ADR IN NIGERIA'S CRIMINAL JUSTICE SYSTEM

By
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1. Introduction

The mere mention of the phrase "Alternative Dispute resolution in Criminal Justice System" must be very surprising for a lot of people because it necessarily evokes a certain sentiment of doubt particularly in this age and the socio-political milieu in which we find ourselves, where violent crimes such as armed robbery, kidnapping and banditry have assumed dimensions hitherto unknown and un-experienced in this clime. It would appear unreasonable for anybody, let alone a Judge of the High Court to be speaking about alternative dispute resolution in criminal jurisprudence when he should be concerned with sentencing criminals to jail and keeping them away for public safety and peace. How can anyone begin to conjure negotiation or mediation with a kidnapper or a murderer or an armed robber or a burglar? It simply does not tally. However, the truth is that behind the façade of legal impossibility, ADR is being used on a daily basis for the resolution of these disputes and or conflicts. Another truth is that the class of the very serious criminal offences which conjure up in our minds doubts as to the applicability of ADR to criminal disputes constitute by far a minority of the number of criminal cases which full our court dockets on a daily basis. We have therefore set out in this paper to examine and find out whether there is a legal basis and or justification for the use of ADR in criminal justice in the face of allegations and common belief, even among lawyers, that ADR does

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not apply to criminal disputes. We shall also attempt to answer the question, should ADR apply to felonies or serious crimes?

2. CONCEPTUAL FRAMEWORK

2.1 What is ADR?

- Alternative dispute resolution
- Appropriate dispute resolution
- African dispute resolution
- Alarming drop in revenue
- Authentic dispute resolution

Hon Justice James Farley defines ADR as:
... those dispute resolution processes, which exist as alternatives to the traditional 'formal' litigation. The term ADR therefore refers to a range of processes designed to aid parties in resolving their disputes without the need for a formal judicial proceeding. [1] ADR simply means Alternative Dispute Resolution and as the name connotes, it is an approach designed as substitute to the rigorous and time consuming litigation approach to dispute resolution

Leo Kanowitz defines ADR thus:

> Alternative Dispute Resolution mechanisms or techniques generally are intended to mean alternatives to the traditional court process. They usually involve the use of impartial intervenors who are referred to as "third parties" (no matter how many parties are involved in the dispute) or "neutrals". Some define Alternative Dispute Resolution more broadly to mean finding better ways to resolve disputes, including those that have not reached – and may never reach – the courts or other official forums. Others place the emphasis specifically on the need for ways to alleviate the burden on the courts. [2]

Alternative dispute resolution is a *supplement* to the formal justice system. The United Kingdom Rules of Civil Procedure, "ADR is defined as collective

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[1] See James M. Farley, "Alternative Dispute resolution and the Ontario Court", paper delivered at the International Bar Association meeting in Lagos, February 27 – 28, 1995, p. 1.
[2] Leo Kanowitz, *Cases and Materials on Alternative Dispute Resolution* (St. Paul Minn: West Publishing Co, 1985), p.27.

description of methods of resolving disputes otherwise than through the normal trial process".

ADR is often associated with the development of community justice centres to resolve neighbourhood disputes in the 1970s and 1980s. Subsequently, the use of ADR processes spread into other areas such as family, environmental, commercial and industrial disputes.[3] The ADR movement as we know it today appears to have started in the 1960s but crystallized in the 1970s and 1980s. This ADR Movement has been variously described as "Modern ADR Movement" and "Western ADR Movement".[4] The label ADR represents a modern name for an age-old practice which was developed in various traditional societies.

2.2 Advantages of ADR

ADR is seen as a more accessible, flexible and efficient form of justice which allow for the active participation of all parties and assists in the preservation of relationships. ADR is also seen as a cheaper more effective way of dealing with minor disputes that do not warrant the use of court resources.[5] The use of ADR in a variety of dispute contexts has grown rapidly over the years, and has been institutionalized to a large extent through the introduction of legislative schemes and through the development of professional bodies which have fostered the use of ADR processes. The advantages of ADR may be summarily stated as follows:

- Lowers court caseloads and expenses.
- Reduces parties' expenses and time.
- Provides speedy settlement of those disputes that were dissipative of the community or the lives of the parties families.
- Improves the public's satisfaction with the justice system.
- Encourages resolutions that were suited to the parties needs.
- Increases voluntary compliance with resolutions.
- Restores the influence of neighborhood and community values and the cohesiveness of communities.
- Provides accessible forums to people with disputes, and

[3] i*bid*
[4] See Dele Peters, *What is ADR*? (Lagos: Dee – Sage Nigeria Ltd, 2005), p.5.
[5] See generally, Leo Kanowitz, Cases and Materials on Alternative Dispute Resolution, *op. cit*, pp.1-2. See also Brown and Marriot, *ADR: Principles and Practice*, *op. cit.*, p.14.

- Teaches the public to try more effective processes than violence or litigation for settling disputes.[6]

2.3 Limitations on the Use of ADR

Often, the speed-costs advantage is illusory. Secondly, and more importantly, as the works of Derek Bok and Fiss show us, ADR may not be appropriate at all times or in all cases, especially where grave issues of public policy may be concerned. Thus, ADR may not be proper where

1) Questions borders on the legal interpretation of statutes or rules,
2) Where legal precedents needs to be set,
3) Emergency situations where injunctive or preventive relief is necessary – eg- an absconding defendant
4) Public policy
5) Where it is necessary to avoid the action becoming statute barred
6) Where a claim is a frivolous claim that will most definitely be dismissed by the court.

Apart from these, there are also inherent dangers in the system of ADR. For instance, ADR may lack due process and other safe guards. It may not involve needed expertise. It may not redress power imbalances. It may lack finality. It may lack the power to enforce its decisions. It may also lack the power to induce settlements. It may hide disputes from public scrutiny and may be impermeable to public standards due to confidentiality.

2.4 Forms of ADR

There is no clearly generally accepted classification of ADR forms and processes. A lot appears to depend on the philosophy or perspective of ADR adopted by each scholar, practitioner or writer. Classification or categorization therefore appears to follow the whims of each writer.[7]

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[6] Goldberg, Sander and Rogers, Dispute Resolution Negotiation, Mediation and other processes 2nd ed (Boston, Toronto, London: Little Brown & Co, 1992), p. 8.

[7] Thus, while some ADR writers divide all the dispute resolution processes (traditional and alternative) into three primary categories, namely, negotiation, mediation and adjudication, others extend them up to six primary categories, namely, negotiation, mediation, the judicial process, arbitration, administrative and legislative processes. Brown and Marriot have criticized the latter classification as no more than a sub-division of adjudication into its constituent parts. We agree with this criticism because they are all aspects of adjudication which involve the handing down of a decision to the parties by some third party.

Notwithstanding, ADR may be divided into Consensual, adjudicative and hybrid ADR. Thus, the ADR spectrum includes negotiation, mediation, arbitration, mini-trial, med-arb, summary jury trial, rent-a – Judge, etc.

2.5 ADR in the Civil Context

Most of our discussions above will conduce to ADR in the civil justice context. Here, there is no doubt that the attitude of the courts have been to encourage amicable resolution of civil disputes at any stage of the dispute, before it goes to court, while in court and even after judgment has been given. That is why today, we hear of post-judgment negotiations. Even while the matter is in the Court of Appeal, there is still room for ADR to operate. As a result, the ADR spectrum is very wide and still developing especially in the civil context.

2.6 ADR in the Criminal Context

According to Lewis and McCrimmon:

> In a criminal justice context, the term ADR can encompass a number of practices which are not considered part of traditional criminal justice: victim-offender mediation; family group conferencing; victim-offender panels; victim – assistance programs; community crime prevention programs; sentencing circles; ex-offender assistance; community service; plea bargaining; school programs. It may also be seen to include cautioning and specialist courts as indigenous courts and drug courts.[8]

The use of ADR in the criminal justice system is a relatively new phenomenon in Western countries.[9] According to Kift:

> In part, the increased interest in the application of ADR processes to the criminal justice system was borne from a

[8] Melissa Lewis, & Less McCrimmon, "The Role of ADR Processes in the Criminal Justice System: A View from Australia", paper presented at the Association of Law Reform Agencies of Eastern and Southern Africa (ALRAESA) Conference, Imperial Resort Beach Hotel, Entebbe, Uganda, 4-8 September, 2005, p. 5, available at www.justice.gov.za/alraesa/conferences/.../ent_s3_mccrimmon.pdf last accessed September 16, 2011.

[9] Laurence M Newel, "A Role for ADR in the Criminal Justice System?" paper presented to the Papua New Guinea National Legal Convention, 25 – 27 July, 1999, p. 17.

> general dissatisfaction with traditional adversarial methods of dispute resolution. 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 conflict.[10]

The inability of the criminal justice system to meet the "needs" of victims is the basis for many claims about the potential for restorative justice and ADR.[11] Consequently, there is a marked increase in recognition of the needs of victims in the criminal justice system. In a 1985 study of alternatives to criminal courts, Tony Marshal provided an analysis of the "needs" of victims in the criminal justice process. According to Marshal, victims suffer two kinds of losses: (1) material losses including loss of money or property or physical injury; and (2) emotional losses including feelings of anxiety, insecurity or pollution. The criminal justice process is not well designed to respond to either of these needs of victims.[12] In relation to material losses for instance, the criminal justice system conceptualizes the offenders' actions as primarily creating "a debt to society", so that it is not well-geared to helping out the victim financially. In relation to emotional losses, the victims' emotional needs can only be met if the State can ensure that the offender is punished. But this is not always the case. In fact, Marshal suggested that victims' participation in criminal proceedings (as witnesses, for example) may actually "reinforce victims' sense of powerlessness arising from the initial criminal experience and further add to their dissatisfaction or even distress.[13] It is in the inability of the criminal justice system to cater for the needs of victims that lie the roots of ADR and restorative justice in the criminal justice system. According to Adeyemi, "the imposition upon and the continued

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[10] S. Kift, "Victims and Offenders: Beyond the Mediation Paradigm?", (1996) *Australian Dispute Resolution Journal* 71, cited in Lewis and McCrimmon, *loc.cit*, p. 4,

[11] Hughes & Mossman, *Re-Thinking access to Justice in Canada: a Critical Review of Needs, Responses and Restorative Justice Initiatives*, (Ottawa, Canada: Department of Justice, 2003) p. 23 available on-line at http://canada.justice.gc.ca/eng/pi/rs/rep-rap/2003/rr03-2/p33.html accessed 21st Jan, 2009.

[12] Tony F. Marshal, *Alternatives to Criminal Courts* (Hampshire: Gower Publishing, 1985) p.20.

[13] *Ibid*, p. 21.

adoption of the accusatorial procedure in Nigeria must be viewed as a procedural disaster. This coupled with the technicality of our Law of Evidence has resulted in the strangeness and incomprehensibility of the criminal trial procedure to the ordinary citizen."[14] There was and still is, a felt need for a system that could provide for the needs of not only the victim but also the offender as well as the society represented by the State. That system appears to have been found in ADR and restorative justice practices such as victim – offender mediation.

ADR in the civil context differs from ADR in the criminal context. Thus, it has been stated that:

> It is not a matter of contention that there are crucial differences between the application of ADR processes in non-criminal and criminal matters. Conferencing and victim offender mediation draw on elements of mediation in non-criminal areas, however differ in many practical and theoretical respects. Mediation refers to conflict and compromise, and seeks to avoid 'blaming'. It seeks to achieve the best outcome for all parties through collaboration, procedural flexibility, interest accommodation, contextualization, active participation, and relationship preservation. In the criminal context, the perceived benefits of more informal methods of justice apply, but conferencing involves a particular theoretical basis (informed by criminological, psychological and sociological theory) and aims to attach stigma to the criminal act)not the offender) and to achieve an acceptance of responsibility.[15]

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[14] A. A. Adeyemi, "The Place of Customary Law in Criminal Justice Administration in Nigeria", in Yemi Osinbajo & Awa U Kalu (eds.), *Law Development and Administration in Nigeria* (Lagos: Federal Ministry of Justice, 1990) p.212; see also A. A. Adeyemi, "Accusatorial Procedure" in "The Criminal Process is a selection Instrument for the Administration of Criminal Justice" in Adedokun A. Adeyemi (ed.), *Nigerian Criminal Process: University of Lagos Criminology Series No.3* (Lagos: Faculty of Law, University of Lagos and International Centre for Comparative Criminology University of Montreal, 1977) Chapter Three, pp. 26 – 71 at 60 – 65.

[15] Lewis and McCrimmon, *loc. cit*, p.9, citing T.O'Connell, "Restorative Justice for Police", (2000) *Real Justice Australia*, 9.

In a similar vein, the South African Law Commission, quoting the Northern Territory Law Reform Committee has observed that mediation in the criminal justice context is not the same as mediation in civil disputes. For the Commission, five differences should be kept in mind, to wit:

a. the offence has already occurred and consequently there is no continuing dispute.
b. the parties are not equal in that the offender committed the offence totally on his/her terms without regard for the victim;
c. mediation in the criminal justice context represents a shift towards "restorative justice", which views crime as a violation of one person's right by another;
d. mediation in the criminal justice context contains an aspect of reparation that is not a component of mediation in the civil context;
e. mediation in the criminal justice context especially when it forms part of the sentencing process involves the final agreement being publicly aired in court. This would never occur in civil mediation where the outcome is confidential and remains simply a matter between the parties.[16]

While the views expressed above may be substantially correct, this thesis does not agree entirely with some of the views. For instance, it may not be right to state that because the offence has already occurred, consequently, there is no continuing dispute. This is so because the need for settlement would not arise if the dispute is not continuing. It is because once the offence has occurred, a dispute arises which dispute continues until it is resolved that mediation of the dispute arises. Similarly, it would be wrong to state that mediation in the civil context does not produce an outcome that is aired in the court. Mediation in the civil context can produce such outcomes depending on the circumstances, for instance, if it were an amicable resolution whose terms of settlement is filed in court and is rendered by the judge as a judgment of the court.

[16] South African Law Commission, *Issue Paper 8 (Project 94): Alternative Dispute Resolution*, available at file:///C:/Users/user/Documents/ZALC%20AGAIN%20ON%20ADR, accessed June 25 2010. See also Northern Territory Law Reform Committee, *Mediation and the Criminal Justice System*, Final Report No. 17A March 1996.

The distinguishing factors between ADR in the civil and criminal contexts may then be charted thus:

	Civil Context	**Criminal Context**
1.	Involves the parties only.	Involves not only the parties but the State or society.
2.	There is no blame.	There is blame but the blame or stigma is attached to the act not the offender.
3.	Involves only private interests	Involves some public interest
4.	There is no initial admission of guilt.	There is initial admission or assumption of guilt.

3. Forms of ADR in the Criminal Justice Process

These include:

3.1 Victim-Offender Mediation

The dynamics of Victim-Offender Mediation has been described as different from those which characterize civil mediation. Unlike much of civil mediation, mediation in the criminal context does not involve disputants and the mediation is not for the purpose of determining fault, since the offender has admitted wrongdoing. The mediator's participation is based on recognition of one person's wrongdoing at the outset. According to Marty Price, "the mediator is neutral as to the individuals, respecting both as valuable human beings and favouring neither... But the mediator is not neutral as to the wrong."[17] The mediation does not divert attention from the offender's conduct and obligations to make amends by considering whatever role the victim might have had in the crime. These complexities can only be addressed when "the current offence has been atoned for, when the bargaining table is once again level".[18] However, it must be recognized that a critical component of VOM is that it is meant to be more concerned with changing the parties than restitution of any actual loss. Thus, Mark Umbreit advocates "humanistic mediation" as a healing process rather than

[17] Marty Price, "Can Mediation Produce Justice? A Restorative Justice Discussion for Mediators", ADR Report http://www.com/articles/justice.html. accessed January 21 2009.
[18] Tony F Marshal, *Restorative Justice: An Overview, op.cit.*

an emphasis on reaching agreements.[19] The engagement between the victim and the offender is often touted to be the most important aspect of victim-offender mediation. Victims report that the opportunity to speak directly to the offender is often more important to them than any actual restitution which results from the mediation.[20] Victims may feel that they have regained some of the control which they had lost and which the traditional system does not offer them. They may be able to obtain answers to questions which have haunted them, such as "why me", "how did you get into my house" or "were you watching me?" and set aside some fears about whether the offender will return.[21]

3.2 Family Group Conferencing

Conferencing is a meeting among offender, victim and members of the community and perhaps even the arresting police officer. In some cases, the emphasis is on including the family of the juvenile offenders (hence family group conferencing). In others, the conference would include members of the larger community (hence, the more reference to it as group conferencing). Although conferencing is widely considered to be a restorative justice initiative, Umbreit and Zehr state that the original conferences were not based on restorative principles, rather, restorative justice has modified them or increased the models which are grouped as "conferencing."[22]

Conferencing builds on victim – offender mediation programmes by bringing together not just the individuals involved in the criminal offence but also members of their families and the broader community.[23] Many victim-offender mediation programmes do not involve anyone other than the offender and the victim because it is believed that other attendees might

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[19] Mark S Umbreit, "Humanistic Mediation: A Transformative Journey of Peacemaking", Center for Restorative Justice and Mediation, http://ssuche.umn.edu/rjp/Resurces/Documents/umb97e. PDF, accessed September 11, 2011.

[20] Gordon Bazemore and Mark S Umbreit, *Conferences, Circles, Boards and Mediations: Restorative Justice and Citizens Involvement in Response to Youth Crime*. Prepared for the Balanced and Restorative Justice Project (funded by the Office of Juvenile Justice and delinquency Prevention, U.S. Department of Justice, 1999).

[21] Marty Price, "Can Mediation Produce Justice?", *loc.cit.*

[22] Mark S. Umbreit & Howard Zehr, "Restorative Family Group Conferences: Differing Models and Guidelines for Practice", (1996) 60 *Federal Probation* 24.

[23] Peter Condliffe, "Difference, Difference Everywhere...", *ADR Bulletin*, Vol. 6, No. 10 (2004), pp.1-6, at p.1. Lewis & McCrimmon, *op.cit*, p.9.

dilute the benefits of the face-to-face contact between the victim and the offender. Yet, others believe that support helps the session and the follow-up phase. Excessive individualism of victim-offender mediation practice may have given the impetus to the development of the restorative approach involving the community called group conferencing.

3.3 Sentencing Circles

According to Julian V. Roberts and Carol LaPrairie in the Criminal Law Quarterly:

> A sentencing circle is a process whereby community members contribute to sentencing decision making in cases involving community members. The circle is held in open court, proceedings are recorded and interpretation services provided where necessary. Participants sit in a circle and there is no formal arrangement about who sits where. There is variability in procedures, but these basically entail some version of the following. Participants are welcomed and introduced, the facts of the offence and offender are presented by the criminal justice participants, at which point the discussion is opened to the public present. The discussion can involve any number of subjects, including the underlying cause of the crime, the impact of the crime on the victim and the community, and the details of potential sentences. The objective is to bring to the circle (including the judge) the best available information out of which an appropriate sentence can emerge. There is no sworn testimony or cross-examination of the participants, and there are no rules regulating the statements that may be made.[24]

Reacting to the above passage, Newel stated as follows:

> It will be seen that this a form of restorative justice used at the sentencing stage. It is clear from the article in the Canadian Criminal Law Quarterly that it is ADR in the sense of giving the court a much better appreciation of how to resolve issues in a matter, than could come out of normal sentencing systems. It

[24] Julian V. Roberts and Carol LaPrairie, "Sentencing Circles: Some Unanswered Questions," (1996) 39 *Criminal Law Quarterly*, 69 at 70-71.

> does not divert matters from the criminal justice system, but does perhaps provide a stepping stone to full use of restorative justice by the Criminal Justice System.[25]

3.4 Plea Bargaining

The Black's Law Dictionary defines plea bargaining as "The process whereby the ACCUSED and the PROSECUTOR in a criminal case work out a mutually satisfactory DISPOSITION of the case subject to court approval. It usually involves the defendant's pleading guilty to a lesser offense or to only one or some of the counts of a multi-count INDICTMENT in return for a lighter sentence than that possible for the graver charge."[26]

Plea bargaining is ADR in the criminal justice system because negotiation is the very basis of ADR. A negotiated agreement between a prosecutor and a criminal with a view to settlement of a criminal dispute is nothing more or less than ADR in the criminal justice system. Plea bargaining often represents not so much "mutual satisfaction" as perhaps "mutual acknowledgement" of the strengths or weakness of both the charges and the defense, against the backdrop of crowded criminal courts and case dockets. Plea-bargaining usually occurs prior to trial but, in some jurisdictions, may occur any time before a verdict is rendered. It is also often negotiated after a trial that has resulted in a Hung Jury.[27] The parties may negotiate a plea rather than go through another trial. Plea-bargaining involves three areas of negotiations:

a. **Charge bargaining:** This is a common and widely known form of plea-bargaining. It involves a negotiation of the specific charges (counts) or crimes that the defendant will face at trial. Usually, in return for a plea of "guilty" to a lesser charge, a prosecutor will dismiss the higher or other charge(s) or counts. For instance, in return for dismissing charges for first-degree murder, a prosecutor may accept a "guilty" plea for manslaughter (subject to court approval).

b. **Sentence bargaining:** Sentence bargaining involves the agreement to a plea of guilty (for the stated charge rather than a reduced

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[25] Newell, *op.cit*, p.16.

[26] H.C. Black, *Black's Law Dictionary 6th ed.* (St Paul Minnesota: West Publishing, 1990) p.1152.

[27] A hung – Jury is a jury that cannot reach a verdict by the required voting margin. See Bryan Garner, *Black's Law Dictionary, ibid*, p. 873.

charge) in return for a lighter sentence. It saves the prosecutor the necessity of going through trial and proving its case. It provides the defendant with an opportunity for a lighter sentence.

c. **Fact bargaining:** This is the least used. Negotiation involves an admission to certain facts ("stipulating" to the truth and existence of provable facts, thereby eliminating the need for the prosecutor to have to prove them) in return for an agreement not to introduce certain other facts into evidence.[28]

3.4.1 Certain Misconceptions about Plea Bargaining[29]

1. Plea Bargaining or Plea Bargain? The process is called plea bargaining while the outcome is referred to as plea bargain.
2. Plea Bargain, EFCC and Corruption (Exclusive association with EFCC). Even though the process has been closely associated with the EFCC, it is not exclusive to the EFCC. It is open to all criminal justice agencies.
3. Plea Bargain is not codified in our Laws. It is not true. Section 270 of the Administration of Criminal Justice Act 2015 and section 441 of the Administration of Criminal Justice law of Enugu State have copious provisions for plea bargaining. Same also for Lagos State and some other states in Nigeria.
4. Plea Bargain is for the Rich Alone. This is also not true. It is available for everybody within the criminal justice system.
5. Plea Bargain Leads to Light Sentences. This is also not true. Many people misunderstand the principles behind sentencing. The amount of money involved does not necessarily determine what is sentenced or what is forfeited to the complainant. The fact of conviction is symbolic and can never be equated in monetary value or terms.

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[28] "Guilty Plea – Plea bargaining – A Definition and Types of Bargaining, Development of Plea Bargaining, A Comparative Perspective, Operation of the plea Bargaining System", at http://law.jrank.org/pages/1283/Guilty-Plea-Plea-Bargaining-Definition-types-bargaining.html. last visited October 10, 2011.

[29] See Kevin N Nwosu, "Towards a Functional Approach to Teaching of Criminal Justice in Nigeria – The Imperative of the SMA Belgore Model" in E. Smaranda Olarinde (ed) *Mainstreaming Interdisciplinary Approach to Legal Education: Imperative for Nigeria Development – Proceedings of the 48th Annual Conference of the Nigerian Association of Law Teachers [NALT]* (Ado-Ekiti: Nigerian Association of Law Teachers/ABUAD Press, 2015) 166 – 194.

6. Court must Sanction Plea Bargains. Again, this is not true. The court can decide to refuse to cognizance a plea bargain if it is not satisfied that it accords with the ends of justice.

4. Legal Basis For ADR in Nigeria's Criminal Justice System

Dispute, whether characterized as civil or criminal, is an essential part of man in society. So long as man remains a gregarious being, living in communities or societies, frictions must arise which give rise to disputes, civil or criminal in nature. In this respect, it should be noted that there is nothing inherent in a conduct that makes it a criminal offence and not a civil offence. The distinction lies mainly in the procedure chosen by the person whose rights have been injured to ventilate the claim. If he or she chooses the civil procedure, it is called a civil wrong but if he or she chooses the criminal procedure, the wrong is called a criminal offence.[30] This explanation is important because many people are ignorant of how the current adversarial or accusatorial criminal justice system which we operate and which tends to propagate the idea that crimes are not amenable to ADR came into being. If a crime occurs, one of the commonest things you can hear is that the complainant or victim has no power or control over the criminal justice process. That it is no longer the case of the victim but that of the State. This was what led Nil Christie to assert that the State has stolen the conflict between individuals as if it were a property capable of being stolen. *The State has stolen the crime from its owners and should give it back.*

History shows that the evolution of our current adversarial system of justice can be traced back to the Norman conquest of the Anglo-Saxons in England about 12th century.[31] Under the Anglo-Saxon Kings, justice was shared between all "free men" (skilled tradesmen and property owners- those who were not serfs (peasants), and the King, the Bishops and the Sheriffs, (Shire Reeves). Shire Reeves had little of a judicial role until about 1000 A.D. Prior to that for about 100 years, they were just Policemen and Tax collectors. King Henry I (1068 – 1135) set up the system of local Justice of the Peace (Magistrates and Justices in Eyre or Circuit Judges). Justices were not recorded by name until the reign of King Henry II.

Prior to the time of King Henry I, the Sheriff and the Bishop presided over local justice. The *Leges Henrici Primi* (Laws of King Henry I) was a

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[30] See Okonkwo & Naish, *Criminal Law in Nigeria, 2nd edn.* (Ibadan: Spectrum, 1980) p.20.

[31] See Laurence M. Newell, "A Role for ADR in the Criminal Justice System?, A paper prepared for the Papua New Guinea National Legal Convention, 25 – 27th July 1999, p.2.

compilation of the earlier Mercian, Dane law and West Saxon laws, combined with some Canon law and other European laws. It was more of a restatement of the existing law. However, in *Leges Henrici Primi*, i.e. the first "Law" created by King Henry I – his coronation Oath, (hence the name) he announced his policies, including recognition of previous law. He also issued a decree securing royal jurisdiction over certain offences (robbery, arson, murder, theft and other violent crimes) against the king's Peace. Prior to this decree, crime had been viewed as conflict between individuals. The traditional emphasis was upon repairing the damage by making amends to the victim. Thus, the decree of Henry I following the Norman invasion of Britain brought a major paradigm shift that turned away from the well established understanding of crime as a victim – offender conflict within the context of community.[32] According to Mark .S. Umbreit, dealing with the historical background of the Retributive Model of Justice,[33]

> Dating all the way back to 12th century England, following the Norman Invasion of Britain, a major paradigm shift occurred that turned away from the well established understanding of crime as a victim – offender conflict within the context of community. William conqueror's son, Henry I, issued a decree securing royal jurisdiction over certain offences (robbery, arson, murder, theft, and other violent crimes) against the king's peace. Prior to this decree, crime had been viewed as conflict between individuals. The traditional emphasis was upon repairing the damage by making amends to the victim.[34]

In a substantially similar account, Zedner recounts as follows:

> The renaissance of reparative justice derives its impetus from an even earlier historical tradition, for it harks back to the origins of Anglon Saxon law when little distinction was made between public and private wrongs. Both were dealt with by a system for gaining compensatory redress via monetary

[32] *Ibid.*

[33] See Peter Condliffe, "The Challenge of Conferencing: Moving the Goal Posts for offenders, Victims and Litigants", (1998) 9 *ADRJ* 113 at 144-145.

[34] Mark S. Umbreith, "Restorative Justice Through Victim – Offender Mediation: A Multi-Site Assessment", keynote speech of the 25th Annual meeting of the Western Society of Criminology held at Newport Beach California, 26-28 Feb, 1998. See also Western Criminology Review Vol. 1. No.1, available online at http://wcr.sonoma.edu/vnl/v/nl/.html. Accessed September 9, 2011.

> payments known as the 'bot' whose sum was fixed according to the nature and extent of the harm done. Only with the growth of royal jurisdiction in the twelfth century was direct restoration to the victim sacrificed to the wider purposes of securing the 'King's Peace'. Crimes were differentiated from other social wrongs on the grounds that they were so serious as to offend not only against the interests of the victim but against King and community as well. Accordingly, the rights of the victim to compensation were usurped by fines payable to the Crown and personal apologies were supplanted by demands for atonement to God. Over time, the original restoration purpose of the 'bot', the claim of the victim to redress and, indeed, the interest of the offender in making good have been effectively submerged beneath the wider social purposes of maintaining order.[35]

Zedner has also submitted that not only has the State 'stolen' the conflict, by the artifice of legal language, it has transformed the drama and emotion of social interaction and strife into technical categories which can be subjected to the ordering practices of the criminal process. For her, the small proportion of conflicts which enter the criminal justice system undergo an elaborate process of inquiry, classification and judgment by police, lawyers and judge by means of which they are translated to fit the legal categories of crime. The criminal justice process may thus be seen as a means of repackaging conflicts in order to render them amenable to legal regulation. She then concludes that the adversarial system further distances and embattles the two parties, whilst high standards of proof demand absolute attribution of culpability. The intimate relations between many victims and offenders involved in crimes against the person, the blurred distinction of victim and offender status and causal responsibility which are inimical to securing a conviction are diminished and denied.[36]

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[35] See Lucia Zedner, "Reparation and Retribution: Are they Reconcilable?" *The Modern Law Review*, Vol. 57, No 2, (March 1994) 228 at 231, citing Roebuck, *The Background of the Common Law* (Oxford: Oxford University Press, 1988) 29; and Greenberg, "The Victim in Historical Perspective", (1984) 40 *Journal of Social Issues*, 79.

[36] Zedner, *Ibid, pp.* 231-232. See also Nils Christie, "Conflicts as Property", (1977) 17 *British Journal of Criminology* 1.

In Nigeria, the court has held that arbitration and other forms of ADR are so far restricted to civil matters. In *BJ Exports & Chemical Processing Co v Kaduna Refining and Petrochemical Ltd*,[37] it was held that arbitration and other forms of ADR are so far restricted to civil matters. According to the Court of Appeal, per Mohammed JCA:

> 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 a 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 (1990) 4 NWLR (pt.142) 1 at 32-33.

However, notwithstanding the position of the courts that ADR is not applicable to criminal matters or disputes in Nigeria, it is opined that ADR is indeed an entrenched part of the Nigerian criminal justice system, primarily because it is indigenous to the various peoples of the Nigerian State. The different peoples, i.e. ethnicities that formed Nigeria had forms of the modern "ADR" long before the Nigerian State came into existence. In the Igbo nation, the concept of *omenala* [38] aptly captured the essence of what is today called ADR. In the Muslim north, the concept of *sulh* and *ad takhim* clearly encapsulated ADR of any description.[39] In the Tiv area of North-central Nigeria, the concept of *jir* and *tar*[40] were the equivalents 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. Okafo calls this grounded law.[41]

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[37] (2003, FWLR (Pt.165) 445 at 465; 2003, 24 WRN 74).

[38] C. C. Obiego, Igbo Idea of God. *Lucerna*, 1978 (1), 28.

[39] M. A. 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.* Lagos: NCMG, (2007) 73-79.

[40] P. Bohannan, *Justice and Judgment Among the Tiv.* London, New York, Toronto: Oxford University Press, (1957) 2.

[41] Chukwunonso Okafo, *Reconstructing Law and Justice in a Postcolony.* England, USA: Ashgate Publishing Company, (2009) 8.

The jurisprudence of non-applicability of ADR to criminal cases is one founded on the concepts of compoundment and concealment of offences which the law legislates against in sections 127, 128 and 130 of the Criminal Code. Section 127 of the Criminal Code provides that any person who asks, receives, or obtains, or agrees or attempts to receive or obtain any property or benefit of any kind for himself or any other person upon any agreement or understanding that he will compound or conceal a felony, or will abstain from, discontinue, or delay a prosecution for a felony, or will withhold any evidence thereof, is guilty of an offence and if the felony is such that a person convicted of it is liable to be sentenced to death or imprisonment for life, the offender is guilty of a felony, and is liable to imprisonment for seven years. In any other case the offender is liable to imprisonment for three years. Section 128 of the Criminal Code, on the other hand, provides that any person who, having brought, or under pretence of bringing an action against another person upon a Penal Act, law or statute in order to obtain from him a penalty for any offence committed or alleged to have been committed by him, *compounds the action without the order or consent of the court*in which the action is brought or is to be brought, is guilty of a misdemeanour and is liable to imprisonment for one year. Finally, section 130 of the Criminal Code stipulates that any person who, having arrested another upon a charge of an offence, willfully delays to take him before a court to be dealt with according to law, is guilty of a misdemeanour and is liable to imprisonment for two years. A combined reading of sections 127 and 128 of the Criminal Code would reveal that in the Southern States of Nigeria where the Criminal Code applies, a felony cannot be compounded but other offences such as a misdemeanour and a simple offence can be compounded with the leave of the Court. The effect of these provisions is to render the use of ADR in criminal cases legally very difficult if not impossible. Let me say straightaway that it is rather unfortunate that the provisions relating to compoundment is still on our statute books having been repealed or abolished in England, its home of origin in 1967, i.e. more than 50 years ago.

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. Starting with the Constitution which is the grundnorm, section 14(2) thereof recognizes that "Sovereignty belongs to the people of Nigeria from whom government through this Constitution

derives all its powers and authority." If sovereignty, which is the ultimate source of authority and power in a politico-legal system belongs to the people, then, it is my submission that the power to resolve disputes, including criminal disputes, which is innate and inherent in the people cannot be taken away from them. It is instructive that while the Constitution provides in section 19(d) as one of its foreign policy objectives respect for international law and treaty obligations as well as the seeking of settlement of international disputes by negotiation, mediation, arbitration and adjudication, nothing is said in the said Constitution about domestic policy on resolution of disputes. I submit that it could not have been the intention of the Constitution to cognizance the use of ADR on the international plane and refuse cognizance of the same on the domestic plane. Thus, the Constitution itself is the foundation of the use of ADR in the criminal justice system.

To further show that this is the intention of the Constitution, section 17 of the Federal High Court Act provides as follows, "In any proceedings in the court, the Court may promote reconciliation among the parties and encourage and facilitate the amicable settlement thereof." What is significant about the section 17 of the Federal High Court Act is that unlike some State High Court Laws which tend to limit the power of the court to approve of the use of ADR in criminal proceedings to only minor offences, it does not place any such restrictions on the court showing the true intent of the Constitution.

Section 14 of Economic and Financial Crimes Commission Establishment Act[42] empowers the Commission to compound offences in order to obtain practical restitution. In *FRN v Cecilia Ibru*,[43] the EFCC was able to recover 199 assets and ₦190 billion naira through the plea bargaining process.[44] That, in our view, is nothing but ADR and restorative justice in action. Plea bargaining has now been legislated into the criminal justice system of Lagos State[45] and the Federation by the Administration of Criminal Justice Act 2015. The Child's Rights Act 2003[46] has also expressly incorporated ADR into the juvenile justice system.

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[42] Cap. E1, Laws of the Federation of Nigeria 2004.
[43] Unreported FHC/L/297C/2009.
[44] O Ameachi, & Anosike, "Ex-Oceanic Bank MD, Cecelia Ibru, Jailed: To Forfeit 199 Assets", N190bn. *The Sun*, October 9, 2010, 12.
[45] Administration of Criminal Justice Law No. 10 of 2007.
[46] Cap. C50, Laws of the Federation of Nigeria 2004, sections 151, 204, 208, 209 and 223).

5. Common Problems Associated with ADR in Criminal Matters

In criminal justice, we deal with society's means of securing compliance with the dominant values of society as defined by laws prohibiting certain conducts and omissions at the pain of sanction. Because criminal justice deals with society's means of securing compliance with the dominant values of the society, resolution of criminal disputes is generally seen as a public law question which must be dealt with by the public institutions of the State. Alternative Dispute Resolution (ADR) including arbitration challenges these assumptions. As a result, there is always a tension between privatisation of criminal disputes and resolution only by the State epitomized in criminal prosecution before the courts. Thus, one of the commonest problems associated with the use of ADR in criminal justice is how to confront the dominant theme in criminal justice which is the doctrine of retribution. In his magnum opus, *Metaphysische Anfansgrunde der Rechtslehre*, (The Metaphysical Elements of Justice) Immanuel Kant argued that retribution was the only possible justification for punishing lawbreakers.[47] In his translated words:

> Judicial punishment can never be used merely as a means to promote some other good for the criminal himself or for civil society, but instead, it must in all cases be imposed on him on the ground that he has committed a crime... He must first be found of deserving of punishment before any consideration is given to the utility of this punishment for himself or for fellow citizens.

The retributive system is founded on the following assumptions:

1. Crime is essentially lawbreaking;
2. When a law is broken, justice involves establishing guilt;
3. So that just deserts can be meted out;
4. By inflicting pain;
5. Through a conflict in which rules and intentions are placed above outcomes.[48]

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[47] Immanuel Kant, *Metaphysical Elements of Justice* (John Ladd , translated, Hackett Publishing Co, 2nd ed, 1999, in R. Perry, The role of retributive justice in the common law of tort: A descriptive theory. *Tennessee Law Review*, 2006 (73) 1-104, 6.

[48] H. Zehr,, *Changing Lenses: A New Focus for Crime and Justice* (Scottsdale, PA: Herald Press, 1990), p. 81..

That retribution has also been the dominant theme in Nigeria's criminal justice policy can be seen in the fact that since the military took over the reins of government in Nigeria in 1966 through to the current civilian democratic governance, every new criminal legislation has been accompanied with the imposition of harsher sentence of imprisonment and or fine or death sentence. It has not helped that citizens contribute to this state of affairs by their frequent calls for the imposition of stricter sentences as a means of dealing with crimes for which they appear ill-equipped to deal with.[49]

Opponents of the use of ADR in the criminal justice system usually set up a number of objections. These include that the ADR option privatizes disputes in contexts in which public policy requires the clear intervention of the State with strict public scrutiny.[50] In other words, ADR tends to view conflict as personal, emotional and rooted in miscommunication rather than as stemming from illegal and criminally actionable behaviour. Further objections are raised that ADR methods do not ensure any balance of power between the disputants in the settlement process unlike the public courts where the judge holds the balance in the public interest.[51] The problem of power imbalance is one of the greatest concerns of the opponents of ADR in criminal justice.[52] Power imbalance refers to a situation where one person is in the position of control while the other is in the position of subservience so that there is no likelihood of any negotiations on the basis of equality. This, it is argued, is because the offender committed the crime on his own terms.[53]

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[49] See for instance, "Oshiomole Advocates Stiffer Penalties For Rape, Child Abuse", http://www.nairaland.com/2436992/oshiomhole-advovcates-stiffer-penalties-rapechild accessed January 20, 2016. See also E. Ochayi, Panacea for Curbing Kidnapping and Crime. *Opinion Nigeria*, http://www.opinionnigeria.com/panacea-for-curbing-kidnapping-and-crime/#sthash.ob4TufSz.dpbs accessed 20 January, 2016.

[50] Janet Rifkin, Mediation *in the Justice System: A Paradox for Women*, 1 *Women & Criminal Justice*, Vol. 1, (1989) 41-54 at 48.

[51] Id.

[52] Karia Fisher, Neil Vidmar & Rene Ellis, "Procedural Justice Implications of ADR in Specialized Contexts: The Culture of Battering and the Role of Mediation in Domestic Violence Cases," 46 *Southern Methodist Law Review* (1992) 2117; Stephen B. Golberg, Frank E. A. Sander & Nancy H. Rogers, *Dispute Resolution: Negotiation, Mediation, and Other Processes* (Boston, Toronto, London: Little, Brown & Co, 1992) p. 328; Anita Vestal, "Domestic Violence and Mediation: Concerns and Recommendations," Mediate.com, (2007) at http://www.mediate.com/articles/vestala3.cfm posted May 2007, accessed August 10, 2013.

[53] Rose Garrity, *Mediation and Domestic Violence*, 5, 6 (1998) available at http://www.biscmi.org/documents/MEDIATION-AND-DOMESTIC-VIOLENCE, last visited

So, there is no basis of negotiation as there is no equality in bargaining power. Violence cases assume that the abuser or offender is in the position of control while the victim is in the position of subservience and therefore, needs protection which ADR or mediation cannot offer but law enforcement can.[54]

The critics of mediation and other ADR processes argue that it is inappropriate for victims especially abused women to be required to participate in mediation with their abusers, and that negotiations about behaviour are unacceptable even in the presence of a third party.[55] These critics argue that when mediation is used instead of formal court interventions, the result can be dangerous for victims particularly women in the domestic violence situations.[56] This is because such ADR or mediation generally involves the parties negotiating in face to face sessions with the assistance of neutral third parties, victims are required to meet, discuss and negotiate with their abusers.[57] In this scenario, there are serious concerns not only about safety, but also about legitimizing the negotiation or negotiation of non-negotiable subject matter such as the violence itself.[58] There is also the argument that the confidential nature of ADR leads to perpetuation of the violence.[59] In the area of domestic violence, law and the intervention of criminal justice system have played an important role in publicizing the seriousness of domestic violence and in penetrating the silence that allows the perpetrator to commit the violence.[60] Mediation perpetuates this realm of secrecy and isolation from public scrutiny.[61] Additionally, mediators are sworn to keeping the confidentiality of the process. Thus, even when proceedings disclose domestic violence of high degree, they are under

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August 10, 2013, p. 3; South African Law Commission, *Issue Paper 8 (Project 94) Alternative Dispute Resolution*, available at file:///C:/Users/user/Documents/ZALC%20AGAIN%20ON%20ADR, last accessed June 25 2010.

[54] Caroline Bridge, "Conciliation and the New Zealand Family Court: Lessons for English Law Reformers," *Legal Studies*, Vol.16, (Nov 1996) 298 at 314.

[55] Rifkin, supra note 41 at 49.

[56] Id.

[57] Id.

[58] Fischer, Vidmar & Ellis, supra note 52.

[59] D. Bryant , D. Seigle, L. Jabbar & N. McGeorge, "Mediating Criminal Domestic Violence Cases: How Much Is Too Much Violence," *International Perspectives in Victimology*, Vol. 5, (August 2010) 47 at 50 .

[60] Sarah Krieger, *Note: The Dangers of Mediation in Domestic Violence Cases*, 8 *Cardozo Women's Law Journal* (2002) 235.

[61] Id.

obligation of non-disclosure to the police thereby helping to perpetuate domestic violence. Again, there is the question of safety of the victim. Finally, there is the argument that ADR agreements are not enforceable and engenders no follow-ups; the abuser may not want to work with the victim to come to a fair agreement, and even the best mediator can't make this happen with the result that most abusers will quickly enter into any agreement to get off the hook only to relapse as soon as possible.[62] ADR therefore leads to re-victimization and perpetuation of abuse.[63]

In addressing these concerns, it is very important to bear in mind that ADR in criminal justice context is quite different from ADR in the civil context and this is the point that is not always obvious to the opposers of ADR in the criminal justice context. The arguments about privatization of dispute resolution process, power imbalance and adequacy of procedure arise apparently from a lack of understanding of the nature of ADR in the criminal justice context.[64] In mediation for instance, while civil mediation involves only private interests and the parties only, criminal context mediation involves not only the parties but the State as well as some public interest.[65] In civil mediation, there is no blame but in criminal context mediation, there is blame. However, the blame or stigma is attached to the act not the offender.[66] Equally, in civil context mediation, there is no initial admission of guilt but in criminal context mediation, there is initial admission of guilt by the offender which forms the basis of the mediation.[67] Thus, it may not be right to state that because the offence has already occurred, there is no continuing dispute. This is so because the need for settlement or mediation would not arise if the dispute is not continuing. Once the offence has occurred, a dispute arises which continues until it is resolved. The formalities and orientation of law are often impediments to the satisfactory and

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[62] Nancy Ver Steegh, "Yes, No and Maybe: Informal Decision Making About Divorce Mediation in the Presence of Domestic Violence," 9 *William & Mary Journal of Women and the Law* (Spring 2003) 145.
[63] Id.
[64] Melissa Lewis and Les McCrimmon, "The Role of ADR Processes in the Criminal Justice System: A View from Australia," loc cit. See also South African Law Commission, *Issue Paper 8 (Project 94): Alternative Dispute Resolution*, available at file:///C:/Users/user/Documents/ZALC%20AGAIN%20ON%20ADR, accessed June 25 2010. See also Northern Territory Law Reform Committee, *Mediation and the Criminal Justice System*, Final Report No. 17A March 1996.
[65] South African Law Commission, *Id.*
[66] Id.
[67] Id.

efficient resolution of most individual grievances. Often, the procedural requirements of the courts make it impossible for the parties to obtain timely, less costly and satisfactory form of justice. The argument that the ADR process as a private process disparages the need for legal representation; and does not adequately distinguish between situations in which trained advocates are necessary from those in which they are not is not correct. This is because, unlike litigation where only lawyers can appear for the parties, in ADR, the parties are still entitled to not only legal representation but also reserves the right to be represented by non-lawyers.

Mediation, as an alternative dispute resolution in the criminal justice process, is now firmly established.[68] According to Kumar, mediation is the most sought after form of ADR where the issue of criminal justice is concerned.[69] In spite of the initial and continuing challenges, most jurisdictions appear now to have accepted mediation as a veritable tool in the resolution of criminal disputes.[70] However, the same cannot be said of arbitration. When it comes to arbitration as means of resolving criminal disputes, the existing literature does not appear to be compelling in giving credence to arbitration as an alternative to criminal prosecution. This distinction in approach may be explicable on the basis of the fact that while one is entirely consensual, the other is adjudicatory. In mediation, for instance, the issue of guilt is not in question as the very basis of mediation is that the offender has admitted guilt and the parties are concerned to look for the best possible ways of dealing with the aftermath of the crime. In the case of arbitration, on the other hand, there is no initial admission of guilt

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[68] There are more than 600 Victim-Offender Mediation programs in North America and Europe. See Mark S. Umbreit, "Restorative Justice Through Victim-Offender Mediation: A Multi-Site Assessment," *1Western Criminology Review* (1998) 1.

[69] Anoop Kumar, "Applicability of ADR in Criminal Cases, at http://www.manupatrafast.com/articles/PopOpenArticle.aspx?ID=5ff4acc7-53ef-4d12-a0a8-1b41ab12beba&txtsearch=Subject:%20Arbitration last accessed on July 16, 2016.

[70] C. A. Ogbuabor, C. C. Obi-Ochiabutor & E. L. Okiche, "Using Alternative Dispute resolution (Adr) in the Criminal Justice System: Comparative Perspectives," *International Journal of Research in Arts and Social Sciences*, Vol. 7, (2014) 318-337. As of April, 2000, there were more than 289 victim-offender mediation programs in the United States and more than 500 in Europe. See Office of Victims of Crime, "National Survey of Victim-Offender Mediation Programs in the United States," available at https://www.ncjrs.gov/ovc_archives/reports/...ascii.../ncj176350.pdf *last accessed on February 26 2016. See also National Institute of Justice, "Victim-Offender Mediation," at* http://www.nij.gov/topics/courts/restorative-justice/promising-practices/pages/victim-offender-mediation.aspx *last accessed on February 26, 2016.*

and the arbitral tribunal would be required to determine guilt and proceed to hand down a sentence. Thus, in the case of arbitration, the very first question that normally calls for an answer is whether arbitration as a private process can resolve the criminal question? In other words, can a private tribunal find somebody guilty? The answer is in the affirmative. The only distinction between the finding of guilt by a private tribunal and a public tribunal is in the nature of punishment or sanction. While the private tribunal apparently cannot render a sentence of imprisonment, the public tribunal can.[71]

6. Justifying Alternative Dispute Resolution in Serious Offences

ADR in the sense it is used here includes arbitration. For simple offences and misdemeanours, the use of ADR appears to be taken for granted. No jurisdiction appears poised to question the use of ADR to settle such cases today. Where the problem arises is in the application of ADR to serious offences. However, research has shown that it is in serious offences that the need for the intervention of ADR in the criminal justice system is felt most.[72] This is most apparent where the crimes are ones offending person or property or even status of an individual, because in most of these cases, there would usually be an underlying relationship so that the offence or crime is in the first instance a rupture of relationship which requires reconciliation and restoration more than retribution. According to analysts, the need for forgiveness is highest where pain runs deep.[73] In the words of Peachy, reconciliation is most necessary where the desire for retribution is greatest. There is little need for reconciliation where the loss is trivial or can be addressed by third- party compensation through insurance or the State,

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[71] It has been asserted that the primary basis of the distinction between ADR and judicial adjudication is that the former exists only as a consequence of party consent, whereas judicial adjudication is predicated on the coercive power of the state. See Catherine A. Rogers, "The Vocation of the International Arbitrator," 20 *AM. U.INT'L L. REV*, 957, 986 (2005). See also, Jeffery R. Seal, "Settling Significant Cases," 79 *WASH. L.REV*, 881, 932 (2004); Richard Reuben, "Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice," 47 *UCLA L. REV*. 949, 958 (2000).

[72] Dean Peachy, "Restitution, Reconciliation, Retribution: Identifying the Forms of Justice People Desire," in Heinz Messmer & Hans-Uwe Otto (eds.) *Restorative Justice on Trial: Pitfalls and Potentials of Victim Offender Mediation, International Research Perspectives* (1992, Springer) 551 at 556; Jonathan Rudin, "From punishment to healing," *Canadian Institute for the Administration of Justice Conference*, 1999, available at http://www.ciaj-icaj.ca/sentencing/rudin.html accessed September 16 2015.

[73] Id.

but there is a tremendous opportunity for reconciliation where pain runs deep.[74] For Rudin, restorative justice should not be restricted to minor offences because it is "clearly a waste of a very valuable resource."[75] Reconciliation, lasting solution and possibly forgiveness that can lead to restoration is hardly achievable within the current accusatorial or adversarial criminal justice system founded on retribution.[76] The existence and potential role for forgiveness in restorative justice practices is significant because of its continued exclusion within the traditional criminal justice system.[77] Indeed, the existence of victim forgiveness is repeatedly described as irrelevant during sentencing as victim forgiveness remains conspicuously absent from the list of varied sentencing considerations.[78] Yet, forgiveness is an important element in the criminal justice process.[79] Forgiveness is important because it is beneficial for healing.[80] Forgiveness, whist not the primary objective of restorative justice, often occurs during the process.[81] Whilst restorative justice provides opportunities for forgiveness, such outcomes only arise where the victims are satisfied with the restorative

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[74] Peachy, ibid at 556.

[75] Rudin, supra note 72.

[76] See M. Bagaric and K. Amarasekara, "Feeling Sorry? – Tell Someone Who Cares: The irrelevance of Remorse in Sentencing," *The Howard Journal*, Vol. 40, (2001); Jac Armstrong, "Restorative Justice as A Pathway for Forgiveness: How and Should Forgiveness Operate Within the Criminal Justice System?," at http://www.academia.edu/250960/Restorative_Justice_As_a_Pathway_for_Forgiveness_How_and_Should_Forgiveness_Operate_Within_the_Criminal_Justice_System p. 3, last accessed on July 16, 2016.

[77] Bagaric and Amarasekara, id.

[78] Armstrong, supra note 76.

[79] See Ari Kohen, "The Personal and the Political: Forgiveness and Reconciliation in Restorative Justice," *Critical Review of International Social and Political Philosophy*, Vol. 12, No. 3, (September 2009) 399; Charlotte V. O. Witvliet, Everett L. Worthington, Lindsey M. Root, Amy F. Sato, Thomas E. Ludwig, and Julie J. Exline, "Retributive Justice, Restorative Justice, And Forgiveness: An Experimental Psychophysiology Analysis," 44 (1) *Journal of Experimental Social Psychology*, Vol. 44, No. 1, (January 2008) 10-25.

[80] Armstrong, supra note 76; K. Bender and M. Amour, "*The Spiritual Component of Restorative Justice*," *Victims and Offenders*, Vol. 2, (2007) 251-267; Howard Zehr, *Changing Lenses: A New Focus For Crime and Justice* (Herald Press, Scottsdale P. A.) p. 187.

process.[82] The importance of forgiveness to justice includes that it can contribute to the well-being of both victim and offender by facilitating the re-integration of the offender into the community,[83] contributing to the victim's mental and physical health[84] by helping to release the victim from the negative power of crime, and restoring the victim's peace of mind.[85] According to Wachtel:

> From seemingly minor crimes to the most severe, victims and their loved ones feel angry, hurt, betrayed and frightened by offenders. The restorative justice process gives them an opportunity to express those feelings directly to offenders, to ask questions such as "why me', to get an apology and to help determine restitution – outcomes that our court system cannot provide.[86]

The alternative appears to lie in ADR which conduces more to reconciliation and restorative justice, enabling parties, to generate options that can give all the parties concerned optimal satisfaction. Umbreit notes that victim-offender mediation (VOM) has begun to take account of the need to adapt to serve the more intense needs of parties involved in serious and violent criminal conflicts.[87]

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[81] Armstrong, id;

[82] Armstrong, id, p. 1; M. Armour and M. Umbreit, *Victim Forgiveness in Restorative Justice Dialogue*, 1 *Victims and Offenders*, Vol. 1, (2006) 123-140.

[83] W. Craig, *The Practice of Punishment* (London: Routledge, 1992).

[84] See C. V. O Witvliet, T. E. Ludwig & K. vander Laan, "Granting Forgiveness or Habouring Grudges: Implications for Emotion, Physiology and Health," *Psychological Science*, Vol. 12, (2001) 117-123.

[85] B. Van Strokkom, "Moral Emotions in Restorative Justice Conferences: Managing Shame, Designing Empathy," *Theoretical Criminology*, Vol. 6, (2002) 339-360.

[86] See Ted Wachtel, *Restorative Justice Is Not Forgiveness*, at http://www.huffingtonpost.com/ted-wachtel/restorative-justice-is-no_b_2567653.html last accessed on July 16, 2016. See also John Braithwaite, *Restorative Justice and Responsive Regulation*, (Oxford University Press, 2002) p. 3.

[87] Mark S. Umbreit, " Avoiding the Marginalization and McDonaldization of Victim-Offender Mediation: A Case Study in Moving toward the Mainstream," in Gordon Bazemore and Lode Walgrave (eds.) *Restorative Juvenile Justice: Repairing The Harm of Youth Crime* (Criminal Justice Press ,1999) pp. 213, 223.

7. Entry Points of ADR under the Current Legal Framework

There are potential entry points for ADR under the current legal framework. Llewellyn identified five possible entry points, namely: (i) Pre- Charge Entry; (ii) Post-Charge/Pre-Conviction Entry; (iii) Post-Conviction/Pre-Sentencing Entry (iv) Post-Sentence Entry; and (v) Prevention Stage.[88] For purposes of clarity, we shall deal with the entry points in four stages, namely: i. Before the crime is committed, i.e., Crime Prevention; ii Prosecutorial Discretion; iii Judicial Discretion; and iv Correctional Discretion

7.1 Crime Prevention

A good number of crimes could be prevented with a good culture of ADR. If ADR is seen as a problem-solving tool or tools, then, it will be invariably concluded that ADR applies to crime; and as a problem-solving tool, it could solve the problem by preventing the crime from occurring in the first instance, or managing it properly if it occurs. After all, it is said that "prevention is better than cure". Research shows that about 40-50% of crimes do not occur between total strangers. Most homicide cases (61%) occur between relatives and friends.[89] With effective application of ADR and a good culture of dispute resolution, most relationship based crimes could be easily prevented and better managed.

7.2 Prosecutorial Discretion

Prosecutorial discretion refers to the discretion which is vested in the police, the Attorneys- General and other authorities with powers of prosecution to decide which matters go to court for decision and those that do not. With ADR, it is possible to reduce the number of cases that find their way into the courts through the exercise of prosecutorial discretion. By the dry letters of the law, a crime is a problem between the offender and the State. The State is legally and technically personified by the Attorney- General. The Constitution by sections 174 and 211 confer on the Federal and State Attorneys-General respectively powers of prosecution. These powers are the power to institute, take over and continue any such criminal proceeding that may have been instituted by any other authority; and power to

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[88] J Llewellyn, "Building, strengthening and transforming communities: Exploring the possibilities for restorative justice in Jamaica" (2002) 27 *West Indian Law Journal*, 77 – 110.

[89] Fred Adler, Gerhard Mueller & William Laufer, *Criminal Justice* (USA: McGraw Hill Inc, 1994) p. 30.

discontinue any criminal proceeding at any stage before judgment. The power to continue, take-over, and discontinue is that of the Attorney-General; and in doing this, he is not subject to anybody's control except his conscience and the constitutional injunction of public interest, interest of justice and the need to prevent the abuse of legal process. So far in Nigeria, the common law position remains the law as far as the exercise of the powers of the Attorney General is concerned. He is not subject to direction or control by any other authority.[90] Even though this position has come under heavy criticism by scholars, the position of the law has not changed (Omoregie, 2009: 135-148; Popoola, 2007: 321-342).[91]

The import of section 174 (2) and 211 (2) of the Constitution on delegation is that the Attorney General does not need to delegate his powers each time on every case. Thus, unless there is evidence to the contrary, there is a presumption that officers of his department act with authority. With regard to sub-section (1) the power to enter a *nolle* is as absolute as the power to initiate. Subsection (3) of section 174 is even a more profound provision. Once the Attorney General says he acted in public interest, there is nothing anybody can do about it. If the Attorney General says, "in the interest of justice, I am not prosecuting" the court has no powers to compel prosecution or even comment on the prosecutorial powers. What it means is that if the offender, the victim and the Attorney General agree not to prosecute, then, the accusation of compounding a case is avoided.

As stated above, the Attorney General need not be personally involved in every case. All that needs to be done is to develop Prosecutorial Guidelines, so that the discretion is properly exercised on case by case basis; and if the State or public interest is prejudiced, the State can insist on prosecution. Sometimes, the State will want to send out a signal in which

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[90]*Fawehinmi v 1GP*, [2000] 7 NWLR (Pt. 665) 481 CA; [2002] 7 NWLR (Pt. 767) 606 SC; *State v* IIori (1983, 14 N.S.C.C. 69.

[91] Omoregie E (2009) Power of the Attorney- General over Public Prosecution under the Nigerian Constitution: Need for Judicial Restatement. *The Appellate Review*, l (1), 135-148; Popoola A O (2007) The Jurisprudence of Nolle Prosequi. In Popoola A O & Adodo E O I (eds.) *Current Legal Developments in Nigeria: Essays in Memory of Professor J.D.Ojo (* pp.321 – 342) Ile – Ife: Obafemi Awolowo University Press.

case they insist on prosecuting. A good instance is kidnapping in present day Nigeria. State interest here overrides victim interest. In respect of prosecutorial discretion, the former Attorney-General of the Federation, Mohammed Adoke Bello, took a very bold step in making the Economic and Financial Crimes Commission (Enforcement) Regulations 2010 pursuant to section 43 of the EFCC Act. The Regulations contain some prosecutorial guidelines for the agency. The avowed objective of the Regulations is to provide a procedure for carrying out the mandate of the Commission including the prosecution of matters (EFCC (Enforcement) Regulations 2010, ss. 1 & 2). The Regulations are meant to avoid sham proceedings such as the one witnessed in *FRN v Lucky Igbinedion* (FHC/EN/6c/2008) where Igbinedion, a former governor of Edo State of Nigeria, was arraigned on a 191 count charge over economic crimes committed against the State. Following a plea bargain, the charges were reduced to a one count charge to which he pleaded guilty and was sentenced to six months imprisonment with an option of fine of a little above N3million. Of course, the fine was paid there and then. Public opinion was so bad on the matter that the chairman of the EFCC, Nigeria's anti-corruption agency complained bitterly culminating in an appeal by the EFCC over the absurd sentence. Eventually, fresh charges were brought against Igbinedion in FHC/B/11c/2011.

Amadi has argued that the provision of section 36 (12) of the Constitution which provides that "... a person shall not be convicted of a criminal offence unless that offence is defined and the penalty therefore is prescribed in a written law..." implies that Parliament (National or State as the case may be) can make law approving the extension of ADR in resolving criminal matters (Amadi, 2007).[92] We concur with the above submission, and further posit that section 36 (4) of the Constitution which enables a criminal charge to be withdrawn strengthens the case for the application of ADR to criminal matters. The section provides that: Whenever any person is charged with a criminal offence, he shall, *unless the charge is withdrawn,* be entitled to a fair hearing in public within a reasonable time by a court or

[92] Amadi G O S (2007) Using arbitration and adr in resolving criminal cases in Africa: Breaking new grounds. Paper presented at a Workshop on The Role of Arbitration and ADR in Poverty Alleviation and Access to Justice for the Poor in Africa, June 26-28, 2007, at Hilton Hotel, Nairobi, Kenya.

tribunal. We are of the view that a charge may be withdrawn if the matter is settled amicably.

7.3 Judicial Discretion

ADR can apply in the criminal justice system during the process of trial through the exercise of judicial discretion. In this regard, the process of conviction may be contrasted with the process of sentencing. Conviction is an objective standard in that once all the elements or ingredients of an offence are proved, the judge has no discretion whether to convict or not to convict. According to the court "the role of the judge in an adversary system of justice is to determine from the facts before him whether the charge against the accused has been proved (*Ugheneyove v State,* 2004, 12 NWLR (pt.888) 626; *Onagoruwa v State,* 1993, 7 NWLR (pt.303) 49 at 107). Sentencing, on the other hand, appears to be subjective. This is because, except the law provides to the contrary, the punishment provided is the maximum. The courts typically retain the discretion to impose anything less, even a fine where the law does not mention an option of fine. There are no existing sentencing guidelines in Nigeria.

ADR can be applied at the stage of sentencing. At this stage, the court begins to look at the background and circumstance of the offender. When I published my paper on "Mainstreaming ADR in Nigeria's Criminal Justice System" in 2014,[93] what we used to have in the trial process was mere *allocutus*. In that paper, we suggested that *Allocutus* can be turned into some kind of mediation or conferencing in which convict, the victim, and the community can be involved in finding an appropriate sentence or basis for sentencing; which can also provide some kind of face-saving for the offender and enable proper re-integration into society instead of dumping him in prison. I am happy to report that that suggestion is now reflected in section 311 of the ACJA which now provides:

> (1) Where the provisions of section 310 of this Act have been complied with, the court may pass sentence on the convict or adjourn to consider and determine the sentence and shall then announce the sentence in open court

[93] Ogbuabor, C. A., Nwosu, E. O., & Ezike, E. O., (2014) "Mainstreaming ADR in Nigeria's Criminal Justice System," *European Journal of Social Sciences, Vol. 45, No. 1, pp. 32 – 43.*

(2) The court shall, in pronouncing sentence, consider the following factors in addition to sections 239 and 240 of this Act.
   (a) the objectives of sentencing, including the principles of reformation and deterrence;
   (b) the interest of the victim, the convict and the community;
   (c) appropriateness of non-custodial sentence or treatment in lieu of imprisonment;
   (d) previous conviction of the convict.

(3) A court after conviction, shall take all necessary aggravating and mitigating evidence or information in respect of each convict that may guide it in deciding the nature and extent of sentence to pass on the convict in each particular case, even though the convicts were charged and tried together.

This provision will reduce prison intake. Also, the cost (i.e. both financial and personnel) need not be borne by the government but by the people themselves. The cost of feeding and other welfare needs of inmates are clearly taken off the State Treasury. So, the cost-benefit analysis is in favour of the State. Those that eventually go to prison will be properly monitored and they can come out better. The ACJA has also introduced non-custodial sentences including community service but we must note that this is not available for all categories of offences. (See section 460 of ACJA).

The ACJA has also made copious provisions for restitution and unlike in the past under the CPA where the court can only make limited restitutive orders in addition to a sentence of punishment, the court can now make full restitutive orders in criminal proceedings and obviate the necessity of a complainant having to embark on a civil litigation after his assailant has been criminally tried and convicted and sentenced. (see 319, 320, 321, 322, -328 of ACJA). Similarly, under sections 329-346, ample provisions have been made for restoration of property to their real owners. These are some of the provisions which tend to show that our criminal justice system has started pursuing a restorative justice policy even though there is still a large room for improvement.

7.4 Correctional Discretion

This is the discretion exercised post-conviction by prison authorities, borstal institutions and other approved correction centres. The law allows the release of prisoners before the expiration of their sentence if they are of good conduct. However, the laws insist that the prisoner would have served almost all the sentence. Regulations 54 and 55 of the Prisons Regulations made under the Prisons Act, Cap. P29, Laws of the Federation of Nigeria, 2004 provide for a maximum remission of sentence to the tune of one-third of the sentence. There is no reason why this system could not be improved upon by reducing the minimum time to be spent in custody before release upon a recommendation for good behaviour. There is also no reason why the parties involved cannot be invited intermittently to review the case of an inmate with a view to releasing him/her whether he/she has spent the minimum time or not.

8. Concluding Remarks - ADR And Restorative Justice: The Way Forward

Besides the dominant theme of retribution, there is another justice theme in the criminal justice jurisprudence which has been globally recognized to hold the searchlight in the search for a more humane, accessible, problem-solving approach to criminal justice problems. That is the restorative justice theory. It a justice theory which seeks to repair the harm caused by a criminal wrong to the point possible of repair. The restorative justice principle or theory has been advanced by alternative dispute resolution. The key components of Restorative Justice are: (1) Encounter/Reconciliation; (2) Restitution; (3) Reintegration; and (4) Restoration.[94]

In answer to the questions we posed at the beginning of this paper, it is obvious now that there are clear legal basis for the use of ADR in our criminal justice administration. There are also legal justifications for incorporating such an approach. The use of ADR including arbitration in the criminal justice system is not an anathema as many people are bound to think. In fact, in the USA, it has now been held in *Wright v Brockett* (571

[94] See Kevin N Nwosu, "Towards a Functional Approach to Teaching of Criminal Justice in Nigeria – The Imperative of the SMA Belgore Model" in E. Smaranda Olarinde (ed) *Mainstreaming Interdisciplinary Approach to Legal Education: Imperative for Nigeria Development – Proceedings of the 48th Annual Conference of the Nigerian Association of Law Teachers [NALT]* (Ado-Ekiti: Nigerian Association of Law Teachers/ABUAD Press, 2015) 166 – 194.

N.Y.S.2d, 660, 661 (1991) that: "A mediated agreement attained in a controversy pending which was referred to mediation-arbitration ... is not void as an agreement to compromise a criminal case within the meaning of [New York law] ..." According to the court, "the legislature specifically intended for the parties to resolve their disputes through mediation-arbitration and to abandon pending or threatened criminal prosecution. This newly declared public policy supercedes the common law rule codified in the law forbidding accepting or offering consideration for not prosecuting a criminal matter." Accordingly, it is submitted that a mediated settlement or an arbitral award that bestows something of value on the parties especially the victim is not illegal.

Should ADR apply to serious offences? This paper has contended that there is no reason why arbitration and ADR cannot be used to settle serious criminal matters, provided that the parties voluntarily agree to utilize that process or procedure, if restorative justice is in reality among the policy objectives of criminal law. So long as punishment and retribution remains the avowed predominant goal of the criminal law, efforts to extend arbitration and ADR to serious offences legally may prove futile. But the moment, attention is focused on restorative justice as the dominant justice theme, then, application of arbitration and ADR to criminal matters becomes a matter of course and the issue will no longer be the legality of such procedure but how to properly canalize such procedures so that they do not overflow the banks.

We must now recognize that crime is an offence primarily against the individual and secondarily against the State where State interest is involved. Thus, the individual has a right to choose the forum to redress the wrong done to him (Moen, 2013: 733). Gone are the days when the individual was seen as merely a witness for the State and his or her interests and needs took a tertiary back-seat in the order of priorities in the crime prosecution agenda. Today, in Nigeria, there are statutory protection of the interests of victims and complainants. These interests and needs include the right to seek alternative redress. That is why the Administration of Criminal Justice Act 2015 in its very section 1(1) stated its policy objectives as follows:

> The purpose of this Act is to ensure that the system of administration of criminal justice in Nigeria promotes efficient management of criminal justice institutions, speedy dispensation of justice, protection of the society from crime

> and protection of the rights and interests of the suspect, the defendant, and the victim.

The Act proceeded further in section 1(2) to enjoin the courts, law enforcement agencies and other authorities or persons involved in criminal justice administration to ensure compliance with the provisions of the Act for the realization of the purposes of the Act. In sum, the Nigeria's current criminal justice system through the ACJA has recognized the role of ADR in the criminal justice system but one thing remains to be done, the policy objective of the criminal justice system as captured in section 1(1) of the CJA needs to be amended to expressly state that "a core policy objective of Nigeria's criminal justice administration shall be Restorative Justice." Once this is done, ADR will drive the process in the main. The first step is to re-jig current policy objectives as captured by the ACJA because they are not quite deep enough.