International Journal of Judicial Law

Arbitration and criminal justice system: A comparative framework

Onwugbenu Ezinne Olivia
Department of Public Law, Faculty of Law, Nnamdi Azikiwe University Awka, Anambra State, Nigeria

* Corresponding Author: **Onwugbenu Ezinne Olivia**

Article Info

ISSN (online): 2583-6536
Volume: 03
Issue: 04
July-August 2024
Received: 08-04-2024;
Accepted: 11-05-2024
Page No: 16-23

Abstract
Arbitration is a procedure in which a dispute is submitted by agreement of the parties to one or more arbitrators who make a binding decision on the dispute. In choosing arbitration, the parties opt for a private dispute resolution procedure instead of going to court. Arbitration is usually regarded as a domain exclusively reserved for private law. The Arbitration Act is governed by the Arbitration and Conciliation Act CAP18 Laws of the Federation of Nigeria 2004. Inevitably, however, certain criminal matters and allegations might creep into arbitral proceedings. Arbitration and criminal law appear to live on two distant planets, and their paths do not seem ever to have to cross each other. Yet, because criminal law rules might have an impact on both the arbitral proceedings and the solution of the dispute, these two disciplines have more points of connection than could be suspected from the outset. The dispute itself could be fictitious, a screen for money laundering, or the underlying purpose of alleged consultancy might be bribery. Testimony or expertise offered before the tribunal might be false. In such cases, arbitrators can either address the criminal matters or turn a blind eye to them. The aim of this paper is to analyze the concept and purpose of arbitration in criminal matters. The findings of this paper recommends that ADR should be mainstreamed into Nigeria's criminal justice system on a more holistic and systematic basis rather than the piece-meal approach that the criminal justice system is currently witnessing.

Keywords: arbitration, criminal justice system, Nigeria

1. Introduction

1.1. Definition and Concept of Arbitration

Arbitration is a contract-based form of binding dispute resolution. In other words, a party's right to refer a dispute to arbitration depends on the existence of an agreement (the "arbitration agreement") between them and the other parties to the dispute that the dispute may be referred to arbitration [1].

According to the Black's Law Dictionary [2], Arbitration is defined as a process in which an independent person makes an official decision that ends a legal disagreement without the need for it to be solved in court:

- Arbitration is often preferred by firms in business disputes.
- Binding/mandatory arbitration.
- The Texas high court said they had to go to arbitration because that's what the signed contract required.
- The dispute is in arbitration.

Arbitration is often used for the resolution of commercial disputes, particularly in the context of international commercial transactions. In certain countries such as the United States, arbitration is also frequently employed in consumer and employment matters.

[1] The Arbitration and Conciliation Act CAP18 Laws of the Federation of Nigeria 2004.
[2] MLA (7th ed.)Cambridge International Dictionary of English. Cambridge: Cambridge University Press, 1995.

Where arbitration may be mandated by the terms of employment or commercial contracts and may include a waiver of the right to bring a class action claim. Mandatory consumer and employment arbitration should be distinguished from consensual arbitration, particularly commercial arbitration. It is often remarked that arbitration is a gentler way of resolving disputes. Although the much-touted "informality" and "flexibility" are now mired in the growing litigious-ness of arbitral proceedings, if an onlooker were to glance into the room where arbitration is held, he or she would be greeted with a sight differing markedly from the solemn atmosphere of the courtroom. No insignia of state authority and no pomp-just "a group of people sitting around a row of tables [3]. Arbitration is, after all, a creation of the parties to the case, and a family atmosphere bodes ill for overt formality. The fact that arbitration is granted the power to resolve disputes at all is a result of legislative largesse.

Although arbitration preceded the courts, it has, until the middle of the twentieth century, been regarded mostly as an afterthought. However, in the past couple of years there are limited rights of review and appeal of arbitration awards. Arbitration is not the same as: judicial proceedings (although in some jurisdictions, court proceedings are sometimes referred as arbitrations) [4], alternative dispute resolution (ADR), [5] expert determination, or mediation (a form of settlement negotiation facilitated by a neutral third party). Commercial contracts will commonly include provision for how disputes relating to that contract are to be resolved. If the parties choose arbitration, the arbitration agreement will generally be part of the document recording the terms of the commercial transaction. Parties can also enter into an arbitration agreement after a dispute has arisen.

In entering into an arbitration agreement, the parties agree to refer their dispute to a neutral tribunal to decide their rights and obligations. Although sometimes described as a form of alternative dispute resolution, arbitration is not the same as mediation or conciliation. A mediator or conciliator can only recommend outcomes and the parties can choose whether or not to accept those recommendations. By contrast, an arbitration tribunal has the power to make decisions that bind the parties.

One of the attractions of arbitration is that it is typically easier to enforce an award in another country than it is to enforce a court judgment. That said, enforcement regimes vary and it is crucial to take into account the prospects of enforcement in deciding whether, and if so how, to arbitrate a dispute before spending too much time and money. This is especially the case if cash in the bank is one of the important factors in arbitrating. As arbitration is a contract-based dispute resolution mechanism, there may be steps set out in the contract which have to be followed before you can start arbitration. These can include holding meetings between senior people in the two organizations to attempt to resolve the dispute or mediation.

2. Arbitrability of Civil and Criminal Matters

By their nature, the subject matter of some disputes is not capable of arbitration. In general, two groups of legal procedures cannot be subjected to arbitration:

- Procedures which necessarily lead to a determination which the parties to the dispute may not enter into an agreement upon: [6]. Some court procedures lead to judgments which bind all members of the general public, or public authorities in their capacity as such, or third parties, or which are being conducted in the public interest. For example, until the 1980s, antitrust matters were not arbitrable in the United States [7]. Matters relating to crimes, status and family law are generally not considered to be arbitrable, as the power of the parties to enter into an agreement upon these matters is at least restricted. However, most other disputes that involve private rights between two parties can be resolved using arbitration. In some disputes, parts of claims may be arbitrable and other parts not. For example, in a dispute over patent infringement, a determination of whether a patent has been infringed could be adjudicated upon by an arbitration tribunal, but the validity of a patent could not: As patents are subject to a system of public registration, an arbitral panel would have no power to order the relevant body to rectify any patent registration based upon its determination.
- Some legal orders exclude or restrict the possibility of arbitration for reasons of the protection of weaker members of the public, e.g. consumers. *Examples*: German law excludes disputes over the rental of living space from any form of arbitration, [8] while arbitration agreements with consumers are only considered valid if they are signed by either party, and if the signed document does not bear any other content than the arbitration agreement [9].

3. Arbitration and the Criminal Justice System

The use of ADR in the criminal justice system has generated some concerns. For instance, it has been argued that the ADR option privatizes disputes in contexts in which public policy requires the clear intervention of the State with strict public scrutiny. In other words, ADR tends to view conflict as personal, emotional and rooted in miscommunication rather than as stemming from illegal and criminally actionable behavior.

The argument is that since most mediators lack any specialized training in criminal violence issues - because the ADR process is confidential, it is largely unregulated and there can be no guarantees that due process will be

[3] A Redfern & M Hunter, 'Law and Practice of International Commercial Arbitration' 1 (4th ed.2004).

[4] In the United Kingdom, small claims in the county court are dealt with by a procedure called "small claims arbitration", although the proceedings are held in front of a district judge, paid for by the state. In Russia, the courts dealing with commercial disputes are referred to as the Supreme Court of Arbitration of the Russian Federation, although it is not an arbitral tribunal in the true sense of the word.

[5] Although all attempts to determine disputes outside of the courts are "alternative dispute resolution" in the literal sense, ADR in the technical legal sense, is the process whereby an attempt is made to reach a common middle ground through an independent mediator as a basis for a binding settlement. In direct contrast, arbitration is an adversarial process to determine a winner and a loser in relation to the rights and wrongs of a dispute

[6] Larkden Pty Limited v Lloyd Energy Systems Pty Limited [2011] NSWSC 268 (1 April 2011), Supreme Court (NSW, Australia)

[7] Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985)

[8] Cologne, Prof. Dr. Klaus Peter Berger, LL.M., University of. "Principle XIII.5.1 - Confidentiality - Trans-Lex.org". www.trans-lex.org.

[9] Section 1031 sub section 5 of the Zivilprozessordnung. The restriction does not apply to notarized agreements, as it is presumed that the notary public will have well informed the consumer about the content and its implications

maintained or that the outcomes will be favorable for the victim and consistent with public law expectations. Mediation removes domestic violence cases from public view and judicial scrutiny. The arrest, prosecution and removal of a violent person not only protect the victim; it sends a clear message to society that violence cannot be engaged in with impunity [10]. The argument further is 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 [11].

Also, it has been opined 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. The problem of power imbalance is one of the greatest concerns of the opponents of ADR in criminal justice [12]. 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. So, there is no basis of negotiation as there is no equality in bargaining power.

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 [13]. It has been further argued that the confidential nature of ADR leads to perpetuation of violence. For instance, in domestic violence, the criminal justice system has played an important role in publicizing the seriousness of domestic violence and in penetrating the silence that allows the perpetrator to commit the violence. Mediation perpetuates this realm of secrecy and isolation from public scrutiny [14].

Additionally, mediators are sworn to keeping the confidentiality of the process. Thus, even when mediation reveals domestic violence of high degree, mediators are under obligation of non-disclosure to the police thereby helping to perpetuate domestic violence. Finally, there is the argument that ADR agreements are not enforceable, and engender no follow-ups; the abuser may not want to work with the victim to come to a fair agreement, and even the best mediator cannot 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. ADR, therefore, leads to revictimization and perpetuation of abuse [15].

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 opponents of ADR in the criminal justice system. 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. The difference in the application of ADR in civil and criminal justice systems is aptly captured below: 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 [16].

The distinguishing factors between ADR in the civil and criminal contexts may then be charted as follows: 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
3. There is no initial admission of guilt. There is initial admission or assumption of guilt.

The formalities and orientation of law are hindrances to the satisfactory and 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 met by the counter argument that unlike litigation where only lawyers can appear for the parties, in ADR, the parties are still entitled to not only legal representation but also reserve the right to be represented by non-lawyers. On appropriateness of ADR in dealing with violence as a criminal conduct and a public policy matter, it is observed that even statutes encourage the settlement of ordinary assaults by amicable resolution [17]. Such assaults under most penal statutes are misdemeanors capable of amicable settlement and not felonies restricted by the laws of compoundment. Even in the case of felonies, the statutes recognize the right of the parties to settle amicably with the

[10] V Steegh N 'Yes, No and Maybe: Informal Decision Making About Divorce Mediation in the Presence of Domestic Violence.'William & Mary Journal of Women and the Law, (2003) 9, 145.

[11] J Rifkin, 'Mediation in the justice system: A paradox for women. Women & Criminal Justice', (1989), 1(1), 41-54.

[12] K Fisher, N Vidmar & R Ellis, 'Procedural Justice Implications of ADR in Specialized Contexts: The Culture of Battering and the Role of Mediation in Domestic Violence Cases'. (1992) Southern Methodist Law Review, 46, 2117.

[13] Goldberg, Sander & Rogers, 'Dispute Resolution: Negotiation, Mediation, and Other Processes', (1992) 2nd edn. Boston, Toronto, London: Little, Brown and Company. European Journal of Social Sciences – Volume 45, Number 1 (2014) 34.

[14] S Krieger, 'The Dangers of Mediation in Domestic Violence Cases.' Cardozo Women's Law Journal, (2002) 8, 235.

[15] Ibid p 145

[16] M Lewis & L 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(2005), Imperial Resort Beach Hotel, Entebbe, Uganda, 4-8 September, 2005, available at www.justice.gov.za/alraesa/conferences/.../ent_s3_mccrimmon.pdf last accessed September 16, 2011.

[17] L McGregor, 'Alternative Dispute Resolution and Human Rights: Developing a Rights-Based Approach through the ECHR', European Journal of International Law (2015) Volume 26, Iss 3, p 607-634.

consent of the court.

Thus, it is not right to argue that criminal cases are inappropriate for ADR. More importantly, most violence cases usually do not occur in vacuum. There would in most cases be an underlying relationship which makes it even more important to get to the root cause of the matter and deal adequately with the needs and concerns of the parties rather than obtaining a pyrrhic conviction in a criminal court. 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 opponents of ADR in the criminal justice system. 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.

4. Arbitration and Criminal Justice in Other Jurisdictions

In Indian courts numerous cases are pending, suits have experienced roofs, hence Arbitration became one of the most popular modes of ADR in India [18]. Alternative Justice Resolution has gained vital significance in almost every edified administration [19]. ADR normally incorporates and includes negotiation, mediation, discretion, arbitration, collaborative law and conciliation. In arbitration, the parties depend on a 3rd party decision-maker to arrive at binding judgments and decisions. In case of negotiation, lawyers of the parties cooperate and work together to settle disputes. The method of mediation uses a nonpartisan 3rd party to achieve a voluntary resolution, and settlement.

Alternative Dispute Resolution (ADR) incorporates forms and processes that are out of court procedures. Because of fact that pendency of court cases and suits have experienced roofs, ADR has gained paramount significance in pretty much every humanized regulation. It becomes must to review the well-known expressions of US President Abraham Lincoln stressing the profound significance of ADR. To overcome the issues of formal judicial system a new procedure was evolved which is known as ADR which intends to determine and resolve disputes outside the courts.

Assertion and criminal law seem to live on two distant planets, and their ways don't appear to be ever to need to cross one another. Arbitration depends on private autonomy, and its motivation is to mediate private disputes. Criminal law attempts to limit private autonomy for the general interest. Criminal law is at the center of the state's mandatory laws, while arbitration is autonomous from states. However, in light of the fact that criminal law rules may affect both the arbitral procedures and the solution of the dispute, these two disciplines have a greater number of purposes of association than could be suspected from the outset.

The main point is the international business legitimate and legal environment is nowadays described by a twofold pattern. On one side, globalization and the making of a genuine world commercial center have sidelined national states and subverted their conventional job as a definitive wellspring of lawfulness. In nations like France or Germany, since the time of Napoleon III and Bismarck, a long time before the Welfare State was created, the state was seen as having boundless assets and unlimited force. This is not, at this point valid in the present economy. Transnational law has become a reality. Assertion, the self-rule of which from national locales is increasingly more broadly perceived, has risen as the typical method to settle global business debates. With the developing progression of state contracts, state interventions and speculation assertions, states have gotten subject to universal risk, much the same as private gatherings. On the opposite side, in any case, obligatory standards will in general multiply, especially in the field of financial and business law. The reasons for such a pattern are different. In Europe, the inclination to overregulate is one of them.

The idea of ADR mechanism in criminal trail grew out of a critical need to give simple and available solution for poor criminals who are blameworthy and guilty of motor accident cases and other unimportant criminal cases other than some matrimonial cases, debt recovery etc to spare them from extreme deferral, high suit cost and rigid procedures. The Legal Services Authorities (LSA) Act [20] has concurred legitimate and legal status to such conciliatory attempts which came to be known as Lok Adalat and the award passed by it was given the status of a civil court order or decree. Lok Adalats are presently procuring new dimensions so as to ease the case torments of the more vulnerable sections of the general public. It provides a statutory forum to the disputants and litigants to determine their disputes through negotiated settlements in presence of the Lok Adalat judges. The amendment effected to the Legal Services Authorities Act, [21] in 2002 gives the foundation of permanent Lok Adalat for the settlement of disputes relating to public utility administrations or services by applying ADR system so as to decongest the courts.

5. Arbitration and the Nigerian Criminal Law

The Nigerian position appears to be that apart from minor offences, there is no latitude for ADR in the criminal justice system. The position appears to be typified in the provisions of Section 25 of the High Court Law of Enugu State of Nigeria which provides that in criminal cases, the court may promote reconciliation and encourage and facilitate the settlement in an amicable way, of proceedings for common assault or for any other offence not amounting to a felony and not aggravated in degree, on terms of payment of compensation or other terms approved by the court, and may thereupon order the proceedings to be stayed.

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 [22]. 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

[18] Arbitration and Conciliation Act of 1996. The first Formal Statute relating to the subject of Arbitration in India was the Indian Arbitration and Conciliation Act, 1899.

[19] Policy and Legal Advocacy Centre 2004 Laws of Nigeria.

[20] Legal Services Authorities Act, 1987

[21] Ibid

[22] Criminal Code Act, CAP C38, Laws of the Federation of Nigeria, 2010.

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 [23], on the other hand, provides that any person who, having brought, or under pretense 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 misdemeanor and is liable to imprisonment for one year.

Finally, section 130 of the Criminal Code [24] stipulates that any person who, having arrested another upon a charge of an offence, wilfully delays to take him before a court to be dealt with according to law, is guilty of a misdemeanor and is liable to imprisonment for two years. A combined reading of sections 127 and 128 of the Criminal Code [25] 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 misdemeanor 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.

In *BJ Exports & Chemical Processing Co v Kaduna Refining and Petrochemical Ltd* [26], it was held by the Court of Appeal 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. [27] The decision above may be contrasted with that in NNPC v Lutin [28] where the Court of Appeal that there was no reason whatsoever why the allegation of fraud should stop the arbitration from continuing its work.

Despite the legal position of non-applicability of ADR to criminal [29] 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, [30] 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.

In the Tiv area of North-central Nigeria, the concept of jir and tar [31] were the equivalents of modern ADR. These indigenous practices remain 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 et al calls this grounded law [32]. Since restorative justice is indigenous to Nigeria, we submit that it is no longer appropriate to refer to indigenous African law and justice processes as 'alternative dispute resolution' (ADR). It is the Western paradigms or ideas that are indeed the alternatives, and this is so because, the indigenous processes predate the imposed Western paradigms. Likewise, ADR rather than being alternative dispute resolution should be 'Authentic Dispute Resolution.' That way, the acronym remains but the meaning must change if we are referring to the indigenous means of dispute settlement that has been rediscovered by both Western and indigenous scholars [33].

Furthermore, there is evidence that ADR is incorporated in the formal criminal justice system. For instance, the legislation of plea bargaining into the criminal justice system of Lagos State is an affirmation of the critical role of ADR within the criminal justice system [34]. These provisions expressly incorporate ADR into the criminal justice system. Also, the exploitation of the plea bargaining process by the EFCC in its systematic recovery of public funds and properties looted by public officials buttresses the critical role of ADR in the criminal justice system.

In FRN v Cecelia Ibru [35], the EFCC was able to recover 199 assets and N190 billion naira through the plea bargaining process [36]. Consequently, the EFCC Act enables the Commission to compound offences in order to obtain practical restitution. That, in our view, is nothing but ADR and restorative justice in action. The Amnesty Programme of the Federal Government for Niger-Delta Militants offers 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, restitutive as well as restorative. That is ADR in action. The militants 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. Another example of ADR in the criminal justice system in Nigeria is the Pfizer case.

In 2005, 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 settled through an out-of-court settlement. Pfizer agreed to pay amounts ranging from $10000 to $175,000 to the

[23] Ibid
[24] Ibid
[25] Ibid
[26] (2003) FWLR (pt.165) 445 at 465; (2003) 24 WRN 74
[27] (1990) 4 NWLR (pt.142) 1 at 32-33.
[28] (2000) 50 WRN 81)
[29] European Journal of Social Sciences – Volume 45, Number 1 (2014) 36
[30] Obiego, C.C. (1978), Igbo Idea of God, Lucerna, 1, 28.
[31] Bohannan P (1957) Justice and Judgment Among the Tiv. London, New York, Toronto: Oxford University Press.
[32] N Okafo, Reconstructing Law and Justice in a Post colony. England, (2009) 8, USA: Ashgate Publishing Company.
[33] C Okafo, African jurisprudence and restorative justice: The need to rethink the philosophical foundation of Nigerian criminal law and criminal justice administration (2013) (pp. 260-264). In C.G Nnona (ed.) Law, Security and Development: Commemorative Essays of the University of Nigeria Law Faculty (pp. 247-286), Enugu: Faculty of Law, University of Nigeria.
[34] (Administration of Criminal Justice Law No. 10 of 2007; Child's Rights Act 2003, Cap. C50, Laws of the Federation of Nigeria 2004, sections 151, 204, 208, 209 and 223).
[35] (FHC/L/297C/2009, unreported)
[36] A Ogbonna and P Anosike, Ex-Oceanic bank MD, Cecelia Ibru, jailed: To forfeit 199 assets, N190bn. The Sun, October 9, 2010, p. 12.

'study participants' or their survivors [37]. It appears that ADR is working in the criminal justice system but behind a camouflage of discouraging legislative language. Therefore, to achieve optimal results in the use of ADR in the criminal justice system, certain fundamental amendments appear inescapable in our law. It is pertinent to redefine ADR to include an out of court settlement of any form of dispute, whether civil or criminal. Also, the legal requirement that criminal prosecution should be undertaken only in the criminal courts should be amended [38]. This is so because, even though the Constitution does not seem to militate against alternative dispute resolution of criminal matters since such a process does not involve a criminal trial of the alleged offender, the crimes of compounding felonies or concealing arrestable [39] offence respectively are provisions which tend to work against resolving criminal issues by ADR means.

5.1. Challenges of ADR in the Nigerian Criminal Justice System

The challenges that may confront the implementation of ADR in the criminal justice system include:

- From Retributive Orientation to Restorative Orientation: One of the greatest challenges facing the implementation of ADR in Nigeria's criminal justice system is that of orientation. It has been observed that "criminal justice theories can suffer due to lack of acceptance" [40] A vast majority are used to the retributive justice system and would appear to be impervious or hostile to receiving new ideas. It is deeply embedded in our psyche that the only concern of the criminal justice system is punishment of the offender. To such, the only concern of the criminal justice system is the punishment of the offender. Thus, for criminal justice to respond more appropriately to criminal behavior, it must incorporate not only criminal law but also principles of restorative justice and alternative dispute resolution based on indigenous jurisprudence and practices of the Nigerian people [41]. The retributive orientation is further reinforced by the adversarial mindset produced by the adversarial system of justice that we operate.

Thus, one of the greatest problems of ADR and restorative justice is rebuffing the adversarial mindset in favor of a resolutionist or problem-solving approach mindset to resolution of criminal disputes. This pessimistic perception often sees ADR and restorative justice as "soft on crime" but the truth is that ADR and restorative justice are really hard on crime but soft on the human being. This concern is often articulated in the claim that restorative justice is "soft justice" [42]. However, many offenders who have participated in restorative justice programmes particularly those where they have met the victims say that it was tougher than the punishment they would normally receive [43]. As the Supreme Court of Canada pointed out in the Gladue Case [44], restorative justice is not a more lenient approach to justice, and sentence focusing on a restorative justice is not a lighter sentence.

- Suspicion of Manipulation in the ADR Process: The suspicion that the private process is too open to manipulation and that the procedural safeguards for an independent and impartial adjudication of criminal matters usually found in a normal court trial are largely absent continues to pose a challenge to the use of ADR in the criminal justice process [45] While this fear may be well-founded, it appears to be over-blown because as already stated, ADR need not be outside the mainstream of the criminal justice system. The fear is most real where ADR is completely divorced from the mainstream but where ADR is mainstreamed, the fears could be minimal. Again, it must be understood that the process is voluntary. With necessary safeguards, a party will always be free to resile if it becomes obvious that the process is being manipulated.
- Problem of Power Imbalance: According to Hughes and Mossman, "one serious gap in the discussion of restorative justice is the extent to which it actually enhances or diminishes equality [46]. There appears to be a consensus that the problem of power imbalance is real. While sometimes, offences such as spousal abuse may reflect an ongoing relationship of domination and subordination between the victim and the offender, in other cases, offenders may be poor or otherwise disadvantaged compared to a middle-class victim and it will be the offender who needs "better education, increased job training, and an improved living environment [47]. Restorative justice, therefore, often seems "apolitical", failing to take into account structural inequity and imbalances of power between victims and offenders. A typical example is sexual assault cases or domestic violence cases. In addressing the problem of power imbalance, it has been suggested that the parties should participate in establishing the ground rules [48]. However, Hughes and Mossman are of the view that this appears to reinforce the power imbalance than to dismantle systemic power hierarchies [49] has suggested that one way of dealing with the problem is by informing the parties of the right to decline or opt out during the process if the mediation becomes uncomfortable, and this information should be made available to them before and during the course of the mediation. While these suggestions are plausible, the point remains that by putting necessary safeguards in place, a settlement reached in criminal mediation may be preferred by the

[37] This Day Newspaper, August 24, 2011, p 19.
[38] GOS Amadi, "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.
[39] European Journal of Social Sciences – Volume 45, Number 1 (2014) 37
[40] M W Bakker, 'Repairing the Breach and Reconciling the Discordant: Mediation in the Criminal Justice System', (1994), North Carolina Law Review, 72, 1479-1526.
[41] Ibid p 282
[42] J Llewellyn and R Howse, 'Restorative Justice: A Conceptual Framework', (1998), Ottawa, Canada; Law Commission of Canada.
[43] (Canadian Resource Centre for Victims of Crime, 2011).
[44] ([1999] 1 SCR 688).
[45] L M Newel, "A Role for ADR in the Criminal Justice System?" (1999) Paper presented to the Papua New Guinea National Legal Convention, 25 – 27 July, 1999.
[46] European Journal of Social Sciences – Volume 45, Number 1 (2014) 40
[47] R Delgado, "Goodbye to Hammurabi: Analyzing the Atavistic Appeal of Restorative Justice". (2000), Stanford Law Review, 52(4), 751.
[48] G H Teninbaum, 'Easing the Burden: Mediating Misdemeanour Criminal Matters". (2007) Dispute Resolution Journal, 62(2), 62-67.
[49] P Hughes and & M J Mossman, "Re-thinking Access to Criminal Justice in Canada: A Critical Review of Needs, Responses and Restorative Justice Initiatives." (2001), Ottawa, Canada: Department of Justice.

weaker party to having to testify in court at a criminal trial where his or her needs may take a tertiary position with its win-lose outcome.

- Defining the Relationship between ADR and the Mainstream Adjudication: The problem here is whether to integrate ADR within the criminal justice system or to take it outside the formal criminal justice system. It is our considered view that ADR should be integrated into the traditional justice system. Any problem of bureaucracy which may arise would diminish over time.
- Net-widening: The problem of net-widening deals with the danger of bringing in a lot more people into contact with the criminal justice system – people who ordinarily would have had nothing to do with the criminal justice system – thereby widening the net [50] or moving the goal post wider [51]. The answer to these concerns appears to lie in the fact that to stave off future offending, perhaps, first-time offence needs to be met with a societal response; and, sanctions imposed and conditions of net – widening would be agreed upon by the parties directly involved, instead of State apparatus.
- Empirical Data: Part of the inherent quality of ADR is confidentiality because it is, in most cases, a private process. In using ADR to resolve a public issue, the system has to face the challenge of dealing with confidentiality while at the same time securing the public interest. This rather makes it difficult to gather empirical data or evidence. Publication of details of any process has to be by or with the necessary consent or permission of the parties or their authorized representatives. Some, if not most, of the matters never get to the formal system, i.e., either the police or the courts or other official body. In this scenario, it is difficult to gather empirical data.
- Legislative Framework – Planning and Designing: Any meaningful intervention of ADR in the criminal justice system must involve serious amendments to existing laws and the enactment of new ones. The challenge of a statutory scheme in the field of ADR in Nigeria has been well noted in the civil justice sector [52]. The problem appears to be more accentuated in the criminal justice sector. However, the experience of Lagos State in enacting extensive provisions for plea bargaining in the Administration of Criminal Justice Law 2007 has shown that devising an appropriate legislative scheme is not an insurmountable problem. The various ADR organizations can take up the gauntlet by collaborating and coming out with standard guides and code of ethics for ADR practitioners especially in the criminal justice context. This can easily provide the fulcrum for the development of an appropriate statutory framework.
- Manpower, Infrastructure, Training and Funding: Notwithstanding the appeal of ADR generally as inexpensive and speedier, its application in the criminal justice system may require huge capital outlay at least at the initial stages. Such funding requirements would go to manpower [53] development and building of infrastructure. There will be need to train and re-train personnel in ADR processes and management techniques.
- Danger of Ossification: There is also the challenge of ADR losing its informality, simplicity and flexibility as it is institutionalized within the mainstream criminal justice system. Care must therefore be taken to avoid the acquisition of a rigid character by the processes since most of the programmes will have to be structured.
- Corruption: Corruption has remained one of the greatest challenges faced by Nigeria and this has permeated virtually every aspect of national life including the criminal justice system [54]. It is a real problem that must be contended with in the use of ADR and restorative justice. However, we opine that rejecting ADR and restorative justice merely because of fear of corruption in the system amounts to throwing the baby away with the bath water. As efforts to tackle corruption in Nigeria pay off, and processes become more open, the issue of corruption will take the back burner.

Conclusion and Recommendations

Public policy is never constant but it's always shifting depending upon social, legal and economic exigencies of the moment. The reluctance of the Nigerian criminal law to apply ADR and arbitration to criminal matters is founded on public policy, as expressed in the country's criminal legislation, especially earlier criminal legislation. Today, public policy is shifting in favour of applying ADR to criminal disputes. This is so, irrespective of whether the offence is one against property or against the person of an individual or wholly against the State in the sense that there is no singular identifiable individual who can be said to be directly injured, rather, the collective psyche is wounded, for example, looting of public treasuries.

The incorporation of plea-bargaining into Lagos State law is an expression of public policy. The Federal Government of Nigeria's amnesty program for Niger Delta militants, and the policy and practice of the country's courts in encouraging settlement of felonies including homicide cases as seen in the Pfizer Case are expressions of public policy. The Attorney-General's disposition towards encouraging amicable resolution of criminal matters, even homicide cases, is also an expression of public policy. The express incorporation of ADR as the preferred means of dispute resolution, including criminal disputes, into the Child's Rights Act (2003) is an expression of policy. One can therefore safely conclude that the jurisprudence that ADR does not apply to criminal cases especially serious offences is not a valid postulation of the law.

ADR should be properly mainstreamed into the Nigerian criminal justice system in a holistic manner rather than the piece-meal approach currently being witnessed. ADR should be seen as authentic dispute resolution rather than alternative dispute resolution. The purpose is not to reintegrate ADR into the existing dominant legal system which is British prototype but to indigenize the Nigerian law and justice processes. Thus, indigenization of Nigerian law and justice may and should mean the rediscovery and development of the

[50] H Zehr, 'The Little Book of Restorative Justice. Intercourse Pennsylvania: Good Books.' (2002),

[51] J Hudson and B Galaway, Introduction.:In Galaway B and Hudson J (eds.) Restorative Justice: International Perspectives, (1998), (pp. 12 – 13) Monsey, N Y; Amsterdam, the Netherlands: Criminal Justice Press & Kugler Publications.

[52] E O Ezike, 'Developing a Statutory Framework for ADR in Nigeria.' The Nigerian Juridical Review, (2012). 10, 248-266.

[53] European Journal of Social Sciences – Volume 45, Number 1 (2014) 41

[54] E O Ezike, 'Appraisal of Legislative and Institutional Developments of Anti-corruption Laws in Nigeria' Nigerian Journal of Public Law, (2008), 1, 145-160.

indigenous systems and processes of justice and control [55]. The various Ministries of Justice can be utilized. All that is needed is the Prosecutorial Guidelines. New laws are not required as such. The guidelines are to eschew abuse or bring it to minimal level. The public can be properly sensitized so that if State counsel abuses the power, the public can complain. The truth is that what we are postulating here is happening everyday at the police stations for the wrong reason and motive. The only thing is that in many cases, the victims are left out. So, the time is ripe to make the process open and accountable rather than to leave it secret and perpetually open to abuse.

References

1. Amadi GOS. 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; Hilton Hotel, Nairobi, Kenya; 2007.
2. Bakker MW. Repairing the Breach and Reconciling the Discordant: Mediation in the Criminal Justice System. North Carolina Law Review. 1994;72:1479-526.
3. Bohannan P. Justice and Judgment among the Tiv. London, New York, Toronto: Oxford University Press; 1957.
4. Cunneen C. Restorative Justice and the Politics of Decolonization. In: Weitekamp EGM, Kerner H-J, editors. Restorative Justice: Theoretical Foundations. UK, USA: Willan Publishing; 2002:32-49.
5. Delgado R. Goodbye to Hammurabi: Analyzing the Atavistic Appeal of Restorative Justice. Stanford Law Review. 2000;52(4):751.
6. Ezike EO. Appraisal of Legislative and Institutional Developments of Anti-corruption Laws in Nigeria. Nigerian Journal of Public Law. 2008;1:145-60.
7. Ezike EO. Developing a Statutory Framework for ADR in Nigeria. The Nigerian Juridical Review. 2012;10:248-66.
8. Fisher K, Vidmar N, Ellis R. Procedural Justice Implications of ADR in Specialized Contexts: The Culture of Battering and the Role of Mediation in Domestic Violence Cases. Southern Methodist Law Review. 1992;46:2117.
9. Goldberg, Sander, Rogers. Dispute Resolution: Negotiation, Mediation, and Other Processes. 2nd ed. Boston, Toronto, London: Little, Brown and Company; 1992. European Journal of Social Sciences. 2014;45(1):34.
10. Hudson J, Galaway B. Introduction. In: Galaway B, Hudson J, editors. Restorative Justice: International Perspectives. Monsey, NY; Amsterdam, Netherlands: Criminal Justice Press & Kugler Publications; 1998:12-13.
11. Hughes P, Mossman MJ. Re-Thinking Access to Criminal Justice in Canada: A Critical Review of Needs, Responses and Restorative Justice Initiatives. Ottawa, Canada: Department of Justice; 2001.
12. Krieger S. The Dangers of Mediation in Domestic Violence Cases. Cardozo Women's Law Journal. 2002;8:235.
13. Lewis M, McCrimmon L. 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; 2005. Available from: www.justice.gov.za/alraesa/conferences/.../ent_s3_mccrimmon.pdf. Last accessed 2011 Sep 16.
14. Llewellyn J, Howse R. Restorative Justice: A Conceptual Framework. Ottawa, Canada: Law Commission of Canada; 1998.
15. McGregor L. Alternative Dispute Resolution and Human Rights: Developing a Rights-Based Approach through the ECHR. European Journal of International Law. 2015;26(3):607-34.
16. Newel LM. A Role for ADR in the Criminal Justice System? Paper presented to the Papua New Guinea National Legal Convention; 1999.
17. Obiego CC. Igbo Idea of God. *Lucerna*. 1978;1:28.
18. Ogbonna A, Anosike P. Ex-Oceanic Bank MD, Cecelia Ibru Jailed: To forfeit 199 Assets, N190bn. The Sun; 2010;12.
19. Okafo C. African Jurisprudence and Restorative Justice: The Need to Rethink the Philosophical Foundation of Nigerian Criminal Law and Criminal Justice Administration. In: Nnona CG, editor. Law, Security and Development: Commemorative Essays of the University of Nigeria Law Faculty. Enugu: Faculty of Law, University of Nigeria; 2013;247-86.
20. Okafo N. Reconstructing Law and Justice in a Post Colony. England, USA: Ashgate Publishing Company; 2009;8.
21. Redfern A, Hunter M. Law and Practice of International Commercial Arbitration. 4th ed.; 2004.
22. Rifkin J. Mediation in the Justice System: A Paradox for Women. Women & Criminal Justice. 1989;1(1):41-54.
23. Teninbaum GH. Easing the Burden: Mediating Misdemeanor Criminal Matters. Dispute Resolution Journal. 2007;62(2):62-67.
24. Steegh NV. Yes, No and Maybe: Informal Decision Making About Divorce Mediation in the Presence of Domestic Violence. William & Mary Journal of Women and the Law. 2003;9:145.
25. Zehr H. The Little Book of Restorative Justice. Intercourse, Pennsylvania: Good Books; 2002.

[55] C Cunneen, "Restorative justice and the politics of decolonization." In Elmar G.M. Weitekamp & Hans-Jurgen Kerner (eds.) Restorative Justice: Theoretical Foundations UK, USA: Willan Publishing (2002), (pp. 32- 49).