

Applicability of Alternative Dispute Resolution and Plea Bargaining in the Nigerian Criminal Justice System

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ABSTRACT

This article discusses the applicability of two 'informal' approaches to the resolution of conflict: alternative dispute resolution (ADR) and plea bargaining. More particularly, the article examines the relevance of these two approaches to the Nigerian criminal justice system. Widely used as a means of resolving civil disputes, ADR also has a role to play in the achievement of criminal justice. The article examines this role in some detail. Attention is also given to plea bargaining in the context of the country's criminal justice framework. The article proposes that the parties to a criminal dispute, and society at large, might benefit from a more extensive use of plea bargaining, which remains underdeveloped in Nigeria.

1 INTRODUCTION

The use of non-traditional dispute resolution processes, falling within the rubric of alternative dispute resolution (ADR), is now widely accepted in a variety of dispute resolution contexts.¹ Similar processes have been adapted and applied in the criminal justice system context in other jurisdictions of the world, notably the United States. Thus, attention is now on ADR, primarily with regard to criminal matters, as a mechanism for the reinforcement of the restorative justice principle that allows victims, offenders and communities to take an active part in the formulation of the public response to crime, and increases public trust in the criminal justice system. Some jurisdictions have developed a

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¹ P Susan and G Seabolt, *Essentials of Alternative Dispute Resolution* 2 ed (Pearson Publications Co 2001) 2-3; SB Goldberg, FEA Sander and NH Rogers, *Dispute Resolution, Negotiation, Mediation and Other Processes* 3 ed (Aspen Law and Business 1999).

range of 'alternative' methods for dealing with criminal offenders, including programmes such as victim-offender mediation, family group conferencing, and circle sentencing.²

Previously, ADR has largely been used to resolve disputes outside the auspices of a formal judicial system with the help of mediators, arbitrators and legal practitioners. The literature on alternative dispute resolution has little to say about the use of ADR in the criminal justice system. This is borne out of the belief that ADR is more suited to the resolution of civil disputes between parties. There is also the widely held belief that an offender's criminal behaviour (in the form of the commission or omission of one or more proscribed activities) constitutes an offence against the State, which thus requires the two parties (the offender and the State) to resolve the matter via an appropriate forum within the State's formal criminal justice system.³ However, in contemporary society, it is statistically evident that the formal criminal justice system is becoming inadequate, wasteful, inflexible and inefficient compared to the more accessible and speedy alternative dispute resolution system.⁴ It is argued that dispute settlement within the strictures of the formal court system takes too long to achieve and, as a result, justice is delayed. These failings create dissatisfaction and resentment in individuals and the wider community. However, it is misleading to think that ADR can supersede the formal court system entirely; that is, that it becomes the only avenue for the resolution of any and all disputes.⁵ The formal justice system will always be present and will continue to serve as the default mechanism for those disputes that cannot be resolved via the ADR process.⁶ But it is also important to highlight the fact that the ADR process, being of a non-adversarial nature, can help to preserve the relationship of the disputing parties and maintain community harmony.⁷

² L Melissa and L McCrimmon, 'The Role of ADR Processes in the Criminal Justice System: A View from Australia' Alraesa Conference, September 2005, available at <http://www.justice.gov.za/alraesa/conferences/2005uganda/ent_s3_mccrimmonpd> accessed on 6 July 2013.

³ R Sarre and K Earle, 'Restorative Justice' in R Sarre and J Tomaino (eds), *Key Issues in Criminal Justice* (Australian Humanity Press 2004) 44–145.

⁴ E Wojkowska, 'Doing Justice: How Informal Justice Systems can Contribute' (Oslo 2006) 9, available at <<http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/EwaWojkowska.pdf>> accessed on 20 October 2014.

⁵ R Simmons, 'Private Criminal Justice' (2007) 42 *Wake Forest Law Review* 912.

⁶ Ibid.

⁷ T Barfield, N Nojumi and JA Thier, 'The Clash of Two Goods: State and Non-State Dispute Resolution in Afghanistan', available at <http://www.usip.org/files/file/clash_two_goods.pdf> accessed on 6 December 2014.

2 WHY ALTERNATIVE DISPUTE RESOLUTION IN CRIMINAL MATTERS?

The use of ADR processes in criminal matters is a relatively new phenomenon. It is observed that the increased interest in the application of ADR processes to the criminal justice system was borne out of the general dissatisfaction with traditional adversarial methods of dispute resolution. In addition, the criminal justice system has been criticised for being unsuccessful in reducing rates of recidivism (and may even increase the likelihood of reoffending for particular groups, such as juveniles). Further, it ignores the victims of crime and fails to recognise crime as a form of social conflict or dispute.⁸

Nils Christie, a proponent of the application of ADR techniques to criminal 'disputes', asserts 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.⁹ Therefore, it is argued that the proliferation of the idea that a criminal offence represents not just a violation against the State, but also against an individual, has led to increased support for the use of non-traditional criminal justice methods.

Christie posits that traditional criminal justice processes make the offender 'an object for study, manipulation and control', and that we have 'reduced the victim to a nonentity and the offender to a thing'.¹⁰ He therefore takes objection to the fact that the law defines what is relevant, and may, in the process, deem irrelevant the contextual factors that the parties may view as important.¹¹ Christie laments the fact that the key element in criminal proceedings is the conversion of a personal matter involving the actual parties into a conflict between one of the parties and the State. In this scenario, the party represented by the State; that is, the victim, is for the most part almost wholly excluded from participating in the proceedings, with the result that he or she loses out twice. The first loss is the one incurred as a result of the offender's criminal act or acts; the second loss (which often has a more debilitating effect) stems from being denied the right to full participation during the prosecution of the offender. The victim loses his rights and case to the State.¹² The more reason a paradigm shift to ADR becomes relevant.

⁸ S Kift, 'Victims and Offenders: Beyond the Mediation Paradigm?' (1996) *Australian Dispute Resolution Journal* 71.

⁹ N Christie, 'Conflicts as Property' (1977) 1 *British Journal of Criminology* 4.

¹⁰ *Ibid* 5.

¹¹ *Ibid* 8.

¹² *Ibid* 3.

3 WHAT CONSTITUTES ALTERNATIVE DISPUTE RESOLUTION IN A CRIMINAL JUSTICE CONTEXT?

In a criminal justice context, the term ADR may well encompass a number of practices which are not considered part of the traditional criminal justice system. Such practices include: victim and offender mediation; family group conferencing; victim and offender panels; victim assistance programmes; community crime prevention programmes; sentencing circles; ex-offender assistance; community service; plea bargaining; and school programmes. Alternative dispute resolution may also include cautioning and specialist courts (such as indigenous courts and drug courts). These practices, which may be a diversion from the formal court process or may run parallel to it, can occur at different stages of the criminal process.¹³

Thus, in ascertaining the processes that are within the ambit of ADR and the discussion on whether ADR is a concept that can be applied to criminal justice reforms, the National Alternative Dispute Resolution Advisory Council (NADRAC) noted, in its 2002 Report, that victim-offender mediation and diversionary conferencing posed a challenge to the setting of boundaries around ADR.¹⁴ Such processes resemble mediation generally, in that they bring the parties together and attempt to negotiate an agreed outcome, while also challenging accepted definitions of the terms 'dispute' and 'resolution'. The role of the State in criminal matters differs from its role in civil matters, and the question arises as to whether a criminal offence constitutes a 'dispute'.¹⁵ This question lies at the heart of the debate on whether ADR-type processes can and should be applied in a criminal context.

4 ALTERNATIVE DISPUTE RESOLUTION AND RESTORATIVE JUSTICE

The use of ADR processes in the criminal justice system has a great deal in common with the restorative justice movement and shares many of the latter's objectives. Restorative justice, like ADR, does not view the violation of the State and the punishment of the offender as central to the theory and practice of criminal justice. Rather, it shifts the emphasis to issues concerning reparation and the inculcation, in the offender, of a sense of responsibility towards the victim and the community. Restorative justice is thus said to be 'victim-centred'.

¹³ It is observed that the processes are generally applied to offenders who have admitted the offence.

¹⁴ See Australian Government, 'Publications', available at <<http://www.ag.gov.au/LegalSystem/AlternateDisputeResolution/Pages/NADRACPublications-A-Z.aspx>> accessed on 3 September 2014.

¹⁵ National Alternative Dispute Resolution Advisory Council, 'ADR Terminology: A Discussion Paper' Rocfwsk Diaz National Conference, Brussels, 2002, 9–11.

Indeed, the restorative justice movement was largely the initiative of victims groups unhappy with the way in which the official criminal justice system marginalised and disempowered victims.

As far back as 2002, the United Nations Economic and Social Council adopted a Resolution containing a set of basic Principles on the Use of Restorative Justice Programmes in Criminal Matters. The Vienna Declaration on Crime and Justice: Meeting the Challenges of the Twenty-first Century (2000), encouraged the 'development of restorative justice policies, procedures and programmes that are respectful of the rights, needs and interests of victims, offenders, communities and all other parties'.¹⁶

In August 2002, the United Nations Economic and Social Council adopted a Resolution calling upon Member States that are implementing restorative justice programmes to draw on a set of Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters developed by an Expert Group.¹⁷ In 2005, the Declaration of the Eleventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders urged Member States to recognise the importance of further developing restorative justice policies, procedures and programmes that include alternatives to prosecution.¹⁸ These principles offer important guidelines to policymakers, community organisations and criminal justice officials involved in the development of restorative justice initiatives. In 2001, the European Union issued a framework decision stating that Member States should promote mediation in criminal cases.¹⁹ In many countries, the idea of individual and community involvement in criminal justice matters enjoys widespread support.²⁰

It has been observed that there is no well-accepted definition of restorative justice, and the concept is often defined by indicating

¹⁶ 'The Vienna Declaration on Crime and Justice: Meeting the Challenges of the Twenty-first Century' 10th United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Vienna, 10–17 April 2000 A/CONF.184/4/Rev. 3 para 29.

¹⁷ United Nations Office on Drugs and Crime, *Handbook on Restorative Justice Programmes* (United Nations 2006).

¹⁸ Bangkok Declaration, 'Synergies and Responses: Strategic Alliances in Crime Prevention and Criminal Justice' 11th United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Bangkok, 18–25 April 2005 para 32.

¹⁹ See art 10 of the European Union Council Framework Decision 15 March 2001, available at <<http://www.eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32001F0220>> accessed on 3 September 2014.

²⁰ J Faget, 'Mediation, Criminal Justice and Community Involvement: A European Perspective in the European Forum for Victim-Offender Mediation and Restorative Justice' in J Faget (ed), *Victim-Offender Mediation in Europe – Making Restorative Justice Work* (Leuven University Press 2000) 39.

what it is not.²¹ Thus, restorative justice must not be confused with retributive justice, which is the dominant Anglo-American model of criminal justice, since the two concepts are diametrically opposed to each other.²² A key feature of the retributive justice model is that criminal acts (or omissions) are to be regarded as violations against the State and that perpetrators of such acts should be punished rather than rehabilitated.²³ In this tradition, crime is defined in legal terms and is removed from its moral, social and political context.²⁴ By contrast, restorative justice views crime as a matter involving two persons (the offender and the victim), rather than one person (the offender) and an abstract entity (the State). Furthermore, instead of concerning itself with the punishment of the offender, restorative justice focuses on problem-solving, dialogue, repentance and forgiveness.²⁵ Restorative justice is a way of responding to criminal behaviour by balancing the needs of the community, the victims and the offenders. A variety of terms is used to describe the concept, including the following: 'communitarian justice', 'making amends', 'positive justice', 'relational justice', 'reparative justice', 'community justice' and 'restorative justice'.²⁶ The development of restorative justice principles dates back to the beginning of the twentieth century. More recently, within the last 20 years, these principles have been the subject of intense study on the part of a number of theorists, including Howard Zehr,²⁷ Dan Van Ness,²⁸ Mark Umbreit,²⁹ and John Braithwaite.³⁰

Restorative justice possesses a number of commendable features; for instance, it is flexible in terms of response, it incorporates problem-solving, and it addresses the plight of the victim and his or her needs.³¹

²¹ D Schmid, 'Restorative Justice: A New Paradigm for Criminal Justice Policy' (2003) *Victoria University of Wellington Law Review* 4; K Daly and H Hayes, 'Restorative Justice and Conferencing in Australia' (2001) 186 *Australian Institute of Criminology* 1.

²² Retributive justice is a theory of justice that considers punishment, if proportionate, to be the best response to crime.

²³ Sarre (n 3) 144–145.

²⁴ Ibid 148.

²⁵ Ibid.

²⁶ D Miers, 'An International Review of Restorative Justice' London Home Office Crime Reduction Research Series Paper 10 / 2001, 88, available at <<http://www.justice.ie/en/JELR/RestorativeJustice%20LR.pdf/Files/RestorativeJustice%20LR.pdf>> accessed on 3 September 2014.

²⁷ H Zehr, *Changing Lenses* (Herald Press Scottsdale 1990).

²⁸ DV Ness, 'Justice That Heals', available at <http://www.restorativejustice.org/justice_that_heals/justiceheals1.html> accessed on 8 May 2013.

²⁹ SM Umbreit, 'Restorative Justice through Victim-Offender Mediation: A Multi-Site Assessment' (1998) 1(1) *Western Criminology Review*, available at <<http://wcr.sonoma.edu/v1n1/umbreit.html>> accessed on 30 July 2013.

³⁰ J Braithwaite, 'Restorative Justice' in HJ Schneider (ed), *International Handbook of Criminology* (Walter de Gruyter 2009).

³¹ United Nations Office on Drugs and Crime, 'Criminal Justice Reform Handbook Series' Vienna, 2006, available at <<http://www.ncjrs.gov/app/application/abstract.aspx?ID=2308708>> accessed on 16 August 2013.

5 BASIC PRINCIPLES ON THE USE OF RESTORATIVE JUSTICE PROGRAMMES

The Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters³² set out the following fundamental safeguards:

- (a) *The right to consult with legal counsel:* The victim and the offender should have the right to consult legal counsel concerning the restorative process and, where necessary, to translation or interpretation.
- (b) *The right of minors to the assistance of a parent or guardian:* This right is in addition to the right to consult with legal counsel (see above).
- (c) *The right to be fully informed:* Before agreeing to participate in restorative processes, the parties should be fully informed of their rights, the nature of the process and the possible consequences of their decision.
- (d) *The right not to participate:* Neither the victim nor the offender should be coerced, or induced by unfair means, to participate in restorative processes or to accept restorative outcomes. Their consent is required. Children may need special advice and assistance before being able to provide valid and informed consent.
- (e) *Participation is not evidence of guilt:* Participation of an offender in a restorative justice process should not be used as evidence of admission of guilt in subsequent legal proceedings.³³
- (f) *Agreements should be voluntary and reasonable:* Agreements arising out of a restorative justice process should be arrived at voluntarily and should contain only reasonable and proportionate obligations.³⁴
- (g) *Confidentiality of proceedings:* Restorative processes deliberations 'that are not conducted in public should be confidential, and should not be disclosed subsequently, except with the agreement of the parties or as required by national law'.³⁵ Some human rights instruments also aim at protecting children's privacy, and the confidentiality of proceedings involving children. They are also relevant.
- (h) *Judicial supervision:* Restorative justice programmes and proceedings outcomes should, 'where appropriate, be judicially supervised or incorporated into judicial decisions or judgements [sic]'.³⁶ Whenever that occurs, the outcome should have the same status as any other judicial decision or judgment. This means that in most

³² Economic and Social Council, 'ECOSOC Resolution 2002/12: Basic Principles on the Use of Restorative Justice in Criminal Matters' para 13, available at <<http://www.un.org/en/ecosoc/docs/2002/resolution%202002-12.pdf>> accessed on 3 September 2014.

³³ Ibid para 8.

³⁴ Ibid para 7.

³⁵ Ibid para 14.

³⁶ Ibid para 15.

systems the outcome could, therefore, be appealed by the offender or the prosecution. These outcomes should preclude prosecution in respect to the same facts.

- (i) *Failure to reach an agreement:* Failure to reach an agreement should not be used against the offender in subsequent criminal justice proceedings.
- (j) *Punishment not to be affected by a failure to implement an agreement:* Failure to implement an agreement made in the course of a restorative justice process (other than a judicial decision or judgment) should not be used as justification for a more severe sentence in subsequent criminal proceedings.

There are a number of restorative justice programmes that apply restorative processes, or seek to achieve restorative outcomes.³⁷ These programmes point towards a gradual shift from deterrence to reparation as a mode of criminal justice in some nations.

Nonetheless, restorative justice has its weaknesses. On the part of the victim, it is argued that the legitimacy of the victim's desire for just punishment of the person who wronged him may be dismissed too lightly. For instance, the victim may feel compelled to forgive and lighten the punishment of the offender due to various facets of the victim-offender mediation, such as the offender's apology and the mediator's presence. To the offender, the victim-offender mediation may not be truly voluntary, given his vulnerable situation. This may compromise his constitutional right against self-incrimination, because victim-offender mediations often require the offender to admit his guilt prior to participation in the mediation process. Furthermore, because criminal mediation does not enjoy the precedents and conventions of the more-established criminal adjudication, it introduces uncertainty regarding the protection of basic assumptions such as confidentiality and enforcement of reached resolutions.³⁸ Nonetheless, it is submitted that the merits of restorative justice outweigh the demerits.

³⁷ United Nations Office on Drugs and Crime (n 31) 7. For the various restorative justice programmes, see RJ Gehm, 'Victim-Offender Mediation Programs: An Exploration of Practice and Theoretical Frameworks' *Western Criminology Review* 1(1), available at <<http://www.wcr.sonoma.edu/v1n1/gehm.html>> accessed on 29 April 2013.

³⁸ GO Flora, 'Mediation as Practiced in Criminal Law: The Present, the Pitfalls, and the Potentials' (2012), available at <http://www.americanbar.org/content/dam/aba/migrated/dispute/docs/2010_BoskeyEssay_Winner_FloraGo.authcheckdam.pdf> accessed on 3 September 2014.

6 PLEA BARGAINING: TYPES, FEATURES AND CRITICISM

A 'plea bargain', also referred to as a 'plea agreement' or 'plea deal', is an agreement in a criminal case between the prosecutor and the defendant whereby the defendant agrees to plead guilty to a particular charge in return for some concession from the prosecutor. This may mean that the defendant will plead guilty to a less serious charge or to one of several charges in return for the dismissal of other charges. It may also mean that the defendant will plead guilty to the original criminal charge in return for a more lenient sentence.³⁹

It has been observed that '[s]o long as defendants routinely expect to receive some form of sentencing consideration in exchange for an admission of guilt, the essence of a system of bargaining plea is present'.⁴⁰ The origin of plea bargaining is not settled. It is argued to be as old as public prosecution.⁴¹ Although it may not have originated from the United States of America, plea bargaining has been well developed in the American criminal jurisprudence.⁴² Jurists are still divided as to the significance or otherwise of the practice of plea bargaining, with some in support of the practice and others against it, including in Nigeria.⁴³ Plea bargaining is of different forms.⁴⁴ For instance, there is 'charge bargaining', under which the defendant pleads guilty to a less serious crime than the original charge. There is also 'count bargaining': here, the accused pleads guilty to one of the multiple original charges. Under 'sentence bargaining', the accused pleads guilty after agreeing in advance on the sentence that will be given. However, such a sentence can still be denied by the judge. Further, there is 'fact bargaining', under which concession is given based on negotiations reached on the facts of the case.

Protagonists of plea bargaining argue that the practice ameliorates some of the problems of the majority of criminal justice systems – trial delays, overcrowded prisons, and so on. Plea bargaining is perceived as a way of disposing of cases more speedily, reducing the workload

³⁹ W Shittu, 'Comparative Analysis of the Jurisprudence of Plea Bargaining and Its Application in Nigeria' *Punch Newspaper* (Nigeria) 23 April 2012.

⁴⁰ W Thomas, 'In Defense of Bargain Justice' (1979) 13 *Law and Society Review* 509, 512.

⁴¹ O Dirk, 'Plea Bargain' *New York Times Magazine* 29 September 2002, available at <<http://www.nytimes.com>> accessed on 15 January 2013; V Elizabeth, 'The Social Origins of Plea Bargaining: Conflict and the Law in the Process of State Formation 1830–1860' (1999) 33 *Law and Society Review* 161.

⁴² TK Adekunle, 'Plea Bargaining and the Nigerian Penal System: Giving Judicial Imprimatur to Corruption', available at <<http://www.newgroundresjournals.org/journals/NGRJLSRE/Pdf/2013/June/T.%20Kehinde%20Adekunle.pdf>> accessed on 3 September 2014.

⁴³ W Scott, 'The Value of Plea Bargaining' (2005) 58(4) *Oklahoma Law Review* 599–636.

⁴⁴ The Basics of a Plea Bargain, available at <<http://www.nolo.com/legal-encyclopedia/the-basics-plea-bargain.html>> accessed on 1 July 2014.

of judges, avoiding the rigours of a lengthy trial, and, ultimately, rendering justice more speedily.⁴⁵ It is further argued that the practice can be justified on penological grounds: offenders who are ready to plead guilty to their alleged crimes are more often willing to be rehabilitated. Thus, pleading guilty makes them remorseful, which makes it unnecessary to mete out the full punishment.⁴⁶

Antagonists of plea bargaining are of the view that the practice is inconsistent with the essence of the criminal justice system, namely deterring people from committing crimes. Deterrence often necessitates punishment, according to some opponents of plea bargaining. If punishment is to be compromised, then the essence of deterrence is jettisoned.⁴⁷ Plea bargaining has also been viewed as being contrary to the well-established constitutional principle of the accused person's innocence until proven guilty. It is posited that the Constitution requires proof, and even where the accused enters a guilty plea, the onus still lies on the prosecution to prove its case beyond reasonable doubt.⁴⁸

Furthermore, plea bargaining must be based on the free will of the accused person. The equality of the parties, and the protection of the rights of the accused, must be guaranteed. The accused has the right to renounce the agreement before judgment. The right of appeal exists for the accused if the plea bargain agreement is influenced by deception, coercion, violence or threats. The prosecution is obliged to consider the public interest, the severity of the penalty and the personal characteristics of the accused, in order to forestall the possibility of abuse of process. The agreement must be endorsed by the court, and the prosecution must consult the victim and obtain his or her written consent before finalising the process.

Despite these several reservations, plea bargaining does present a number of benefits. It generally saves time since the case can be concluded without the need to go to trial. This time-saving element has the knock-on effect of alleviating the larger problem of congestion of cases and delays in trials. It saves accused persons' money, given the reduced time needed to resolve the matter. It allows the accused to have fewer, or less serious, or less socially stigmatising offences on his record, and to avoid undue publicity as a result of being in the public

⁴⁵ O Kayode, 'Plea Bargaining: An Indispensable Tool in the Criminal Justice System', available at <<http://www.chatafrikarticles.com/articles/898/1/Plea-Bargaining-An-Indispensable-Tool-in-The-Criminal-Justice-system/Page1.htm>> accessed on 29 June 2013.

⁴⁶ *Brady v United States* [1970] 397 US 742, 753.

⁴⁷ B Ajibola, 'Plea Bargain is Corruption' *Punch Newspaper* (Nigeria), available at <<http://www.punchng.com/Articl.aspx?theartic=Art200708052363678>> accessed on 29 March 2013.

⁴⁸ Constitution of Nigeria of 1999, as amended by s 36. See Constitution of the Federal Republic of Nigeria, 1999, available at <<http://www.nigeria-law.org/ConstitutionOfTheFederalRepublicOfNigeria.htm>> accessed on 20 August 2014.

eye for a lengthy period of time. It means that people who would otherwise have had to attend court no longer need to. For the court and the prosecutor, plea bargaining ensures that justice is rendered in the context of a crowded calendar.

However, and in spite of the benefits just outlined, serious concerns remain concerning the legitimacy of the plea bargaining process. The biggest concern is that plea bargaining assigns guilt where none may exist. In other words, an innocent defendant may decide to plead guilty to a lesser offence for fear that, if he does not, he might be found guilty of a more serious offence at trial. In addition, the knowledge that the option of resorting to a plea bargain exists can lead to poor police investigations and poorly prepared cases on the part of the defence and the prosecution. In other words, police officers and counsels may use plea bargaining as a means of concluding a mutually beneficial deal rather than, as they should, pursuing justice. In doing so, the importance of establishing the truth about what may or may not have happened and the legal consequences of the alleged act or acts is forgotten. It must also be mentioned that many view the practice of plea bargaining as unconstitutional because it takes away an accused's right to a trial. A former Chief Justice of Nigeria has stated that '[t]he concept is not only dubious but was never part of the history of our legal system – at least until it was surreptitiously smuggled into our statutory laws with the creation of the Economic and Financial Crimes Commission'.⁴⁹ He further stressed that the concept of plea bargaining is indeed a threat to the criminal justice system in Africa.

7 PLEA BARGAINING IN NIGERIA

The argument against the adoption of plea bargaining is about its close relationship with rewards, threats, coercion and selective prosecution, all of which lead to queries on the justness of legal outcomes. Plea bargaining is a relatively new concept in Nigeria. Thus, it has been observed that, '[n]o law set out any modality for plea bargaining, it is not until recent times that it became a matter of public discussion'.⁵⁰

The basis for plea bargaining in our laws is to be found in the Economic and Financial Crimes Commission (EFCC) Act. The relevant section provides thus:

Subject to the provisions of section 174 of the constitution of the Federal Republic of Nigeria 1999 which relates to the power of the Attorney General of the federation to institute; continue or discontinue criminal proceedings against any provisions in any court of law, the commission may compound any offence punishable under this Act by accepting such sums of money as

⁴⁹ D Musdapher, 'Alternative Dispute Resolution' Abuja Summit, Nigeria, 15 November 2012.

⁵⁰ W Danlami, 'Bargain: Escape Route?', available at <http://www.amanaonline.com/Articles/art_4522.html> accessed on 3 March 2013.

it thinks fit, not exceeding the amount of the maximum fine to which that person would be liable if he had been convicted of that offence.⁵¹

A more direct reference to the practice of plea bargaining can be found in the Laws of Lagos State:

[T]he prosecutor and a defendant or his legal practitioner may before the plea to the charge, enter into an agreement in respect of

- a) a plea of guilty by the defendant to the offence charged or a lesser offence of which he may be convicted on the charge, and
- b) an appropriate sentence to be imposed by the court if the defendant is convicted of the offence to which he intends to plead guilty.⁵²

The rise in popularity of plea bargaining is the result of its use in a number of recent high-profile cases. (The general public's belief that the practice is only made available to defendants from the upper classes of society is, however, largely misplaced.)

However, Adedokun Adeyemi, among others, has argued that plea bargaining is not specifically provided for under any Nigerian Federal legislation, and that the nearest legal provision to plea bargain is section 14(2) of the EFCC Act.⁵³ He concludes that the use of section 14(2) of the EFCC Act to make defendants make restitutions is in derogation of section 29(2) of the Evidence Act⁵⁴ and is being abused in Nigeria's criminal jurisprudence. However, he admits that plea bargaining expedites the conclusion of the criminal process, reduces the cost of prosecution and that in the United States, more than 90 per cent of criminal cases are settled through plea bargain.

It has also been contended that it is an embarrassment to Nigeria's judicial system, since the concept encourages people who unlawfully enriched themselves with public funds to escape long sentences, giving

⁵¹ Section 14(2) of the Economic and Financial Crimes Commission Act, Laws of the Federation of Nigeria, 2004. See also, N Victor, 'Nigeria: The Problem with Plea-Bargain' *Vanguard Newspaper* (Nigeria) 10 October 2007.

⁵² Section 76(1) of the Administration of Criminal Justice Law 10 of 2007 of Lagos State.

⁵³ O Oladipo, 'Plea Bargain and Nigeria's Criminal Justice Administration' *The Nation* 11 January 2013, available at <<http://www.thenationonline.ng.net/new/news/plea-bargain-and-nigerias-criminal-justice-administration/>> accessed on 17 June 2013.

⁵⁴ Evidence Act, Laws of the Federation of Nigeria, 2011. Section 29(2) of the Act provides that:

If, in any proceeding where the prosecution proposes to give in evidence a confession made by a defendant, it is represented to the court that the confession was or may have been obtained—

- (a) by oppression of the person who made it; or
- (b) in consequence of anything said or done which was likely, in the circumstances existing at the time, to render unreliable any confession which might be made by him in such consequence, the court shall not allow the confession to be given in evidence against him except in so far as the prosecution proves to the court beyond reasonable doubt that the confession (notwithstanding that it may be true) was not obtained in a manner contrary to the provisions of this section.

the impression that only the poor will serve long-term punishment under the law. Thus, it has been argued that plea bargaining 'leads to corruption, and corruption has reduced ... moral values'.⁵⁵

Further, in the Workshop on the Practice and Perspectives of Plea Bargaining in Nigeria,⁵⁶ there was unanimity among judges, lawyers, anti-corruption agencies and other stakeholders in the nation's justice administration system that the inclusion of corruption, murder and sexual offences in a proposed Bill to the National Assembly should be discouraged. This was in view of the attempt by the Nigerian Law Reform Commission (NLRC), through a draft Bill, to include the concept of plea bargaining in Nigeria's Constitution as part of measures to eliminate, or reduce to the minimum, the time and expenses involved in full-scale trials.

However, the Chairman of the Nigerian Law Reform Commission was of the view that the process is subject to Court approval, and that there is no doubt that by pleading guilty to a charge, trial times will be reduced and expenses minimised.⁵⁷ The Chairman also noted the absence of any specific provisions regarding plea bargaining under existing Nigerian federal law, but did acknowledge that section 14(2) of the EFCC Act came close to it.

The argument that plea bargaining should not be made available to those convicted of serious crimes was also raised by the Chairman of the Independent Corrupt Practices and Other Related Offences Commission (ICPC). The Chairman observed that the extension of plea bargaining to persons found guilty of homicide, murder, manslaughter, infanticide, genocide and the like; that is, crimes where lives are terminated forever, is inappropriate.⁵⁸

The withdrawal of the plea bargaining option can and should apply to other serious crimes, namely corruption, rape, fraud and stealing of public funds. Conversely, plea bargaining is applicable in cases where the prosecution is struggling to prove a case of corruption, since the plea bargain agreed upon can be a means of recovering some of the stolen funds.⁵⁹ This pragmatic approach has achieved success in

⁵⁵ B Aturu, quoted in O Oladipo, 'Plea Bargain and Nigeria's Criminal Justice Administration' *The Nation*, available at <<http://www.thenationonline.ng.net/new/news/plea-bargain-and-nigerias-criminal-justice-administration/>> accessed on 17 June 2013.

⁵⁶ Workshop on the Practice and Perspectives of Plea Bargaining in Nigeria, Abuja, 7 May 2013.

⁵⁷ Cited in K Falade, 'Plea Bargain: A Dubious Saviour?', available at <<http://www.nationalmirroronline.net/new/plea-bargain-a-dubious-saviour/>> accessed on 3 September 2014. Justice (Retired) Umaru Atu Kalgo was Chairman from 2009 after serving as a Justice of the Supreme Court of Nigeria.

⁵⁸ Ibid. Ekpo Nta is the Chairman of the ICPC.

⁵⁹ Ibid. Justice Isaq Bello is a Justice of the High Court of the Federal Capital Territory in Abuja, Nigeria.

several Nigerian cases, including those concerning *Cecilia Ibru*,⁶⁰ *Tafa Balogun*,⁶¹ *Igbinedion*,⁶² and *Alamieyeseigha*,⁶³ although the fact that the offenders were able to escape severe punishment as a result of their agreeing to plea bargain, caused a considerable public outcry.

7.1 *The Effects of Plea Withdrawal*

Plea bargaining is ordinarily expected to be on the basis of voluntariness. However, if the accused person is informed of a heavier sentence than the one he anticipated, he may decide to withdraw his guilty plea.⁶⁴ Where the defendant withdraws his guilty plea before sentencing, the trial will commence *de novo* (from the beginning) before a new judge or magistrate.⁶⁵ The statutory effect of such a plea withdrawal is that the agreement will lapse, and the admission made by the accused will not be admissible against him in a subsequent hearing, and both the prosecutor and the defendant are banned from entering into another plea bargain on the same facts.⁶⁶ In the same manner, Rule 410 of the Federal Rules of Evidence, applicable in the United States, provides that a guilty plea (whether in civil proceedings or criminal proceedings) that is later withdrawn is inadmissible against the defendant who made the plea or who participated in the plea bargaining discussion.⁶⁷ The

⁶⁰ This was a case of misuse of depositors' funds brought against the former Chief Executive Officer of the Oceanic Bank, Cecilia Ibru. The prosecution and the defence agreed under plea bargain that Ibru should forfeit 199 assets and funds worth about 190 billion Nairas, and be sentenced to six months imprisonment. *FRN v Dr (Mrs) Cecilia Ibru* FHC/L/297/2009.

⁶¹ *FRN v Tafa Balogun* FHC/ABJ/CR/14/2005.

⁶² Igbinedion had faced 191 count charges. On 17 December 2008, following the plea bargaining process, these were narrowed down to one. On 19 December 2008, an Enugu High Court fined Igbinedion, a former Governor of Edo State, the sum of 3.5 million Nairas after he entered into a plea bargain with the Economic and Financial Crimes Commission. *FRN v Lucky Onosakhare Igbinedion* FHC/EN/68/2008.

⁶³ Alamieyeseigha pleaded guilty before a Nigerian court to six charges on 26 July 2007 and was sentenced to two years in prison on each charge. However, because the sentences were set to run concurrently and the time was counted from the point of his arrest nearly two years before the sentences, his actual sentence was relatively short. Many of his assets were ordered to be forfeited to the Bayelsa State Government. On 27 July 2007, just hours after being taken to prison, he was released due to the time already served in detention during trial (*Associated Press International Herald Tribune*, 28 July 2007). *FRN v DSP Alamieyeseigha* (2006) 16 NWLR (pt 1004) 1.

⁶⁴ Section 76(9)(b) of the Administration of Criminal Justice Law (n 52).

⁶⁵ Federal Rules of Evidence, Rule 410, 51 FRD315, 355.

⁶⁶ Section 76(10) of the Administration of Criminal Justice Law (n 54). At least that is what the law states. However, the problem is with what is actually obtainable in practice.

⁶⁷ Federal Evidence Review, Federal Rules of Evidence 2014, available at <http://www.federalevidence.com/rules-of-evidence#return_dropbox> accessed on 3 September 2014.

prohibition on the use of guilty pleas in later proceedings, in so far as US case law is concerned, dates back to the late-nineteenth century.⁶⁸

In *Kercheral v United States*, the defendant asked to withdraw his guilty plea after finding out he would receive a much higher sentence than the prosecutor had promised during negotiations.⁶⁹ The trial court granted the request, but went ahead and in fact allowed the facts of the plea to be introduced at trial. At this stage, the Supreme Court invalidated the practice. The temptation to use plea statement or confessional statements against the defendant is rife. As may be deduced from the *Kercheral* case, the most useful incriminating statements are made during plea negotiations.⁷⁰

More troubling is the decision reached by the US Supreme Court in *US v Mezzanetto*.⁷¹ The case involved a Statute specifying that incriminating statements made by a defendant in the course of a plea bargain may not be used against him at trial. During the plea bargaining process, the defendant, at the behest of the prosecution, agreed not to invoke the statutory provision in the event that the informal process was unsuccessful and the matter went to trial. The issue before the court was whether the defendant was allowed to waive the statutory protection available to him. The court held in the affirmative. Justice Souter, while dissenting, pointed out that 'Mezzanetto is well in the way to having made Rule 410 and Rule 11(f) dead letters'.⁷² According to Okwori, Justice Souter's declaration was prophetic. The court in *United States v Birch* explicitly allowed plea statements to be used in the prosecution's case in chief.⁷³

These developments are troubling and have serious implications for the rules of evidence. The decision in *Mezzanetto* undermines the credibility of plea bargaining as a means of administering criminal justice. If a defendant believes or suspects that what he says in confidence at the bargaining table will be used against him at trial, he is hardly likely to approach the table in the first place. By contrast, the prosecutor stands to gain a great deal from eliciting incriminating statements from the defendant, 'whom they know is desperate to obtain sentencing benefits of a guilty plea, but with whom they have no intention to settle with',⁷⁴ since he (the prosecutor) will be able to use

⁶⁸ C Slobogin, 'The Story of Rule 410 and *United States v Mezzanetto*: Using Plea Statements at Trial', available at <<http://www.ssrn.com/abstract=896785>>. Slobogin's analysis of the *Mezzanetto* case *vis-à-vis* the history of Rule 410 convincingly postulates that the much touted Rule 410 has lost its substance and purpose.

⁶⁹ *Kercheral v United States* 274 US (1927).

⁷⁰ *Ibid* 4.

⁷¹ *US v Mezzanetto* 513 US 196 (1995).

⁷² *Ibid*.

⁷³ *United States v Birch* 156 USF 3d, 1321-23 (DC Cir 1998).

⁷⁴ Slobogin (n 68) 6.

these statements to make a better, stronger case against the defendant when the matter comes to court.

A guilty plea occasioned by a plea bargain is not recognised under Nigerian formal law (other than being implied in the EFCC Act). However, as is evident from the various cases discussed in this article, plea bargaining is gradually becoming part of judicial practice. But it is unlikely to be effective if our courts follow the court in *Mezzanetto* and allow the prosecution to bring to trial evidence that works against the defendant, where such evidence was given in confidence by the defendant during the plea bargaining process.

8 CONCLUSION

This article espoused the applicability of alternative dispute resolution (ADR) and plea bargaining in the Nigerian criminal justice system. Though both are relatively novel systems of criminal procedure, they are important and achievable alternative mechanisms in the context of criminal justice.

In the United States criminal justice system, the dominance of plea bargaining is such that it is used to resolve 90 per cent of criminal cases. The popularity of the practice is largely due to its ability to resolve issues speedily and inexpensively when set against the time and costs associated with traditional criminal procedures. It also avails the defendant of 'lenient' sanctions and the opportunity to contribute towards the restorative justice process.

The United States' reliance upon and commitment to plea bargaining suggests that other jurisdictions might benefit from adopting the same approach. However, as pointed out in this article, plea bargaining has several demerits. For the defendant, there is the argument that he suffers the deprivation of fundamental human and constitutional rights; most notably, the right to a trial, and that he may be forced or coerced into agreeing to whatever the prosecution wants, with the result that the voluntariness of the plea is undermined. Furthermore, a plea withdrawal works against the defendant where the courts have sanctioned prosecutorial use of plea statements in any subsequent trial. For the victim, the punishment the offender receives as a result of a successfully concluded plea bargain might seem unnecessarily or unreasonably light.

In the case of Nigeria, plea bargaining is the most widely used form of alternative dispute resolution. However, it is suggested that other forms of ADR should be developed alongside the existing plea bargaining process in order to improve Nigeria's criminal justice system. Such other programmes include victim and offender mediation, family group conferencing, victim assistance programmes, community crime prevention programmes, sentencing circles, and ex-offender assistance. In jurisdictions such as the United States, the administration of

criminal justice has evolved in appreciable measures as a result of the use of these various ADR programmes. For Nigeria to evolve in the same manner, it must break free from the conventional retributive justice system and set about transforming itself in accordance with the principles of restorative justice. In addition, institutions with well-planned structures and trained ADR personnel should be commissioned to entrench these various ADR programmes so that they are not merely seen as informal structures, but statutorily created institutions that have legal force.

Thus, federal acts, State laws and rules of courts should, as far as is practicable, specifically provide for these various forms of ADR programmes. Existing legislations that allude to these programmes should be reviewed with a view to making the relevant provisions binding upon all stakeholders in the Nigerian criminal justice system. If this is achieved, it is hoped that the dispensation of justice would run smoothly, since not all criminal cases would have to go through the rigours of litigation.

However, as already suggested, only less serious offences should be subjected to plea bargaining. Thus, crimes such as corruption and fraud by public officers, murder, rape and armed robbery should not be subjected to plea bargain in order to preserve the sanctity of the administration of criminal justice. Perpetrators of crimes such as these should be tried by a formal court of competent jurisdiction and if found guilty, convicted and sentenced appropriately.