

# Exploring adr in Criminal Process: A Panacea to Effective Administration of Justice in Nigeria By

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## Abstract

The judiciary can play an important role in practically executing the arbitration process and in encouraging litigants to adopt the process of arbitration in a speedy and cost-effective manner. The legal profession has to accept business and market needs, equip themselves with the knowledge and skills of mediation, and develop professional capacity in the field of Alternative Dispute Resolution (ADR) as this is a major requirement for modern-day clients. The Nigeria criminal justice system is characterized with unnecessary adjournments and delays as a result of the flood of litigation overflowing its dockets as the demand for adjudication exceeds the capacity of the Courts to deliver justice in a timely manner. The prisons are congested and in highly deplorable conditions. However, this paper will examine the application of ADR mechanisms in solving these problems of the administration of criminal justice system in Nigeria. It posits 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:** ADR, Criminal Justice System, Plea bargain, Victim Offender Mediation, Restorative Justice, Litigation.

## 1. Introduction

The use of non-traditional dispute resolution processes, falling within the rubric of ADR, is now widely accepted in a variety of dispute contexts. In recent years, similar processes have been adapted and applied in a criminal justice context as part of an overall package of criminal justice reforms. ADR is a non-binding method of resolving conflict with a third party. ADR generally refers to all out-of-court conflict resolution procedures. ADR procedures differ from litigation in that they derive their legality and effectiveness from parties' agreement, supported by legislations. Negotiation, mediation, conciliation, arbitration, early neutral evaluation, expert appraisal, and other hybrids are the main ADR processes.

The applicability of ADR in the sphere of criminal matters is only a recent trend. Despite the increased use of ADR in civil cases and in limited areas of juvenile and minor criminal law, ADR is rarely used to resolve disputes involving major criminal charges against adults. The initial attitude of completely outlawing the use of ADR to settle disputes of a criminal nature appears to have given way to a reluctant acceptance of ADR in the criminal justice sector.

For Rudin (1999), restorative justice should not be restricted to minor offences because it is "clearly a waste of a very valuable resource." Reconciliation and forgiveness that can lead to restoration is hardly achievable within the current accusatorial or adversarial criminal justice system founded on retribution. The alternative appears to lie in ADR which conduces 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.

Conflict is a part and parcel of every society. Disputes emerge during dealings among citizens, between citizens and the state and between and among governments. Parties resolve their issues through court's legal process or through the process of ADR which includes arbitration, mediation, conciliation, negotiation, and early-neutral evaluation, among others. The adversarial process of resolving the disputes comes to an end with a win or lose situation

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which wipes out social relationship. ADR gave parties the option to select the arbitrator or mediator, the location, and the process. ADR uses negotiation and mediation to resolve disputes between parties

## 2. Meaning and Different Forms of Alternative Dispute Resolution Mechanisms

ADR is a procedure for settling a dispute by means other than litigation, such as arbitration or mediation. ADR helps parties resolve their differences without resorting to a more confrontational adjudicative process. It looks at needs, interests, and solutions, and can promote healing. It is voluntary, timely, confidential, and based on mutual agreement. Unlike the conventional courts, it is designed to yield solutions that are adapted to the particular circumstances of individual cases, as it is about solving problems rather than imposing solutions through an adjudicative process.

### 2.1. Forms of ADR

- **Arbitration:** Arbitration is a process in which a third neutral party, after listening to parties in a relatively informal hearing, makes a binding decision resolving the dispute. The arbitrator is typically a private person chosen by the parties. The person chosen to arbitrate the dispute often has specialized expertise in the subject matter of the dispute. A dispute that might otherwise go to court becomes subject to binding arbitration only by the agreement of the parties. In this sense, arbitration is a creature of contract, and the terms of the parties' particular arbitration agreement.
- **Mediation:** This involves the use of a third-party, but a mediator unlike an arbitrator has no authority to impose a resolution on the parties. Instead, the mediator's goal is to facilitate negotiation and help the parties to reach a mutually acceptable settlement of their own dispute. It is private and confidential, and not open to the public.
- **Negotiation:** Negotiation unlike arbitration does not require the participation of a neutral third-party with decisional authority.<sup>2</sup> Instead, the parties themselves have the responsibility for deciding the terms of any resolution. Negotiation is voluntary, in the sense that disputing parties are not ordinarily forced to negotiate with each other. The process of negotiation is informal and without defined procedures or rules governing the presentation of evidence or arguments. Because the goal of negotiation is a mutually acceptable resolution, the parties to a negotiation can shape that resolution to suit their own needs and interests.<sup>3</sup> In essence, negotiation usually involves complete autonomy for the parties involved, without the intervention of third parties.

## 3. Criminal Justice Reform: ADR in the Criminal Justice Context

The use of ADR processes in criminal matters is a relatively new phenomenon in Western countries. In part, the increased interest in the application of ADR processes to the criminal justice system was borne from a general dissatisfaction with traditional adversarial methods of dispute resolution. However, the criminal justice system has attracted a particular set of criticisms, as follows: (a)

it is seen as unsuccessful in reducing rates of recidivism (and may even increase the likelihood of reoffending for particular groups, such as juveniles and indigenous persons); (b) it ignores the victims of crime and fails to recognize crime as a form of social conflict.

One important proponent of the application of ADR techniques to criminal 'disputes' was Nils Christie, a Professor of Criminology from Norway, who asserted that 'conflicts become the property of lawyers' and that formal legal processes rob individuals of the right to full participation in the dispute resolution process. The proliferation of the idea that a criminal offence represents not just a violation of state but also a community conflict which requires resolution between individuals has led to increased support for the use of non-traditional criminal justice methods.

## 4. Forms of Non-Traditional Criminal Justice Methods.

- **Victim-Offender Mediation:** This is also known as victim-offender reconciliation programs (VORP). Its fundamental goal is to promote direct communication between the victim and the offender. Although, this act isn't practiced in Nigeria. It is a process that provides interested victims (primarily those of property crimes and minor assaults) the opportunity to meet their offenders in a safe and structured setting. Victim-Offender Mediation focuses on restitution and reconciliation through face-to-face meetings between victims and offenders before trained mediators. The goal is to hold offenders directly accountable while providing important support and assistance to victims.<sup>4</sup> With the assistance of trained mediators, the victims are able to let the offenders know how the crime affected them, receive answers to their questions, and be directly involved in developing a restitution plan that holds the offenders financially accountable for the losses they caused.
- **Community Dispute Resolution Programmes (CDRP):** It has the advantage of disposing of minor conflicts that have not been settled by courts and are clogging criminal dockets. Its advocates hope to empower communities to resolve conflicts away from the state's influence and to shift the focus from the offender's individual rights towards community building. In Michigan, every year over 10, 000 people seek resolution through CDRP rather than bringing these before a judge or magistrate.
- **Victim Assistance Program:** It refers to those government programs, which provide information and aid to persons who have suffered direct physical, emotional, or pecuniary harm as a result of the commission of a crime. The Victims of Crime Act (VOCA) of USA established the Crime Victim's Fund, this Fund is supported by all fines that are collected from persons who have been convicted of offenses against the United States, except from fines, collected through certain environmental status and other fines that are specifically designated for certain accounts.

## 5. What constitutes ADR in the criminal justice context?

In a criminal justice context, the term ADR can encompass a

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number of practices which are not considered part of the traditional criminal justice system: 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 (such as Indigenous Courts and Drug Courts). These practices can occur at different stages of the criminal process. They can be a diversion from the court process or they can be in parallel with the court process. These processes are generally only applied to offenders who have admitted the offence.

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 also involves a particular theoretical basis (informed by criminological, psychological and sociological theory) and aims specifically to attach stigma to the criminal act (not the offender) and to achieve an acceptance of responsibility.

It is opined that ADR is indeed an entrenched part of the Nigerian criminal justice system, primarily because it is indigenous to the various people of the Nigerian State. The different people, 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*" (Obiego, 1978, 28) 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*" (Bohannon, 1957) 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*" (Okafo, 2009).

## 6. Challenges of ADR in the Nigeria Criminal Justice System

Many are of the indication that ADR was a better option for justice administration in Nigeria, some others noted that the option came with some challenges. However, the challenges which may confront the implementation of ADR in Criminal Justice System may include;

**a. 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" (Bakker, 1994, 1520). A vast majority of people 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. Thus, for criminal justice to respond more appropriately to criminal behaviour, it must incorporate not only criminal law but also principles of restorative justice and ADR based on indigenous jurisprudence and practices of the Nigerian people (Okafo, 2013, 282). 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 favour 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" (Llewellyn, 2002, 101). 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 (Canadian Resource Centre for Victims of Crime, 2011). As the Supreme Court of Canada pointed out in the Gladue Case ([1999] 1 SCR 688) restorative justice is not a more lenient approach to justice, and sentence focusing on a restorative justice is not a lighter sentence.

**b. Problem of Power imbalance:** Hughes and Mossman state that, "one serious gap in the discussion of restorative justice is the extent to which it actually enhances or diminishes equality. 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 (Delgado, 2000). Restorative justice, therefore, often seems "apolitical", failing to take into account structural inequity and imbalances of power between victims and offenders (Hughes & Mossman, 2002). A typical example is sexual assault cases or domestic violence cases.

Notwithstanding, 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 negotiation on the basis of equality. Thus, it is argued, because the offenders committed the offence on his own terms, there is no basis for negotiation as there is no equality in bargaining power. These critics argued that when mediation is used instead of the formal court interventions, the result can be dangerous for victims, particularly for women in the domestic violence situation. ADR methods do not ensure any balance of power between 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 the criminal justice system.

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**c. Orientation:** Another challenge facing the implementation of ADR in the criminal justice system is that of orientation. It has been observed that criminal justice theories can suffer due to lack of acceptance.[] A vast majority people 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. Thus, for criminal justice to respond more appropriately to criminal behaviour, it must incorporate not only criminal law but principles of restorative justice and ADR based on indigenous jurisprudence and practices of the Nigerian people.

**d. Manpower, Infrastructure, Training and Funding:** 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 development and building of infrastructure. There will be need to train and re-train personnel in ADR processes and management techniques.

### 7. Benefits of ADR in Criminal Process

The use of ADR has been 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 seen as a cheaper and more effective way of dealing with disputes that do not warrant the use of court resources. The use of ADR method has grown rapidly, and has been institutionalized to a large extent through the introduction of legislative schemes, the benefits of this method in criminal process includes; lowering court caseloads and expenses, provides speedy settlement of disputes that were dissipative of the community or the lives of the parties, encourages resolutions that were suited to the parties' needs, restores the influence of neighborhood and community values and the cohesiveness of communities, teaches the public to try more effective processes than violence or litigation for settling disputes amongst others.

### 8. Case Study

An 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 'study participants' or their survivors. (This Day, August 24, 2011). It appears that in Nigeria, ADR is working in the criminal justice system but behind a camouflage of discouraging legislative language.

In spite of the provisions legislating against the use of ADR in criminal justice in Nigeria, there is ample evidence that ADR is incorporated in the formal criminal justice system. For instance, plea bargaining has been legislated into the criminal justice system of Lagos State (Administration of Criminal Justice Law No. 10 of 2007). The Childs Rights Act 2003 (Cap. C50, Laws

of the Federation of Nigeria 2004, sections 151, 204, 208, 209 and 223) has also expressly incorporated ADR into the juvenile justice system. Section 14 of Economic and Financial Crimes Commission Establishment Act empowers the Commission to compound offences in order to obtain practical restitution. In FRN v Cecilia Ibru, (FHC/L/297C/2009) the EFCC was able to recover 199 assets and N190 billion naira through the plea bargaining process (Ogbonna & Anosike, 2010). That, in my view, is nothing but ADR and restorative justice in action.

### 9. Legal and Ethical Implication

Dispute, whether characterized as civil or criminal, is an essential part of man in the 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 respect to this, 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 criminal procedure, the wrong is called a criminal offence. This is important as many people are ignorant of how the current adversarial or accusatorial criminal justice system is operated.

### 10. Recommendation

In light of the salient problems identified, it is obvious that the only way to decongest the courts and allow for settlement of disputes, especially criminal matters, amicably, is through the various ADR methods. It is therefore opined that even in the criminal justice system, the future of ADR in Nigeria is bright and promising in bringing about a society where disputes are disposed of more expeditiously and at lower costs, without having to resort to judicial settlements. Indeed, it has become imperative for stakeholders in criminal justice administration to seek other alternative approaches in resolving criminal disputes. This article recommends the following

- Enlightenment trainings on the benefits of ADR and restorative justice should be conducted. Advertorials needs to be placed on social media platforms, television and radio to ensure that the gospel of restitution is adequately preached and an urgent need to intensify training of criminal justice practitioners in the area of ADR. Also, meaningful intervention of ADR in the criminal justice system must involve serious amendments to existing laws and the enactment of new ones. Such provisions as those that condemn compounding, for example, should be amended to allow certain officials and persons in certain conditions and in respect to different offences particularly property offences to lawfully compound provided the person to whom restitution is made is the victim.
- Encouraging the payment of adequate legal fees to the criminal justice practitioners involved in ADR. This payment should be made commensurate to the normal charges for court appearances so as to encourage criminal justice practitioners to utilize ADR for the settlement of criminal disputes within Nigeria. Resistance by some of the criminal justice practitioners in Nigeria to engage in ADR for the settlement

of criminal disputes as attested to by most of the participants could emanate from the fear that such legal practitioners were not paid fees commensurate to normal fees paid for repeated court appearances.

- Alternative Dispute Resolution centres should be set up in different locations across the country to administer the various appropriate dispute resolution methods. Such centres could be built alongside and in schools, courts, certain public offices, etc.

## 11. Conclusion

Undoubtedly, ADR in the criminal justice system is a global phenomenon. Thus, the assertion of Nigerian courts to the contrary as was held in *B J Exports & Chemical Processing Co v Kaduna Refining and Petrochemical Ltd*, (FWLR, 2005, pt. 165: 445, 465; WRN, 2003: 24, 74) that a criminal matter, like the allegation of fraud raised by the respondent does not admit of settlement by arbitration may likely undergo a review. The fact is that in Nigeria, ADR is working in the criminal justice system even in cases where very serious offences are concerned. The formal mechanism of criminal dispute resolution viewed criminal act as an offence against the state. This rigid, inflexible, pedagogical fixation with abstract legal principles over time without due attention to contemporary social reality has been a problem. The delay, time and cost in the disposal of criminal cases, including petty matters like stealing a loaf of bread, remains a persistent drawback of the formal mechanism of criminal justice administration and justice delivery.

Presently, ADR is used to resolve issues related to family, environmental, commercial, and industrial disputes. The success of ADR in resolving these disputes compelled policymakers to introduce it in other sectors.

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