not go to a FGC[30].

It is pertinent to note here that conferencing is used in a number of overseas jurisdiction; however, Australia and New Zealand stand out in that they have sustained statutory based schemes for such processes unparallel in other jurisdictions[31]. New Zealand was indeed the first jurisdiction to introduce a statutory – based conferencing scheme when it passes The Children, Young Persons and their Family Act, 1989.

5.7 Germany

Germany, though a civil law country, typifies the approach of the civil law countries to ADR in the criminal justice system. ADR is well accepted in the German criminal justice system, especially mediation.

According to Trenczek:

> Although mediation is often presented as an alternative to the adversarial court process, it operates within the shadow of the law. This is especially true for mediation schemes within the criminal justice context. Unlike in other countries, especially common law jurisdictions, mediation in Germany is most frequently used not in the civil law but within the criminal justice field by Victim Offender Mediation (VOM) programs[32].

[30]This percentage will however include police warnings and cautions as well as informal police diversion.

[31] M Lewis, and L McCrimmon, *opcit*, p.9

[32] T Trenczek, 'Victim- Offender Mediation in Germany –ADR under the Shadow of the Criminal Law?', *Bond Law Review*, 13 (2) Art 6,1-17

In Germany, the process known as VOM is referred to as *"Tater-Opfer-Ausgleich"* (TOA) which literally translated is *"Offender- Victim-Balancing".* It means both conflict settlement and reconciliation[33]. TOA is integrated in the German Criminal Code and is a routinely used acronym in Germany. The result is that today, there are in Germany, about 400 ADR programs operating mostly community based and/ or state-financed, with about two-thirds operating within the juvenile justice context while one third works with adult offender.

5.8 Ethiopia

In Ethiopian criminal justice system, even if the term ADR is not clearly defined, the Criminal Procedure Code of Ethiopia mandates the court to try to reconcile the crime victim & the accused during private prosecution[34]. However, this provision lacks clarity because the term 'reconcile' is not defined; the manner how it shall be conducted; the parties who shall participate in the process and their respective responsibilities; and the duties and rights of the victim and the offender in the process are not clearly prescribed. Similarly, the Criminal Procedure Code of Ethiopia authorizes the *'Athibia Dagna'* to resolve through 'compromise'[35] offences such as insult, assault, petty damage to property or petty theft where the value of the property stolen does not exceed Five Ethiopian Birr[36]; however, this provision does not prescribe the status of *'Athibia Dagna'* in the criminal justice system; it failed to prescribe how compromise procedure works; it does not indicate the rights & duties of both sides of parties to the dispute like that of

[33]T Trenczek, *opcit*
[34] Criminal Procedure Code of Ethiopia, Negarit Gazeta Extraordinary Issue No.1 of 196, Art.151, para.2.
[35] Civil Code of Ethiopia, Proclamation No. 165 of 1960, Art. 3307, defines 'Compromise' as "a contract whereby the parties, through mutual concessions, terminate an existing dispute or prevent a dispute arising in the future"
[36] Criminal Procedure Code of Ethiopia, Art. 223

aforementioned provision. Under the Criminal Justice Policy of FDRE[37], an emphasis is given to introduce 'plea bargaining' to be implemented in the criminal justice system.

Notwithstanding the aforestated provisions, under the Ethiopian Criminal Procedure Code, crimes are categorized into two types. Firstly, those crimes punishable upon public prosecution and secondly, those crimes punishable only upon private complaint. The former refers to those types of crimes in which the interest of the community at large or the state is considered affected and in those types of crimes whether the crime victim has petitioned his/her complaint against the suspect is not a prerequisite to set justice in motion. While the later refers to those types of crimes in which the victim is considered the individual person, who is the direct victim of the alleged crime; and it is stated that those types of crimes imply a higher degree of private interest than public interest. Under the Criminal Procedure Code of Ethiopia[38], discretionary power is vested with the crime victim to petition complaint against the offender if the alleged offences fall under the category of crimes punishable upon private complaint. In these types of crimes, justice comes into motion upon when the crime victim or his/her legal representative petitions complaint before police or public prosecutor even in case when the alleged crime is flagrant one[39]. Therefore, if the crime victim and the offender are willing to settle their dispute through ADR process in the case where the alleged crime is punishable upon private complaint, the Criminal Procedure Code of Ethiopia does not expressly preclude them.

Moreover, in case where the public prosecutor refuses to prosecute the offender if he/she beliefs that the evidence collected does not warranty the conviction of the offender according to Article 42, paragraph 1(a), of the Criminal Procedure Code of Ethiopia, similarly this law

[37] Federal Democratic Republic of Ethiopia
[38] Art.13 and 21, Para.1
[39] *Ibid*; Art.19-21

authorizes the crime victim or his/her legal representative to prosecute the offender privately if the alleged crime is punishable upon private complaint. This procedure is called private prosecution[40]. During private prosecution, the same law empowers the court to attempt to reconcile the injured party and offender on the day fixed for first hearing before reading out and explaining the charge to the accused[41]. Moreover, the law states that if the reconciliation is effective, it will be recorded in the file and it shall have similar effect with the judgment of the court[42].

Particularly, it is supposed that if reconciliation is effective, it will terminate the prosecution; and it will preclude prosecution of the offender on similar crime in the future. Nevertheless, if such reconciliation is impossible, the court continues to hear the case as an ordinary prosecution by following the rules of procedures laid down under Articles 123 to 149. Since the main rationale of referring cases to ADR is to reduce the case load of courts, either judiciary or administrative tribunal, and to save time and resource of the litigation & disputant parties, the stage at which a case is referred to ADR is highly crucial. It is worthy of note that the Criminal Procedure Code of Ethiopia empowers the trial court to attempt to reconcile the injured party and offender during on the day of first hearing in case of private prosecution. This is encouraging and Nigeria Criminal Law should consider imitating the Ethiopian Criminal Law.

[40]*Ibid*; Art. 42
[41]*Ibid*; Art. 43
[42]*Ibid*

5.9 ADR under Islamic/ Sharia Criminal Justice System

What we call criminal law falls in the Sharia under three (3) separate headings. Quaranic offences and their punishments[43]; the law of homicide and hurt; and other crimes punishable at the discretion of the Judge[44].

According to Bambale:

> The Arabic word for crime is ‘jarima', which is derived from the word, 'jaram'. The word 'jaram' literally means 'to cut' and 'to earn' what is not good. Technically, 'jarima', or crime refers to prohibition imposed by Allah, the violation of which gives rise to punishments known in Arabic as 'uqubat'. These punishments take the form of Hadd, Qisas and Ta’azir. Therefore, crime may be defined as the legal prohibition imposed by Allah, violation of which is punishable by Hadd, Qisas and Ta’azir…
>
> In some cases of crime, the right of individual is dominant and in others, the right of Allah is more conspicuous. Where the right of the individuals is dominant, the punishment is called Qisas[45].

Hadd[46] is a crime with fixed punishment. This consists of those Quranic offences or crimes mentioned in the Quran, for which fixed penalties are provided in the Sharia. They are; Theft[47], Robbery[48], Drinking of Alcohol[49], and False Accusation of Unlawful Sexual Intercourse[50]. An essential with regards to Quranic offences is that, if they are formally proven, the judge has not latitude in the choice of punishment. The word “Qisas” means retaliation. This is the domain of hurt homicide and assault based offences. Here, the course of the law and punishment depends largely on the victim’s desire, whether to retaliate or to forgo. In the words of Peters:

---

[43] *Hudud*
[44] Ta’Zir, Siyasa; R Peters, *Islamic Criminal Law in Nigeria*, (Ibadan: Spectrum Books Ltd, 2008), p.1
[45] YY Bambale, Crimes and Punishments Under Islamic Law, (Lagos: MaltHouse Press Ltd, 2003), p.1
[46] *Hudud* for Plural
[47] *Sariqa*;
[48] *Hiraba*
[49] *Shurb al- Khamr*
[50] *Qadhf*; R Peters, *locit*, p. 8

> The second domain, that of homicide and hurt, is one characterized by private prosecution in the sense that the culprit can only be sentenced and punishment if the victim or his 'avengers' demand punishment. Whereas most islamic jurists hold that the victim's heirs are his avengers, the Maliki School lays down that only the victims adult, male agnatic relatives (or in the absence of male agnates, his daughter or sister have this right regardless of whether the victim was a man or a woman).
>
> If homicide or hurt is committed intentionally, the punishment is retaliation (Quisas). Thus, for homicide the culprit may be punished by death, and for hurt causing the loss of limbs, or senses, by inflicting the same injury on him, at least if this is technically possible without endangering the convicts life. Another condition is that the perpetrators blood price must not exceed that of the victim, Eg because of differences in religion. 'If the death or injury is not caused intentionally or if the victim or his heirs are willing to forgo punishment in kind," retaliation is then replaced by the payment of the blood price (Diya)… In most cases, not the culprit but his aqila (solidarity group ie, his tribe, or agnatic relatives) is obliged to pay the blood price[51].

Ta'azir refers to discretionary punishment. This domain of Islamic Criminal Law has no clearly defined offences. Judges have the discretion to punish sinful or otherwise undesirable acts. This is called *ta'azir or siyasa*. This aspect of Islamic criminal law is what appears to have been codified in section 92 of the Zamfara State Shariah Penal Code, wherein it provides that: "Any act of omission which is not specifically mentioned in the Shariah Penal code but is otherwise declared to be an offence under the Qu'ran, Sunnah and Ijtihad of the Maliki School of Islamic Thought shall be an offence under the code and such an act shall be punishable".

Consequently, Islamic law presents us with a mixed grill. In some cases, it would appear that the criminal law would not compromise prosecution and punishment much in the same manner as the criminal code's stance against compoundment and arbitrability of felonies, while in some cases, the Islamic criminal law would countenance ADR and restorative justice. In Islamic Criminal Law, there is a concept known as *Sulh*. According to Hon Justice M.A Ambali,

[51] R Peters, *opcit*, p.3

"readily, I want to say that ADR has a seemingly (sic) equivalent in Islamic legal system. It is called *Sulh*… Is an integral part of Islamic legal system right from inception"[52]. The concept of *Sulh*, it seems, approximates to peaceful settlement[53]. According to one definition of it, it means to concede/ forgo a right or demand something in lieu of if for the purpose of terminating a conflict or to avoid occurrence of conflict[54]. Another version has it as a covenant which brings disputes between two parties to an amicable end…. *Sulh* is prescribed by Qu'ran, Sunuah and the consensus of Jurists for the purpose of attaining accord in place of disagreement and put an end to bitterness between the warring parties…..[55] Yet another version states as follows: Prevail on disputing parties till they go for peaceful settlement. Surely, court's decision will lead to ever-lingering bitterness between them[56]. These definitions of *Sulh* are founded on Quranic injuctions such as:

a) There is no good in many of their conferences except the conferences are of such as enjoin charity or goodness or the making of peace among men.
b) …so fear Allah and set things right among yourselves.
c) …so make peace between your brothers and fear Allah that mercy may be shown to you.
d) And if a woman has reason to fear ill-treatment from her husband or that he might turn away from her:- it shall not be wrong for the two to set things peacefully to right between themselves, for peace is best[57].

---

[52] MA Ambali, 'The Promise of Restorative Justice, Plea Bargaining and Victim-Offender Mediation in the Sharia Legal System' In NCMG Compendium of Speeches and Papers delivered at the 2nd NCMG African ADR summit, NCMG Lagos, Nigeria, 2007, pgs 73-79
[53] MB Uthman, 'Overview of the Story of Sulh in Civil and Criminal', in IA Aliyu (ed), *AlternativeDispute Resolution and Some Contemporary Issues*, (Zaria: M.O Press & Publisher Ltd, 2010), pp 151-167
[54] AM Ambali locit, p.79
[55] *Ibid*
[56] *Ibid @ p.75*
[57] *Ibid*

A thorough reflection over the foregoing shows that *Sulh* has part and parcel of Islamic legal system right from its onset, and it has ever aimed at avoidance of conflicts and bitterness and their removal, where it occurred. However, *Sulh*, peaceful settlement is paper as long as it does not legalize what is forbidden[58]. The learned judge:

> The remedy for any crime of violence to the person lies with the individuals and not the public. This is because any violence leading to loss of life or bodily injury is a tort in Islamic Law. They may be camdu, deliberated intentional, or *khartau*, unintentional. For both, Qur'an 2:178 and Qur'an 4:92 respectively apply…
>
> The totality of the foregoing verse is that Islamic law prescribes *Qisas*, retribution in cases of intentional act; either it leads to loss of life or bodily injury. It does also prescribe *Diyyaj*, (compensation) in place of offender. Over and above both is *Afwu*, the total and unconditional pardon, where neither *Qisas* nor *Diyyah* is demanded by the victim in the case of bodily injury or his relation, in the case of death. God then promises handsome rewards as contained in Qur'an 42:40 as follow; "the recompense for an injury is an injury equal thereto (in degree): but if a person forgives and makes reconciliation, his reward is due from Allah[59].

5.10 Mainstreaming ADR into International Crimes Disposal

Crime is a legal wrong that can be followed by criminal proceeding which may result in punishment[60]. The general problems which beset the definition of crime generally also assail the definition of the international law[61]. One of the earliest definitions of international crime is that found in the opinion of Judge Cater of the United States Military Tribunal at Nuremburg in *Re List and others*[62], when the stated that: "An international crime is such as act universally recognized as criminal, which is considered a grave matter of international concern and for some valid reason be left within the executive jurisdiction of the state that would have control over it

[58] AM Ambali opcit, p.79
[59] *Ibid*
[60] G William, *Textbook of Criminal Law*,(London: Stevens & Sons Publishers, 1978), p.14
[61] CA Ogbuabor, *et al, opcit,* p. 10
[62] The Hostage case Annual Digest, (1953) p. 636

under ordinary circumstances". From the above definition, international crime follows closely international law- *jus cogens* and may be seen as those wrongs which the generality of civilized nations would see as offending collective sense of humanity.

As a general rule, states apply their criminal law only territorially, that is, the courts of a state will only assume jurisdiction over a criminal investigation or prosecution if the acts concerned are alleged to have been committed within its own territory[63]. The rule of territoriality derives from the doctrine of national sovereignty, according to which, it is not for the courts of one state to judge matters that occur in the territory of another, which the courts of that state are competent to deal with. The rule is also supported by two practical considerations. First, a state many have no facility to investigate directly what happened outside its own territory. Second, the criminal laws of different states vary a lot. What is criminal in one state may be perfectly lawful in another. A state could hardly be expected to punish one of its own citizens for an act which, though criminal when committed elsewhere would have been lawful if committed within its own territory. Exclusive territorial jurisdiction of states for all crimes of course may lead to felons escaping trial and justice by escaping into territories, unless such suspects are successfully extradited, conversely, the same for acts committed outside the state territory by running back home.

The recognition of the fact that certain acts are contrary to the laws of all civilized nations and so, must be arrestable and triable in any state where the offender is found is the beginning of the development of the concept of international crime. It goes back to the development of international law which in order to suppress such acts or violations treated certain types of conducts as crime *jure gentum*, that is, crime contrary to the laws of all civilized nations. This

[63] CA Ogbuabor, *et al, opcit,* p. 10

was typical of crimes committed outside the recognized territory of any particular state, notably piracy in the high seas. In other to suppress piracy in the high seas, the international community law to treat it as a crime *jure gentum.*

Consequently, piracy became the first crime to be recognized by the custom of states to be a concern of international law. Since then, the catalogue of international crimes has continued to expand and includes such crimes as genocide, war crimes and crimes against humanity. It has been asserted, rightly in our view that it is the international community of nations that determines which crime, in the light of the latest developments in law, morality and the sense of criminal justice at a relevant time fails within the definition of an international crime[64]. Just as in the case of crime under municipal law. Whiteman has stated and Kittichaisaree agrees with him that 'it is correct to contend that what acts should be characterized as international crimes depends on the machinery by which such acts are to be death with[65]. Thus, Kittichaisaree asserts that as generally understood, since the UN Conference of Plenipotentiaries for the Establishment of an International Criminal Court in June and July 1998, international crimes are those prosecuted before an international criminal tribunal, whether ad hoc or permanent[66]. Kittichaisaree's definition above has been criticized as unduly restrictive, since it appears to be restricted to the international criminal court and recent developments. According to a learned writer:

> This definition has the effect of locking out an array of other crimes that could be categorized as international crimes, just because they are not listed under the ICC statute. As such, it is capable of retarding the progressive restatement of international crime through treaties. The fact that the international criminal court may not prosecute a crime does not necessarily make it less an international crime; the complimentary jurisdiction of the ICC affirms this to the extent that every international crime under the statute may be tried conclusively before a national court.

[64] K Kittichaisaree, *International Criminal Law*, (Oxford: Oxford University Press, 2001), p.3
[65] MM Whiteman, 'Digest of International Law', *XI*, US Dept of State (1968), p. 835.
[66] K Kittchaisaree, locit, p.3

> In addition, there are several international crimes presented by National Courts through universal jurisdiction. The ICC statute has only codified the gravest of international crimes, upon which international tribunals had hitherto, adjudicated and there is room under the statute for the enlargement of the crimes presently under the statute. As such, through international criminal law might have concentrated on the crime under the ICC, it does signify a synonym for what international criminal law is in its entirety[67].

We therefore agree with Olowororan when he stated that:

> From the array of definitions of international crimes, one could deduce that an international crime, generally speaking, is any act or omission considered criminal and which has gained international acceptability as such, the prosecution of which may give rise to international involvement either by way of trial before an international tribunal, municipal courts (the latter is achieved by the use of universal jurisdiction) or compelling the state having jurisdiction to try the suspect. More specifically, it is any crime that would require international co-ordination and co-operation for its prosecution[68].

Consequently, we are bound to agree with Casses that: "International crimes are breaches of international rules entailing the personal criminal liability of the individuals concerned as opposed to the responsibility of the state of which the individual may act as organs"[69].

The concept of international crime proceeds from the basis that certain acts are enemies of all mankind (*host humani generali*)[70]. Accordingly, international crimes originate from the international community as a whole. By their very nature, such obligations are the concern of all states. According to the ICJ in the Barcelona Traction Case[71]:

> An essential distinction should be drawn between the obligations of a state towards the international community as a whole, and those arising vis-a vis another state… By their very nature, the former are the concern of all states. In view of the importance of the right involved, all states can be

[67]B Oloworaran, 'The International Criminal Court and the Sovereignty of States: A Critical Analysis', Unpublished LLM seminar paper, Faculty of Law, University of Nigeria, Enugu campus.
[68] B Oloworaran opcit, p. 15
[69] A Casses, *International Criminal Law*, (New York: Oxford University Press, 2003), p.12
[70] K Kittichaisaree, opcit, p.15
[71] Second phase- *Belgium v. Spain*, ICJ report (1070) p.32

> held to have a legal interest in their protection; they are obligations *erga omnes.* Such obligations drive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principle and rules concerning the basic rights of human persons, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law…; others are conferred by international instruments of a universal or quasi- universal character.

The category of acts that can be categorized as being subject to obligations *erga omnes* could be classified as *jus cogens* or peremptory norms of international law[72]. International crimes are thus breach of international rules that entail criminal liability of the individual concerned. Such act or omission may be as a result of breach of jus cogens, or breach of treaties or conventions. Such acts or omissions which offen the laws of all civilized nations are treated as crime *jure gentum*. They may also be referred to as *delicti jus gentum or jus cogens crime*:

> … certain international values and interest are so fundamental that their effective protection, necessitates special arrangements aimed at punishing persons who trample them underfoot. Thus, acts of war crime, aggression, terrorism, genocide, slavery, torture and crime against humanity constitute criminal acts punishable under international law. These offences, generally referred to as *delicit jus gentium*, do not only constitute crime under international law but their prohibition is believed to have reached the status of *jus cogens* thereby imposing certain imperative obligation upon each state to be exercised in their own interest and in the interest of the international community as a whole[73].

We must make bold to say that it is international community that decides what conduct, act or omission that may amount to an international crime. Piracy is believed to be the first recognized international crime. As subsequently forcefully stated by Judge Moore in the Lotus Case before the Permanent Court of International Justice, any nation may, in the interest of all, exercise jurisdiction to capture and punish piracy by law of nations, and a pirate is subject to a

[72] K Kittchaisaree, *opcit*, p.12
[73] F Ntoubandi, Amnesty for Crimes Against Humanity Under International Law, (Boston: Martinus Nijhoff, Leiden, 2007) p.185

universal jurisdiction of every state which may try and punish him if he comes within its jurisdiction"[74].

The traditional approach towards the resolution of international crime is no doubt prosecutorial, litigious, adversarial and retribution-based. The preamble to the Rome Statute of the ICC firmly established this when it states its propelling force as follows;

> Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured be taking measures at the national level and by enhancing international co-operation…

Ntoubandi argues that International Criminal Law Convention such as the 1949 Geneva Conventions, and Additional Protocol 1 of 1977, the Genocide Convention, the Torture and Apartheid Convention and the Rome Statute express a clear and unambiguous obligation to prosecute the crimes contained therein[75]. In certain cases, such as in the Rome Statute, the obligation to prosecute assumes a mandatory character[76]. This is a truism. In Atrocity punishment and international law, Drumbl investigated the effectiveness of criminal trials and punishment as presently conducted internationally and nationally, as responses to atrocity[77]. He found that in the area of punishment and sentencing, international tribunals very closely borrow the rationality of ordinary criminal law. In particular, retribution and general deterrence are borrowed without appreciating the fundamental differences between the perpetrators of extraordinary international crimes such as mass atrocity, and perpetrators of ordinary domestic crimes[78]. According to him:

---

[74] (1927 PCIJ Rep. 70)
[75] F Ntoubandi, opcit, p.131
[76] *Ibid*
[77] MA Drumbl, Atrocity Punishment and International Law, (New York: Cambridge University Press, New York, 2007), p.11
[78] MA Drumbl, *opcit.*

> A paradox emerges. International lawmakers have demarcated normative differences between extraordinary crimes against the world community and ordinary common crimes. However, despite the proclaimed extraordinary nature of atrocity crime, its modality of punishment, theory of sentencing and the process of determining guilt or innocence, each remains disappointingly, although perhaps reassuringly, ordinary so long as ordinariness is measured by the content of modern western legal systems.
> In contemporary international practice sanction effectively is limited to imprisonment, with the majority of extraordinary international criminals receiving fixed terms.
> There is no sentencing tariff. Although able to do so, as of the time of my data complication (May 2006), the ICTY has not issued a life sentence. The East Timor Special Panels (Special Panels) were not empowered to issue a life sentence. At the ICTY, among term sentence finalized by May 2006, the mean term was 14.3years, and the median term 12 years. The length of fixed term imprisonment is palpably lower at the special panels where the mean sentence for extraordinary international crime is 9.9 years and the median sentence 8years. The ICTY sentence more severely. It routinely awards life sentences. Slightly less than half of all ICTY convicts receives life sentence; the remainder receives much longer fixed terms of imprisonment than at the ICTY[79].

Continuing, Drumbl further found that although retributive theory has many shades, these share in common the percept that the criminal deserves punishment proportionate to the gravity of the offence. These institution that punish extraordinary international crimes place retribution very high on the list of goals of punishment. The question, then, follows: do the sentences issued to perpetrators of extraordinary international crimes attain the self-avowed retributive goals? Can an architech, or tool of mass atrocity ever receive just deserts?[80] In apparent answer to the question, Drumbl asserts rather melancholically that…"International criminal law remain distant from restorative and reiterative methodology both in theory as well as in practice, which…weakness its effectiveness and meaning in many places directly afflicted by atrocity…[81] this is an indirect but effective manner of stating that retributivism in so far as the punishment of

[79]MA Drumbl, opcit., p.11
[80]*Ibid* @ p.15
[81]*Ibid* @ p. 13

international crimes is concerned has not succeeded. Consequently alternative dispute resolution (ADR) has had to come in various forms and shades. But it must be noted that ADR options are not free of all difficulties. For instance, Drumbl assert in relation to Plea-Bargaining that:

> A further challenge to the retributive value of punishment at both the national and international level is the avid procedural incorporation of plea bargains in cases of extraordinary international crime... Paradoxically, plea bargaining is generally available for extraordinary international crimes at all levels of Judicialization, even though in many national jurisdictions it is not possible for serious cases of ordinary crime. The fact that plea bargaining are readily available for atrocity crome, but not available in many jurisdictions for serious ordinary crimes, weakens the purportedly enhanced retributive value of punishing atrocity crimes to be sure, there are many reasons that favoured plea bargaining for atrocity crimes[82].

He further recognized that "the criminal law, standing alone, simply is not enough nor can ever be enough. In a proposal which he termed horizontal reform, he proposed a diversification in which the hold of the criminal law paradigm of the accountability process yields through a two-step process: initially, to integrate approaches to accountability offered by law generally (such as judicialized civil sanction, or group-based public service) and, subsequently, to involve quasi-legal or fully extra-legal accountability mechanisms such as truth commissions, legislative reparations, public inquires, transparency, and the politics of commemoration".

"…the goal of horizontal reform is to advance from law to justice: initially, by moving international criminal law to a capacious law of atrocity and, ultimately, to an enterprise that constructively incorporates extrajudicial initiatives"[83].

We align ourselves with the submission of the learned author that if international criminal law is to effectively deal with international crimes, it has to incorporate ADR, which in any case,

[82]MA Drumbl opcit, p. 16
[83] Ibid @ p. 18-19

is already part and parcel of it but in a very limited meaner. A leading searchlight has been provided by the operation of the Gacaca Courts in Rwanda, post conflict[84]. Following the 1994 genocide in Rwanda in which approximately 800,000 *Tutsis* and moderate *Hutus* were killed, many by their friends, neighbours and even family members, with over 120,000 suspects in prisons built for maximally 45, 000 inmates, the Rwandan authorities had to take the bull by the horns. They resorted to the *Gacaca* system which is embedded in the traditional practices of the people albeit in a modified form to suit the circumstances.[85] Another learned author captured it this way:

> More than a decade after the 1994 genocide in Rwanda, both international and domestic efforts were still failing to achieve justice for survivors and detainees. The international tribunal for Rwanda (ICTR) has successfully completed only 14 cases (with a further right on appeal) at an enormous cost, while the Rwanda domestic courts have dealt with only a fraction of those detained for genocide. The Rwanda government responded in 1999 by introducing plans for popular community level courts, known as Gacaca. On 10th March 2005, the courts finally began processing more than 100,000 detainees[86].

More so, Clark[87] opined that Gacaca did not exist as a permanent judicial institution, but rather was based on unwritten law and functioned as a body assembled whenever conflict ensued within or between family members, particularly in rural Rwanda. The hearings were usually held outdoors either on a patch of grass or in the village courtyard, overseen by the male heads of households. The traditional aim was to sanction violation of rules that were shared by the community with the sole aim of reconciliation. Thus:

> This objective drew heavily from the traditional Rwanda worldview that considered the family and wider community as the most valuable societal

[84] P Clark, 'Hybridity, Hoslism and Traditional Justice: The Case of the Gacacas Courts in Post-Genocide Rwanda', *George Washington International Law Review* (2007), 39 (4), 767-837
[85] *Ibid*
[86] C Kirkby, 'Rwanda's Gacaca Courts: A Preliminary Critique', *Journal of African Law* (2000), 50(2) 94-117.
[87] P Clark, *opcit*, p. 778

> units. In this worldwide, individuals gained their sense of worth primarily through their embedment in communities, from their connections first to family and then to their wider communities sentencing at *Gacaca* was intended therefore to re-establish social cohesion, incorporating restorative processes that allowed individuals found guilty to regain their standing in the community. Punishments at Gacaca were considered inadequate if they acted solely as punitive measures. For this reason, Gacaca judges never imposed prison terms on those found guilty, although in some instances, they did banish individuals from the community for a short period but always with the option for them to return eventually[88].

It is pertinent to note that in an ideal Gacaca hearing, defendants would confess their crimes, express remorse and ask for forgiveness from those they have injured. The judges would then demand that the confessors provide restitution to their victims, with the process culminating in sharing beer, wine or food, usually provided by the guilty party- to symbolize reconciliation of the parties. With colonization, the process was tinkered with by the Belgian colonialists, much in the system of the indirect rule, appointed local administrators to maintain law and order (usually Tutsis because of the Belgian perception of the Tutsis as superior to Hutus). The Gacaca system continued but instead of hearings occurring in communities as they were required and in front of judges who were usually the elders of the families involved these politically appointed judges soon started to hold Gacaca Sessions once a week in each secteur of the country. All male inhabitants of the community were encouraged to participate and not just those directly affected. The post genocide period marks the most radical evolution of the Gacaca. After a long period of vacillation, certain modifications were made and the Gacaca courts were enabled to deal with the issues raised by the genocide. These modifications included the enactment of an enabling law, the categorization of the offences, and the election of judges. Thus, the Gacaca courts post-genocide Rwanda comprised approximately 9000 community based courts, each overseen by

[88] P Clark, opcit, p. 778

locally elected judges and designed to adjudicate the cases of suspected perpetrators of the 1994 genocide. They also operate with a sentencing guidelines or scheme[89].

Finally, it is worthy of note that plea bargaining has been accepted in the jurisprudence of International Criminal Tribunals. The International Criminal Tribunal for Yugoslavia (ICTY) initially rejected the idea of negotiated pleas as incompatible with its broad mandate. However, it eventually amended its rules to accommodate plea bargaining. Justifying this posture in *Prosecutor v. Erdemovic*[90], the Tribunal stated as follows:

> The concept of guilt plea is the peculiar product of the adversarial system of the common law which recognizes the advantage it provides to the public in minimizing costs, in saving of courts time… this common law institution of the guilty plea should in our view find a ready place in an international criminal forum such as the international tribunal confronted by cases which by their inherent nature are very complex and necessarily require lengthy hearings… An admission of guilt demonstrates honesty and it is important for the international tribunal to encourage people to come forth whether already indicted or as unknown perpetrators. Furthermore, this voluntary admission of guilt which saved the international tribunal the time and effort of a lengthy investigation and trials is to be commended[91].

Using restorative justice principles to address crime and conflict, as was done in the Truth and Reconciliation Commission of South Africa, has shown that focusing on healing can end cycle of violence. It can promote an end to international conflict and violence.

[89] P Clark, *opcit*, p. 778
[90] Case No IT – 96-22 A, oct; 1997
[91] A Petrig, Negotiated Justice and the Goal of International Criminal Tribunals' (2008) 8 Chi-Kent J. Int. Land Comp.L.I

5.11 Nigeria

According to per Mohammed JCA,[92] ADR and Arbitration are only amenable to civil matters and not criminal matters in Nigeria:

> It is trite that disputes which are the subject of an arbitration agreement must be arbitrable. In other words, the agreement must not cover matters which by the law of the state are not allowed to be settled privately or by arbitration usually because this will be contrary to the public policy. Thus criminal matter, like the allegation of fraud raised by the respondent in this case, does not admit of settlement by arbitration as was clearly stated by the supreme court in the case of Kano State Urban Development Board v. Fanz construction Ltd[93].

Not minding the above wrong notion of the court that ADR is not amenable to criminal trials in Nigeria, it is our submission that ADR is indeed an entrenched part of the Nigerian criminal justice system, primarily because it is indigenous to the various peoples of the Nigeria state.

The different people, ie ethnicities that formed Nigerian had forms of the modern "ADR" long before the Nigerian State came into existence. In the Igbo nation, the concept of 'Omenala' aptly captured the essence of what is today called ADR[94] In the Muslim North, the concept of *'Sulh'* and *Ad Takhim'* clearly encapsulated ADR of any description. In the Tiv area of North-Central Nigeria, the concept of *'Jir* and *Tar*'[95] were the equivalent of modern ADR. These indigenous practices have remained in spite of the official criminal justice system. For an effective, efficient and credible criminal justice system in Nigeria, home-grown restorative justice and philosophy of law are critical.

---

[92] *BJ- Exports & Chemical Processing Co v. Kaduna Refining and Petrochemical Ltd* (2003), FWLR (pt 165) 445 @ 464.
[93] (1990) 4 NWLR (pt 142) 1 @ 32 - 33
[94] CC Obiego, *Igbo Idea of God*, (Lagos: Lucerna Publishers, 1978) p. 28
[95] P Bohannam, *Justice and Judgment Among the Tiv*, (London: Oxford University Press, 1957) p.1

In the effort to locate the place of ADR in criminal justice system it is important to always appreciate the fact that much of what lawyers regard as ADR is largely the formal packaging of processes that the people use informally without placing any formal tag or name on them. Essentially, ADR is the same as what we do in our family(s) and communities in Nigeria where some family member or elder intervenes to help parties in their relationships. There is also ample evidence that ADR is incorporated, in the criminal justice system. For instance, plea bargaining has been legislated into the Criminal Justice System of Lagos State[96]; The Administration of Criminal Act, 2015; The Child's Right Act 2003[97] and section 14 of Economic and Financial crimes Commission (Establishment) Act empowers the Commission to compound offences in order to obtain practical restitution.

The Amnesty Programme of the Federal Government for Niger-Delta Militant and Boko Haram Insurgents offer another important evidence of ADR in the Criminal Justice System. Amnesty or pardon is given to somebody who has been tried, convicted and sentenced. But here, we have a case where pardon is granted even before any arrest or trial. The entire amnesty programme is meant to be preventive, rehabilitative, recitative as well as restorative. This is ADR in action. The militants and insurgents involved could have been tried for serious felonies including economic crimes and treason, but, the matter was approached by alternative means, for good reason and good result. It appears that in Nigeria, ADR is working in the criminal justice system but behind a camouflage of discouraging legislative language. For example, in 2007, criminal proceedings were brought against Pfizer following its illegal administration of Trovan, a broad spectrum anti-biotic, on children in Kano State during an epidemic. The drug had not undergone due clinical trials and resulted in deaths and severe health challenges. The matter was

[96] Administration of Criminal Justice Law, 2011
[97] Cap. C50 laws of the Federation of Nigeria, 2004, sections 151, 204, 208, 209 and 233

settled through an out of court settlements. Pfizer agreed to pay amounts ranging from $100,000-$ 175,000 to the study participants or their survivors.

CHAPTER SIX

CONCLUSION AND RECOMMENDATION

6.1 Summary of Findings.

The following findings have been made from the research work which used doctrinal method:

1. Findings has shown that previous works in criminal justice administration in Nigeria have vehemently failed to cogently advocate for the effective mainstreaming or adoption of alternative dispute resolution (ADR) in crime disposal, thus a clear manifestation of the urgent need to fine tune our extant legislation to accommodate it.
2. We discovered that it appears that ADR is working in Nigerian criminal justice system but behind the camouflage of discouraging legislative language, thus the serious widespread notion that ADR processes are not amenable to criminal matters.
3. While there is no doubt about the general categorization of ADR processes, local circumstances are still stumbling blocks to its operations. People still believe in getting appropriate justice through litigation and not ADR. This made the general acceptance of ADR in Nigeria very difficult. Disputants have failed to know that even where a case is pending in court, they can resolve their differences amicably by out-of-court settlement at any time before judgment. Parties can by use of ADR terminate the proceedings at any stage of the case before judgment. Even after judgment the parties can reach some form of settlement outside the terms of the judgment, although the negotiating powers of the parties may not be the same as before the judgment.

4.Our findings reveals also that stigmatization of offenders and the almost lack of any scheme for reintegration of convicted persons after they may have finished serving their terms is a major challenge in our criminal justice system.

5.Diaspora inclination that the concept of alternative dispute resolution (ADR) as we see it today is entirely new concept in our clime is a wrong notion. If anything, what is entirely new to Africa and by necessary implication, Nigeria, is litigation. Before the advent of colonialism, litigation was unknown and unheard of in Africa. What we had which our colonial masters ignored then, is exactly what is now repackaged and branded "ADR" and whose origin is now credited to America and other developed economies. No doubt, our traditional way of settling dispute was supplanted by the British system justice administration and delivery which is through the regular court system.

6.The tendency by legal minds to try to reason out ADR principles from litigation and adversarial mindset is a major challenge to unlocking the potentials of ADR in justice administration. Most ADR processes in their true nature are not sets of legalistic options for dispute resolution[98]. ADR processes are more of multidisciplinary tools for creative problem solving than a set legal processes and principles. Much as ADR processes and practices are recognized and conducted within the framework of the law, their full potentials cannot be maximized if stakeholders continue to apply them with the same litigation mindset and skills[99].

[98] KN Nwosu, loccit,p.184

[99] *Ibid*

7. The structure of the judiciary in Nigeria is in itself a source of delay in criminal justice administration.
8. It is anomalous to have a unitary police and prisons in a federal Nigeria. There is an urgent need to federalize or decentralize the Police and Prisons.
9. The Ministry of Justice at both the Federal and State levels are inadequately funded.
10. The Laws creating Plea Bargaining in Nigeria, apart from that of Lagos State, have failed to provide its prosecutorial and sentencing guidelines and polices, thus, the constant abuse of the process. The major reason that sustains the logic of the process of plea bargaining in Nigeria is that it obviates the need for the dissipation of resources in prosecuting cases. Justice C.C. Nweze provides an insight into the cost of crimes in Nigeria: The total cost of crimes in Nigeria is estimated to be close to 59 billion naira per year. The costs of crime include the expenditures required for protection, those incurred by victims and those associated with the functioning of the justice system. Justice system costs alone amount to 20% of the total, or close to 24 billion naira. These costs include expenditure on police, prosecutors, legal aid, courts and prisons[100].
11. The plight of vulnerable witnesses has also been pleaded as a factor in the sustenance of plea bargaining. Thus, it is argued that it may be unfair to subject victims of such crimes like sexual violence, etc to the excruciating and traumatizing rigors of a court

[100] CC Nweze, 'Plea Bargaining in the Administration of Criminal Justice'. A Paper delivered at The Workshop on Access to Justice, Plea Bargaining and Restorative Justice For Judges of High Courts, held in Abuja, Nigeria, on April 10 – 15, 2007

room[101]. The unfair nature of the "macho adversarialism"[102] of the court room tends to support this claim. There is considerable merit in the view that: The adversarial nature of proceedings encourages advocates to engage in tactics designed to intimidate, humiliate and confuse; tactical gains are to be made from antagonizing and embarrassing opposing witness in court. Cross-examination is thus often directed at unsettling a witness, "hoping to rattle them so that they will be unable to effectively present their evidence, or at least will appear less credible and competent in the Judge's eyes"[103].

12. One other area of the practice that might prove problematic is the question of the enforceability of the terms of a plea negotiation. A fairly example is what happened between the EFCC and Tafa Balogun, the former Inspector General of Police. Sequel to negotiations between the EFCC and Balogun (defendant) that all cases against him would be terminated, he conceded to plead guilty to amended eight count charge of failure to cooperate with the EFCC team probing his acquisition of certain property in Lagos and Abuja. He was accordingly, sentenced to six months jail term for the offence which attracts a maximum of five years. Curiously, however, less than ten (10) days after the deal and his subsequent conviction, another court issued two separate, but similar, orders for his production to face another trial. The orders were issued at the instance of the EFCC, which had earlier agreed to terminate all pending cases against him. The defendant wondered why he would keep his terms of the

[101] For Example, during the trial of Cecilia Ibru of Oceanic Bank Plc by the EFCC in 2010, she fainted three (3) times in court before she entered a plea bargaining.

[102] AE Taslitz, *Rape and The Culture of The Courtroom*, (New York: New York University Press, 1999) p.154.

[103] M Childs, and L Ellison, *Feminist Perspectives on Evidence*, (London: Cavendish Publishing Ltd, 2000) p. 45.

agreement only for the EFCC to renege on the bargain[104]. The victim of crime is central to restorative justice, he meets the offender face to face and in the process the crime is forgiven and communal bonds restored. Likewise, in plea bargain, the prosecutor is expected to consult the victim for his views where feasible. Feasibility of getting the victim's input should not be left to the prosecutor alone to decide.

6.2 Conclusion

It could be tempting to argue that if the critical issues in criminal justice administration in Nigeria, discussed in this study as requiring urgent reforms, are attended to, ADR may not be necessary in Nigeria after all. As alluring as this argument may be, it does nothing to discredit the call for ADR in crime disposals in Nigeria.

In the first place, it is not being advocated that the mainstreaming of ADR into our criminal procedure law is the only solution to the problem bedeviling criminal justice administration in Nigeria; what is being strenuously underscored is that it is, in the present circumstances, partof the solution to the problem. In other words, ADR is being recommended not as a "fix-all kit" for Nigeria's impaired criminal justice system but as part of the criminal justice reform package.

Secondly, it has become necessary for the Nigerian justice administration system to open up itself to new ideas, especially those that have worked, from other common law countries. For years, Nigeria has sucked all sort of economic recovery and political prescription from the World Bank, international monetary fund and other western lending centers and

[104] EFCC NOT BOUND. Retrieved on May 25, 2018, from <http://www.vanguardngr.com>. Accessed on may 25, 2018.

countries. These prescriptions mainly are of free-market economy. In the past thirty-eight years, the psyche of ordinary Nigerians has been bruised by such terms as structural adjustment program, liberalization of the economy, commercialization, privatization, deregulation of the economy, monetization of benefits in the public and civil service, down-sizing or sight-sizing government's work force, debt payment, rescheduling and servicing, et cetera. That these prescriptions have failed woefully to restore the damaged wealth of our economy, though sad, is not our concern here. We draw attention to these economic prescriptions and their political corollaries-multi-party democracy, good governance, transparency, accountability, due process, et all- to show that Nigeria, all this while, has been adopting economic and political standards of the west. A consideration of ADR and its full adoption, therefore, will be in line with the reform programs to which government is committed. The credibility of the consideration and adoption or prescription from familiar quarters, but as an initiative that is necessitated by the need of our criminal justice. Incidentally the Nigerian judiciary is not allergic to the use of foreign court decisions in the determination of cases.

Till today, old and new foreign cases are cited before, and applied by all courts in Nigeria in the determination of cases. The only admonition by the superior courts in Nigeria is that such cases, which are not binding in Nigerian courts, should not be applied in lieu of Nigerian cases that are applicable to cases being determined by the courts. The point being made is that if Nigerian courts still consider, and when necessary apply, foreign judicial authorities, a foreign criminal justice procedure that is working in other common law jurisdictions ought to receive serious attention.

It is not impossible that doubt about the feasibility, and fear about the effect of adoption of ADR may be entertained in the Nigerian justice sector in particular, and the society in general.

Such doubt and fear will be appropriate, for every innovation usually attracts speculation and apprehension. Doubts and fears about a proposal, if rational and when justifiable, are the drawing to the need for a thorough consideration of the proposal before its acceptance. Of course, we are in agreement that ADR should be thoroughly considered by the administration of justice community in Nigeria before its adoption. Part of the consideration must be the regulatory framework that will govern the ADR procedure if, and when it is adopted. If ADR is fully adopted in Nigeria, it, necessarily, must be backed up by statutory sentencing guidelines and prosecuting policies that will regulate its operations. With these guidelines and policies, ADR will not run amok, it will be a blessing rather than a curse. It is also suggested that the Office of the Attorney General should evolve an effective supervisory arrangement to monitor the exercise of prosecutorial discretion in crime disposal. The Attorney General should issue periodic guidelines to prosecutors engaged in plea bargaining. In the United States, the Department of Justice issues guidelines to assist Federal prosecutors in making decisions that fall within their discretion. The guidelines also offer an element of consistency to the decision making process[105]. However, the problem with guideline is that it is not a guarantee that prosecutors would adhere to it, in fact available evidence suggest that they do not always adhere to guidelines[106]. Ensuring compliance with guidelines is an internal matter for the Attorney General and his officers. It may however be an effective tool to check abuses of prosecutors in entering into plea bargains in the hands of an Attorney General who is committed to the protection of the interest of justice, public policy and public interest. The Attorney General may also suspend the practice of ADR in criminal trials

[105]See ES Podgor, 'Department of Justice Guidelines: Balancing Discretionary Justice', (2003) Berkeley Electronic Press p. 1 available online at <http://law.bepress.com/expresso/eps/67> (last accessed on 17th of December 2017

[106]*ibid* .p 1. The worth of the Department of Justice Guideline is further reduced by the fact that Courts routinely find guideline strictly internal and unenforceable at law, the accused has no recourse to judicial review.

especially plea bargaining if he observes abuse of the process as was done by the Attorney General of the State of Alaska in 1975[107].

6.3 Recommendations

In the light of the above findings, the following recommendations are considered pertinent:

1. **Compliance with Statutory Provisions for the Practice of ADR by Lawyers:** Rule 15 (3) (d) of the Rules of Professional Conduct (RPC) for Legal Practitioners 2007 provides *"in his representation of his client, inform his client of the option of Alternative Dispute Resolution mechanisms before resorting to or continuing litigation on behalf of his client.'*

   In addition, *Rule 55 of the RPC* states that breach of any provision in the Rules amount to professional misconduct. Therefore, lawyers now have no option but to be well acquainted with ADR in order to avoid liability for professional misconduct.

   Every lawyer, even the most conservative litigation lawyer should be compelled by the court to practice ADR. This is because many of the skills of an effective litigation lawyer are readily applicable to ADR. These include: the ability to distill complex issues and present them in a compact and persuasive manner; the critical assessment of legal or other risks and their potential costs; the ability to organize and marshal resources to his client's advantage, the ability to distill and overall strategy for resolving a dispute; and the ability to advocate and execute that strategy. All that the

[107]The Attorney General of the State of Alaska in the U. S. in 1975 banned the practice of plea bargaining and issued policy directive prohibiting charge and sentence bargain; see Teresa White Cams John A. Kruse, *Alaska's Ban on Plea Bargaining Reevaluated,* 75 Judicature 310, 310-311 (1992) cited in Joseph A Colquitt note 72 at p. 707.

litigation lawyer needs to do is, one, to recognize the subtle difference between litigation and ADR and adjust accordingly. He must recognize, for example, that ADR is not appropriate in all cases. Two, adjust his behaviour to fit the circumstances. He has to realize that a confrontational, no-holds-barred litigation approach is not usually effective in ADR. Rather, it is advised that the lawyer fosters an atmosphere that allows the adversaries to develop a relationship, a relationship that is dedicated to solving a problem rather than victory.

2. **Initiation of Programmes for the Reintegration of Ex-Offenders**: A major challenge in our criminal justice system is the stigmatization of offenders and the almost lack of any scheme for reintegration of convicted persons after they may have finished serving their terms. With appropriate empowerment, ADR practitioners or Dispute Resolution Specialist can also assist in overcoming this challenge. Programmes can be initiated in communities for the reintegration of ex-offenders with close monitoring and supervision by ADR practitioners.
3. **Mass Public Awareness / Sensitization of ADR:** Disputants do not know how to access ADR with or without a lawyer. It is suggested that the ADR Centers including the Multi-Door CourtHouses need to engage in more publicity so that members of the public can easily access them. This challenge can be drastically reduced if legal practitioners can educate their clients on the availability of ADR. It is also suggested that ADR practitioners and ADR Centers should also join in creating awareness to the public on the issue.
4. **The Need for Immediate Statutory Regulation and Institutionalization of Victim Remedies in Nigeria:** The criminal law of Nigeria has Federal, State and Local

Government components and changes will have to be reflected at all levels. The trend of reform has been to pass comprehensive legislation on victim remedies which will bind all sentencers at all levels of the criminal justice process and supersede the inadequate laws in force presently. As it is recommended here that a proposed Federal Victim Remedies Act will, for example set policy, establish federal funding for victims and create institutions such as a **Crime Victims Mediation and Compensation Board / Authority** to administer Victim Remedies. A similar normative order could be adopted at state level. The Board could also utilize the existing infrastructure of traditional palace / chiefs 'courts' with appropriate intrusion of modern mediation skills training. This would increase the number of access points to criminal mediation along with new criminal pre-trial mediation processes introduced into existing Magistrates and High Courts. The methodology of the Lagos State Government in its recent law is not advisable. Thereunder, issues of victim remedies are dealt with haphazardly under plea bargaining[108], and compensation and restitution orders[109].

5. **Adequate Funding of Ministry of Justice at Both Levels:** The Ministry of Justice, at both the federal and state levels, should be adequately funded and provided with needed facilities to effectively discharge their functions. The number and remuneration of personnel, particularly in the Directorate of Public Prosecutions, should be adequate in the circumstances. Police Investigating Teams should be made to work with the Ministry of Justice throughout the duration of investigation (especially at the early stage of investigation) to receive procedural guidance. Law Officers in the Ministry of Justice, in

[108] see sections 75 and 76

[109] Ibid, ss 289 – 301: See also the case of *Cadbury v. Federal Republic of Nigeria* (2005) 5 NWLR (Pt 918) 332; *Adejumo v. The State* (2006)9 NWLR (pt 986) 627, for Settlement of Criminal Cases.

particular, attorneys working in the Directorate of Public Prosecutions should undergo Continuing Legal Education and take courses in Criminal Procedures and Prosecution generally. Promotion could be made contingent on the successful completion of "diets" or stages of such training or courses. In view of the perennial delay occasioned by failure of the police to forward case files to the director of public prosecutions or the failure of the latter to issue his legal advice in time, a statutory provision should be made, delimiting the period within which the police must forward a case file to the office of director of public prosecutions upon conclusion of investigation, and the period within which the director of the public prosecution must give his legal advice upon receipt of the case file from the police. In this regard, periods of seven (7) days and twenty-one (21) days, respectively, can be prescribed by law

6. **Corporate Social Responsibilities:** The research also recommends that international companies in Nigeria such as MTN Nigeria and DSTV[110], as part of their corporate social responsibility programme should build MTN Phone Repairing Schools and handle over to the government, so that any convict who stole a phone or electronics can be sentenced to the school to learn how to repair phone in order to better his or her life during the jail term than sending them to prison. Likewise, Mr Biggs or Chicken Republic can also build and donate to government, Mr Biggs or Chicken Republic Catering Schools where women who stole food and food stuffs can be sentenced to for their effective rehabilitation. Various churches and mosques can also donate farms for the same purpose.

[110] These are foreign companies that are making a lot of money in Nigeria but have not given anything meaningful to their host State as part of their corporate social responsibility.

7. An Attorney General in exercise of his constitutional powers may settle or compound any case before or during trials. Section 127 of the Criminal Code, creating the offence of compounding felony should be expressly repealed in order to protect prosecutors other than lawyers in the states that are yet to domesticate the Administration of Criminal Justice Act, 2015.
8. **A Call on Government to Assist in Setting up ADR Centers:** As a result of the importance of ADR in justice delivery, the role of government must be emphasized. For the processes of ADR to be available to members of the public, governments at all levels must be involved in the setting up of ADR Centers or Multi-Door CourtHouses and this will involve substantial financial commitment. Recently, the World Bank came to the aid of the Lagos State judiciary by sponsoring the Settlement Week where many cases were disposed off through ADR processes thus easing the case-load on the court system. It is hoped that state governments would also take cue from this.
9. **Increased Boldness of ADR Practitioners to Intervene in Conflicts:** Since there is insufficient awareness and understanding of ADR, it will be useful if ADR practitioners summon the courage to intervene in conflicts and offer their services.
10. **Recognition and Enforcement of ADR Settlements:** There is the general notion that ADR settlements, especially mediation are unenforceable in the event of a breach by any of the parties. It is recommended that lawyers should be made to be aware that mediation agreements are enforceable once they have been registered in court. At the Multi-Door Courthouse, settlement agreements which are duly signed by the parties shall be enforceable as a contract between the parties and when such agreements are further endorsed by an ADR Judge, it shall be deemed to be enforceable as a Judgment of the

High Court[111]. In any case, where true mediation has been done, the likelihood of parties not adhering to the agreement reached in minute since it is both parties that arrived at their own settlement.

11. **Amendment of the ACJA**: There should be an amendment of the Administration of the Criminal Justice Act 2015, to provide:-
    i. More options such as: furlough, shock incarceration, restitution, fines, half-way houses and house arrest;
    ii. Parole Board, eligibility for parole, parole revocation and pre-release programes;
    iii. Half-way Houses for ex-convict for assistance in resettlement challenges for ex-convict; and
    iv. A form of compulsory savings schemes for convicts involved in prison work. A matching grant or a percentage of the amount saved should be given to a prisoner when due for release. This will assist in resettlement of the convict.

12. More NGOs Partnership: Federal government should use the Administration of Criminal Justice Act, 2015 as a legal framework to identify community associations, tribal unions, vocational associations, NGOs who are willing to partner with her for monitoring of probation, community sentence and parole. Nigerians place great value on ethical association, especially in the southern part of the country. All NGOs that are willing should be brought on board. Government should partner with such agencies so that they develop a sense of ownership of the project.

[111] See Lagos Multi-Door Court Law, s.19

13. Compulsory Seeking of Victim's View in Plea Bargaining and the Provision of its Prosecutorial and Sentencing Guidelines / Polices: It is recommended that the victim's view should be compulsorily sought in plea bargaining and proper record of it made for the judge's consideration. Allowing victim participation in plea bargaining, observes Akeem Bello[21], serves the legitimate purpose of advancing their financial interest in that compensation, restoration or other remedy could then be prescribed as part of the final outcome of plea bargaining. Furthermore, in line with restorative justice ideas, the Lagos law allows the court to intervene where it perceives that the offence requires a heavier sentence than the one agreed in the plea bargaining[22]. More so, there should be enactment of Plea Bargaining Prosecutorial and Sentencing Guidelines and Polices or provision of its Protocols / Manual to prevent the inherent abuse of the process.

14. Federalization or Decentralization of the Police and Prisons: First, it is anomalous to have a unitary police in a federal Nigeria; it has, therefore, become imperative to federalize or decentralize the police force. This means that the provisions of the constitution governing the police force must be amended to enable states and local governments have police institutions that jointly, with a federal force, will secure life and property and maintain law and order in Nigeria.

Second, the office of the Attorney-General, at both the states and federal levels, should be given supervisory ministerial responsibility over the police force in order to ensure that the force is made to play the ideal role in criminal justice administration. This, also, will require a constitutional amendment.

In the meantime, however, the law enforcement capacity of the police requires urgent fortification. The police force needs adequate funding, infrastructure, personnel, logistics and

supply. Members of the force ought to be well motivated and remunerated. Families or dependants of policemen who die in the course of duty should be well compensated. Members of the force should undergo continuous law enforcement education, including capacity building and human rights training, and refreshers courses on criminal procedures as well as new investigation and prosecution techniques. The arm of the police force that handles specialized investigation such as photography, finger printing, handwriting analysis, ballistic analysis, pathology, and such other forensic examinations should be strengthened, that is, appropriately staffed and funded.

There should be effective coordination between the police and the office of the Attorney-General. The transfer, retirement or death of Investigating Police Officer (IPO) should no longer be allowed to frustrate the prosecution of cases; investigation of criminal complaints should henceforth be assigned to police units or teams, comprising at least five police investigators. An officer in the unit will serve as lead investigating officer in respect of a case while the other officers will serve as concurrent investigating officers. In the event of transfer, retirement or death of the lead investigating officer, any member of the unit or team can give or continue to give testimony in court. In other words, in giving testimony during court trials, emphasis should shift from the investigating police officer (IPO) to the investigating police unit (IPU) or the investigating police team (IPT). Finally, policemen must be made accountable to Nigerians, the law and the constitution. Accordingly, the bodies that are established by law to ensure that the police force is law abiding, disciplined, corruption-free, and alive to its duties and obligations must continue to act to bring an ideal police force of a truly Federal Republic of Nigeria.

Like the police force, the prison system on their other hand ought to be federalized, so that there will be state prisons, at least, co-existing with federal prisons (even if establishment of local council prisons [county jails] is regarded as non-feasible). This, of course, will require a

constitutional amendment since prisons is only within the legislative competence of the federal government. The establishment of state prisons will automatically increase the number of prison facilities in Nigeria, thereby reducing the level of prison congestion and attendant health and other management problems. Federal institution, are increasingly appealing to state governments and the civil society to come to the aid of Nigerian prisons. A federalized prison system will make this appeal unnecessary, as the states would have their prisons obligations to discharge just like the federal government. Under the present arrangement, state governments in Nigeria operate remand homes. If this can be done, there is no good reason why the state government cannot operate state prisons. In the meantime, however, the prison system ought to be adequately funded and provided with facilities so that it can discharge its obligations to prisoners and the Nigerian society at large.

15.Appropriate Empowerment of ADR Practitioners: With appropriate empowerment, ADR practitioners can also assist in overcoming this challenge. Programs can be initiated in communities for the reintegration of ex-offenders with close monitoring and supervision. E.g. the Rehabilitation Programme in the Niger Delta for the Ex-Militants by the Federal Government.

16. Establishment of Sexual Assault Referral Centers (SARC): It is recommended, the establishment of Sexual Assault Referral Centres (SARC), in all the 36 States of the Federation and shall be managed by the Ministry of Women Affairs and Social Development, Ministry of Health and Ministry of Justice to provide holistic and high quality medical and psychosocial services to survivors of sexual assault and rape. Men, women and children who may either experience rape or sexual assault shall benefit from the free and comprehensive medical, counseling and aftercare services provided by the centre. these services shall be delivered to the

clients in a professional and timely manner to help them overcome the trauma of rape and sexual assault. Services to be offered at the Centre shall include:

- Medical examination and treatment by trained forensic examiners for illness and injuries caused by the assault;
- Counseling (face to face and telephony) to help cope with emotional and psychological effects of rape;
- Help in reporting the matter to the police;
- Information on the legal system;
- Referral to other agencies for help not provided by the Centre;
- Free pregnancy tests and other tests associated with rape;
- Free medication and drugs;
- Refund of clients' transportation costs to the Centre in selected cases;
- For some of the clients, there may be need for a change of clothing; and
- Where there is need for laboratory tests not provided in the Centre, the Centre also shall bear the cost of these tests and makes referral to other agencies / organizations for follow up services not available at the Centre. The Centre shall also provides medical reports for clients on referral from the Police which aids in the investigation and subsequent prosecution of perpetrators

17. Establishment of Prison Farms in all the States: The proposed Prison Farms shall be correctional facilities established in all the 36 States in Nigeria and any other place that The Executive Governors may deem fit, with the aim of offering the area for economical use. The proposed regions or areas shall be used for offenders who are serving their term with

manual labor. These farms will be open air lands where a series of activities shall take place. Some of the activities that shall take place in these prison farms include agriculture, quarrying, pig rearing, poultry and at times logging. Each of these farms shall be established by the State Government in partnership with the Nigeria Prison Service through the Federal Ministry of Interior with the intention of handling prisoners who have been sentenced to prison with hard labor. The State Governments shall sign a Memorandum of Understanding with the Federal Ministry of Interior in the sharing formulae of the proceeds from the farms. These farms shall not exist to offer or create harsh conditions for the prisoners. Essentially, it shall exist with the main objective of rehabilitating these hard core criminals to become useful upon release from the prison.

The proposed Prison Farms shall serve various purposes:

i. The agricultural produce generated from these farms will used to feed the prisoners.
ii. Some of the produce will be sold to generate income for the Prison, and State Governments.
iii. Provide education and vocational guidance to some of the convicts. These programs will provide the offenders with vital information and skills on how to improve their lives. In essence, prisoners who participate in these farms will end up with new skills that are critical when it comes to reintegration into the wider community.
iv. Generate income for prisoners. This income will be saved and given to them on completion and discharge from prison in order to enable them have capital to start up their own farm.

v. The prison farm programs will be designed in such a manner that the prisoners will be able to confront some of their criminal behaviors. Through these programs, the prisoners will be able to develop social skills and behavior controlling techniques. The prisoners who may be subjected to these programs will be aided in learning to handle their emotions as well work together as teams.

vi. Certain values will be instilled in these prisoners. For instance, a prisoner will be able to learn the value of generating income. If a prisoner is convicted and lacks a set of values, the prison farms shall provide conducive grounds to instill values such as hard work, perseverance, patience and commitment. When a prisoner is able to appreciate what he is doing or even achieving, then he starts to develop confidence which is part of development.

vii. The general outcome is that these prisoners will come out of these farms with useful skills that will make them better people in the society.

viii. In addition, some of these farms will be used as reference points. By the nature of the farming that will take place, there will be instances where people from the society will come to learn from these farms. These farms shall become learning centers not just for the prisoners, but for the wider society as well.

BIBILOGRAPHY

BOOKS

Adebayo, A.M, *Administration of Criminal Justice System in Nigeria*, (Lagos: Princeton Publishing Co., 2012).

Agaba, J.A, *Practical Approach to Criminal Justice System in Nigeria*, (Lagos: Bloom Legal Temple, 2015).

Akpuru-Aja, A, *Basic Concepts, Issues and Strategies of Peace and Conflict Resolution: Nigeria – African Conflict Case Studies,* (Enugu: Kenny and Bros, 2009).

Aliyu, I.A (Ed), *Alternative Dispute Resolution and Some Contemporary Issues*, (Kaduna: M. O Press & Publishers Ltd, Kaduna, 2010).

Anstey, M, *Negotiating Conflict: Insights and Skills for Negotiators and Peacemakers,* (Johannesburg: Juta & Co, 1991).

Bailey, S.H and Gunn, M.J, *Smith and Bailey on the Modern English Legal System*, (London: Sweet and Maxwell, 1996).

Bambale Y.Y, *Crime and Punishment Under Islamic Law*, (Zaria: Malthouse Press, 2003).

Bernstein, T et al, *Handbook of Arbitration Practice* (3rd ed, London: Sweet & Maxwell,1998).

Bohannam, P, *Justice and Judgment Among the Tiv*, (London: Oxford University Press, 1957).

Childs, M and Ellison, L, *Feminist Perspectives on Evidence*, (London: Cavendish Publishing Ltd.,2000)

Cohen, H, *You Can Negotiate Anything*, (New York: McGraw Hill Book Company,1982).

Douglas, H.Y, *The Dictionary of Conflict Resolution*, (San Francisco: Jossey – Bass Publishers, 1991).

Drumbl, M.A, *Atrocity Punishment and International Law* (New York: Cambridge University Press, 2007).

Ezejiofor, G, *The Law of Arbitration in Nigeria*, (Lagos: Longman Nigeria PLC, 2005).

Fisher R & Ertel D, *Getting Ready to Negotiation*, (New York: Penguin, 1995).

Fisher, R, et al, *Getting to Yes. Negotiating An Agreement Without Giving In*, (London: Random House Business Books, 1992).

Folberg, I.A, *Comprehensive Guide to Resolving Conflict Without Litigation*, (London: Jossey Bass, 1984).

Gray, B, *Collaborating: Finding Common Ground for Multiparty Problems*, (San: Francisco: Jossey-Bass Publishers, 1989).

Hombali,Y.D.U, *Practice and Procedure of Criminal Litigation in Nigeria*, (Lagos: Feat Print and Publish Limited, 2012).

Ibidapo-Obe, A, *A Synthesis of African Law*, (Lagos: Concept Publishers, 2005).

Ibidapo-Obe, A, 'Restorative Justice and Plea Bargaining Practices: A Tilt Towards Customary Criminal Justice' in Nwosu, K.N (ed), *Dispute Resolution in the Palace* (Vol 2, Ibadan: Gold Press Ltd, 2010).

Idigbe, A, *Arbitration Practice In Nigeria*, (Lagos: Distinct Universal Limited, 2010).

Ikejiani – Clark M (ed), *Peace Studies And Conflict Resolution In Nigeria: A Reader* (Ibadan: Spectrum Books Limited, 2009).

Johnson, N.S, et al, *Sociology of Punishment and Correction*, (London: John Wiley & Sons, 1962).

Joseph, R.N et al, *Black's Law Dictionary*, (6th Edition, Minnesota: West Publishing Co, 1990).

Kittichaisaree, K, *International Criminal Law*, (Oxford: Oxford University Press, 2001).

Moore, C.W, *The Mediation Process: Practical Strategies for Resolving Conflict*, (San Francisco: Jossey Bass, 2003).

Ntoubandi, F, *Amnesty for Crimes Against Humanity Under International Law*, (Boston: Martinus Nijhoff Leiden, 2007).

Nwakoby, G.C, and Odoh, B.U, (eds), *Rule of Law, Governance Dispute Resolution and Contemporary Legal Issues in Nigeria*, (Zaria: Ahmadu Bello University Printing Press, 2016)

Nwosu, K.N (ed) (2004), *Legal Practice Skills & Ethics in Nigeria*, (Lagos: Academy Press Plc, 2004).

Nwosu, K.N (ed), *Dispute Resolution in the Palace* (Vol 2, Ibadan: Gold Press Limited, 2010).

Obiagwu, C.E, *The New Criminal Law & Procedure of Lagos State*, (Lagos: LEAP Publishers, 2016).

Obiego, C.C, *Igbo Idea of God*, (Lagos: Lucerna Publishers, 1978).

Odoh, B.U, *Christlike Approach to Dispute Resolution* (Enugu: His Glory Publications, 2013).

Odoh, B.U, *Alternative Dispute Resolution in Nigeria*, (Germany: LAP Lambert Academic Publishing, 2014).

Ogbuabia, A.I, *Criminal Trials and Procedure in Nigeria*, (Lagos: Logicgate Media Ltd, 2017).

Ogunyanwo, S, *The Effective Mediator*, (Lagos: HMB Hephzibah Publisher, 2005).

Okafor,F.U, *Igbo Philosophy of Law*, (Lagos: Fourth Dimension Publishers, 1992).

Olowu, E.U, 'In Search of Objectives, Guidelines and Alternatives to Imprisonment' in Osibanjo, Y & Kalu, A (eds), *Law, Development and Administration in Nigeria* (1990).

Omale, D.O, *Understanding Restorative Justice*, (Enugu: Trinity – Biz Publishers, 2005).

Onwubiko, O,A, *African Thought, Religion and Culture*, (Enugu: Snapp Press Ltd. 1991).

Paranjape, N.V, *Criminology and Penology*, (14th edn, Allahabad: Central Law Publication, 2010).

Peter D, *Alternative Dispute Resolution In Nigeria: Principles and Practice*, (Lagos: Dee – Saga Nigeria Ltd, 2004).

Peter R, *Islamic Criminal Law In Nigeria*, (Ibadan: Spectrum Books Limited, 2003).

Rowan,C.T, *The World of Justice*, (London: Thurgood Marshall, Little, Brown & Co., 1993).

Sani, S, *The Killing Fields: Religious Violence In Northern Nigeria*, (Ibadan: Spectrum Books Limited, 2007).

Sarre, R and Earle K, 'Restorative Justice' in R Sarre and J Tomanio (ed), *Key Issues in Criminal Justice*, (Oxford: Claredon Press, 2004).

Senna,J.J and Siegel, L.J, *Introduction to Criminal Justice System* (2nd edition, San Francisco: West Publishing Company,1981).

Spencer, D, *Essential Dispute Resolution*, (Australia: Cavendish Publishing Property Limited, 2002).

Susskind, L, *The Consensus Building Handbook: A Comprehensive Guide to Reaching Agreement*, (Thousand Oaks: Sage Publications, 1999).

Taslitz,A.E, *Rape and the Culture of the Courtroom*, (New York: New York University Press, 1999)

Ungerford-Welch, P, *Criminal Litigation and Sentencing*, (6th edn., London: Cavendish Publishers, 2004).

William, G, *Textbook of Criminal Law*, (London: Stevens & Sons Publishers, 1978).

JOURNAL ARTICLES

Akande, I.F, 'The Need for ADR in the Nigerian Criminal Justice System' in Aliyu, I.A (ed) *Alternative Dispute Resolution and Some Contemporary Issues* (Kaduna: M.O. Press & Publishers Ltd, 2010), pp. 306 - 329

Alschuler, A.W, 'The Prosecutors Role in Plea Bargaining', 36 *U. Chi. L.Rev*. 50, 50 (1968), pp. 33 -34.

Bello, A, 'Plea Bargaining and Criminal Justice in Nigeria: Issues, Problems and Prospects', *Current Law Series*, Faculty of Law, University of Lagos (2006), pp. 35 -37.

Christie, N, 'Conflicts as Property' (1977), *British Journal of Criminology, pp.3 - 19.*

Clark, P, 'Hybridity, Hoslism and Traditional Justice: The Case of the Gacacas Courts in Post-Genocide Rwanda', *George Washington International Law Review* (2007), 39 (4).

Condliffe, P, 'Putting the Piece Together: The Opportunity for Restorative Justice in Victoria', *Law Institute Journal*, 79 (8), 35.

David J, 'Designing A Dispute Resolution System', (1994) *ICDRJ* 26 at 23-33.

Davis, A and Salem, R, 'Dealing with Power Imbalance in the Mediation of Interpersonal Dispute' (1984) *M.Q* 26.

Elias, T.O, 'Traditional Forms of Public Participation in Social Defence' N0 22 (1969) *International Review of Criminal Policy, p.19*

Ifemeje, S.C, Odoh, B.U and Iteshi, C.V (2015). A Thorough Examination of Civil Litigation as a Dispute Resolution Alternative, Nigeria Police Academy Journal of Clinical Legal Education, (NPAIJCLE) Vol 1, No 2, 2015, pp. 191 -198

Igwe, K. E and Odoh, B.U. 'Non-Custodial Measures to Incarceration: Emerging Trends in Nigeria Under the Administration of Criminal Justice Act, 2015', *Abakaliki Bar Journal*, Vol 3, No1, 2016, 17 - 29

Igwe, K.E and Odoh B.U, (2015). 'Ring-Fencing Arbitration from Judicial Interference in Nigeria: Proposed Amendment and Modifications to the Arbitration and Conciliation Act, CAP A18, Laws of the Federation of Nigeria, 2004', *Afe Babalola University, Ado-Ekiti Law Journal,* May (2015), Vol 1. No 3, pp. 292 - 305

Kift, S, 'Victims and Offenders; Beyond the Mediation Paradigm?' (1996), *Australian Dispute Resolution Journal, pp. 44 -67*

Ladan, M.T. (1998), 'Alternative Dispute Resolution In Nigeria: Benefits, Processes and Enforcement In Current Themes In Nigerian Laws' (1998) *ILARN*.

Odoh, B.U, 'Commercial Arbitration in Nigeria: Prospects and Challenges', *Alternative Dispute Resolution Law Journal (ADRLJ),* Vol. 2, N01, 2018, pp. 371 - 397

Odoh, B.U, and Ifemeje, S.C (2016). Teaching Legal Ethics: A Necessary Tool for the Restoration of the Legal Profession in Nigeria, Ebonyi State University Law Journal, Vol 7. No. 1, 2016, 21 -33

Odoh, B.U and Igwe, K.E. (2016). 'Understanding the Imperative of Plea Bargaining in the Administration of Criminal Justice Act, 2015'. In: Odoh, B.U and Nwakoby, G.C. (ed). *Rule of Law, Governance Dispute Resolution and Contemporary Legal Issues in Nigeria*, pp. 149 - 172

Odoh, B.U and Uguru, U. 'ADR and Restorative Justice: Panacea for Delay in the Administration of Justice', *Abakaliki Bar Journal*, Vol 2, No1, 2015, pp. 17 - 29

Odoh, B.U, and Dankofa, H. 'Integrating the Teaching of Alternative Dispute (ADR) into the Legal Education in Nigeria', *Nigeria Police Academy Journal of Clinical Legal Education,(NPAIJCLE)* Vol.1, No 1, 2015, pp. 1 - 19

Odoh, B.U, Iteshi, C.V and Okpara, J.O. 'Dispute Resolution Within and Outside the Courts - An Overview of the Nigerian Experience', *Nigeria Police Academy Journal of Clinical Legal Education, (NPAJICLE),* Vol 1, No 2, 2015, pp. 17 -35.

Odoh, B.U. 'Creative Approach to Crime: The Case for Alternative Dispute Resolution (ADR) in the Magistracy in Nigeria', *Journal of Law, Policy and Globlization, IISTE, New York, USA.* Vol 36, 2015, pp. 29 - 43

Ogbuabor, C.A et al, 'Using Alternative Dispute Resolution (ADR) in the Criminal Justice System: Comparative Perspectives', *International Journal of Research in Arts and Social Sciences,* Vol. 7, No 2, 2016., pp. 13 - 44

Ogbuabor, C.A, et al, 'Mainstreaming ADR in Nigeria's criminal Justice System', *European Journal of Social Sciences* (2014), pp. 33 -37

Petrig, A, 'Negotiated Justice and the Goal of International Criminal Tribunals (2008) 8 *Chi-Kent J. Int. Land Comp.L.I., pp. 45-54*

Robert, E.S and Stuntz, W.J, 'Plea Bargaining as Contract', 101 *Yale L.J* (1992), pp. 67 -87

Scott-Sanford, J and Arrigo, B.A, 'Lifting the Cover on Drug Courts: Evaluation Findings and Policy Concerns', *49 International Journal of Offender Therapy and Comparative Criminology* (2005).

Trenczek,T, 'Victim-Offender Mediation in Germany - ADR under the Shadow of the Criminal Law?', *Bond Law Review*, 13 (2) Art 6, 1 - 17.

Whiteman, M.M, 'Digest of International Law', XI, US Dept of State (1968), p 18.

Yekin, A.O and Salisu, M, 'Probation as a Non-Custodial Measures in Nigeria: Making a Case for Adult Probation Service', *African Journal of Criminology and Justice Studies: AJCJS*, vol.7, No1 & 2 (2013), p.17

UNPUBLISHED AND INTERNET MATERIALS

Agaba, J.A, ADR: A Threat to Lawyers? Unpublished LL.M Thesis, (2006) University of Jos, Nigeria.

Anderson, A.M, 'Alternative Disposal of Criminal Cases by the Prosecutor: Comparing the Netherlands and South Africa (2014). <http://www.narcis.nl>Accessed on July 8, 2017.

Boulder, C.O, *Coalition Building: Conflict Research Consortium* (1998), <http://www.colorado.edu/conflict/peace/problem/coalition.htm> accessed on April 5, 2018.

Cho, F.C, Alternative Dispute Resolution and the Legal Profession in Nigeria: Issues, Problems and Prospects, Unpublished Ph.D Thesis,(2006), Ahmadu Bello University, Zaria, Nigeria.

Edokpayi, M.I, 'Suspended Sentence: Its Desirability in Nigeria', <http://www.docplayer.net> Accessed on July 6, 2016.

Griffiths, C.T, *Canadian Criminal Justice: A Primer*,(3rd, edn., Toronto: Thomson Nelson, 2006) <http://www.criminallayers.ca/gladue.htm> Accessed September 30, 2017.

Oloworan, B, 'The International Criminal Court and the Sovereignty of States: A Critical Analysis', Unpublished LLM Seminar Paper, Faculty of Law, University of Nigeria, Enugu Campus.

Podgor, E. S, 'Department of Justice Guidelines: Balancing Discretionary Justice', (2003), <http://law.bepress.com/expresso/eps/67> Accessed December 17, 2017

Price, M, 'Personalizing Crime: Mediating Produces Restorative justice for Victims and Offenders'.<http://www.worp.com> Accessed on August 10, 2018.

Schulofer, S, 'People Say the US Has the Best Criminal System in the World' (2011), <http://www.psb.htm> Accessed on May 15, 2018

Van – Nirkerk, G.J, People's Courts and People's Justice In South Africa – New Development In Community Dispute Resolution,(1994) I De June 19.

Rudin, J, 'A Court of Our Own: More on the Gladue Courts', <http://www.namleegal.on.ca/npload/documents/acourt-of-our-own-more-on-gladue-courts.paf> Accessed on July 6, 2017.

Steinberg, M.H, 'Plea Bargains: Why, When and How they are Made'. <http://www.hmichaelsteinberg.com/pleabargaining.htm> Accessed on July 10, 2017.

Vazquez, J, 'Due Process - Lets Make a Deal: The Plea Bargain'. <http://www.occupytheory.org> Accessed on April 30, 2016.

VORP Info & Resources Centre, 'About Victims-Offender Mediation and Reconciliation'. <http://www.vorp.com> Accessed on July 17, 2017.

CONFERENCE PAPERS

Aina, K, ADR and the Relationship with Court Processes; Paper Presented at the NBA Annual General/Delegate Conference, Geld in Abuja, Nigeria, 16-18 August, 2004.

Ambali, M.A, 'The Promise of Restorative Justice, Plea Bargaining and Victim-Offender Mediation in the Sharia Legal System' in NCMG Compendium of Speeches and Papers delivered at the 2nd NCMG African ADR Summit, NCMG Lagos, Nigeria, June 4, 2007

Eri, U, 'Administration of the National Institute: ADR as African dispute Resolution'. A Speech at the 4th NCMG African ADR Summit, Lagos, Nigeria on 1st - 4th November, 1998.

Lewis, M and McCrimmon, L, 'The Role of ADR Processes in the Criminal Justice System: A View from Australia'. A Paper delivered at the Association of Law Reform Agencies of Eastern and Southern Africa (ALRAESA) Conference, held at imperial Resort Hotel, Entebbe, Uganda, on September 4 - 8 2005.

Nweze, C.C, Plea Bargaining In the Administration of Criminal Justice. Paper Presented at the Workshop on Access to Justice, Plea Bargaining and Restorative Justice Organized for Judges of High Courts by NJI, held in Abuja, Nigeria, April 10, 2007.

Nwosu, K.N, 'Access to Justice: Scope and Relevance of ADR, Plea Bargaining and Restorative Justice in Civil and Criminal Justice Reforms'. A Commentary on the Occasion of Dispute Resolution, Day 1, held in Johannesburg, South Africa, November 5 – 12, 2010.

Nwosu, K.N, 'An Overview of ADR Processes'. Paper Presented at the Professional Foundation Course on Dispute Resolution, Organized by Dispute Resolution Associates Limited, Abuja in Collaboration with Association of Professional Negotiators and Mediators, held at Kano, Nigeria, 12 – 13 February, 2011.

Odoh, B.U, Professional Foundation Course on Dispute Resolution; Paper Presented on ADR Part 2 Course Organized by Settlement House, Abuja, held in Maiduguri, Nigeria, September 15, 2010.