Alternative Dispute Resolution and Its Relevancy in Criminal Matters

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ABSTRACT
Disputes may arise in the course of human interactions or endeavours and most times may be between individuals or between individuals and government. Quite often such disputes may be resolved through the conventional courts system or through an instrument for the application of equity rather than the rules of law otherwise known as Alternative Dispute Resolution process which in most cases are cost effective, quicker and non-time consuming. Alternative Dispute Resolution is a broad spectrum of structured processes including mediation and conciliation but excludes litigation though it may be linked or integrated with litigation and involves the assistance of a neutral third party. The thrust of this work beckons on the researcher’s interest to ascertain the relevancy of alternative dispute resolution process under the Nigerian jurisprudence in resolution of criminal matters. This research will lay emphasis on the various methods employed in dispute settlements apart from the conventional courts such as arbitration, mediation, conciliation, negotiation and the recently adjudged process referred to as “Plea Bargain.

Keywords: Alternative Dispute Resolution (ADR), Plea Bargain and Arbitration.

1. INTRODUCTION
In the course of diverse human relationships, disputes are bound to arise in businesses and commercial transactions, between family members, between employers and employees. Dispute may also arise in the relationship that exists between citizens and the state or the Government as the case may be; depending on the circumstances that led to such disputes. However, in either of these situations, such dispute can be resolved either through litigation by instituting a civil action or criminal proceedings in a court of law or more amicably through any of the Alternative Dispute Resolution (ADR) mechanisms such as arbitration, mediation, conciliation, negotiation, early-neutral evaluation to mention a few.

Disputes arising out of the duties¹ and responsibilities arising out of the relationship between the citizens and the State most times results in the institution of criminal proceedings against a person that failed in its duty towards the State. This is irrespective of the fact that some other person is the victim of such an act because all criminal conduct is seen as a crime against the State and not necessarily against the victim of the crime. The most important consideration in this instance or situation is whether the State through its legislation has criminalized such an act by prohibiting its commission in its extant laws.

The above notwithstanding, our courts are seriously congested. Litigation often involves a lengthy, expensive and formal trial process where litigants have no control over who presides over their dispute, the venue of the proceedings or the scheduling of hearings or proceedings. Furthermore, the litigation process is adversarial. It ends in a win-lose situation, which may destroy existing relationships but where a matter is referred to an alternative dispute resolution mechanism, the parties can choose their arbitrator or mediator, they can also choose a venue that is convenient to them; they can choose the procedure to be

¹ The duties a citizen owe the State and the responsibilities of the State towards its citizens in the case of Nigeria are set out in Chapter II of the Constitution of the Federal Republic of Nigeria, 1999(as Altered) which contains the Fundamental Objectives and Directive Principles of State Policy contained in Sections 13-24 which are however non-justiciable by virtue of Section6(6)(c) of the 1999 Constitution as altered.
adopted. It is against this background that this work shall examine the various mechanisms of ADR and attempt at seeing how they can be employed in the resolution of criminal proceedings, where and if possible.

2. Definition of Terms

It is most appropriate at this juncture to elucidate some of the alternative dispute resolution processes.

2.1 Arbitration

This is a method involving one or more neutral third parties who are usually agreed upon by the disputing parties and their decision is final. The decision arrived at by arbitrator(s) is called an award and same is enforceable like a court judgment. The agreement to arbitrate must be in writing, signed, and the agreement is irrevocable except by agreement of the parties or by leave of court. In Nwaenang v. Ndakarke & Ors., it was held thus:

*The Supreme Court in the recent case of Agala v. Okusin*, per Ogbuagu, JSC, had defined arbitration simply as follows: “An arbitration is a reference to the decision of one or more persons with or without an umpire of a particular matter in difference between the parties”. See also NNPC v. Lutin Investment Ltd, Black’s Law Dictionary, 6th Edition, Ihunwo v. Ihunwo per Garba, J.C.A (Pp. 59-60 paras. F-A).

Also in Kano State Urban Development Board v. Fanz Construction Company Ltd the Supreme court, on the meaning and nature of arbitration, held as follows:

Halsbury’s Laws of England says as follows as to the meaning of an arbitration itself:- “An arbitration is the reference of a dispute or difference between not less than two parties for determination, after hearing both sides in a judicial manner, by a person or persons other than a court of competent jurisdiction. The persons to whom a reference to arbitration is made are called arbitrators. Where provision is made that in the event of disagreement between the arbitrators (usually in such case two in number) the dispute is to be referred to the decision of another, or third, person, such person is called the umpire. The decision of the arbitrator or umpire is called the award.

From the above, it is clear that arbitration is a process of dispute resolution driven by the agreement of parties to submit their dispute which may arise out of their business relationship or transactions to an impartial third party for his decision which is binding on the parties.

2.2 Mediation

This is essentially a non-binding dispute resolution mechanism involving a neutral and impartial third party who tries to help the disputing parties reach a mutually agreeable solution. The third party here is impartial, does not take decisions for the parties rather he helps them in identifying

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5 (2010) 10 NWLR PT 1220 P. 412 @ 448.


7 (2014) ALL FWLR (199) 1444 @ 1453.

8 [(1990) LPELR – 1659 (SC)]


11 See also Ikem v. Vidah Packaging Ltd & Anor. (2011) LPELR-3825 (CA) where it was held that if there is a distinct agreement to appoint an umpire to determine the difference between the parties and other conditions are present, there is arbitration.
the issues and interests that need to be solved. An agreement reached by the parties during mediation is enforceable if the terms of the settlement are reduced into writing by the parties and witnessed by their counsel. The terms of settlement will thereafter be filed in court and made the judgment of the court in the form of a consent judgment. In other words, what a mediator does is to assist the parties in dispute in identifying issues in contention and also assisting them in resolving these disputes and arriving at some form of compromise. He however does not make a binding decision.

2.3 Conciliation

The process of conciliation is basically that of mediation. The only difference is that the neutral third party is usually an expert in the field or area of dispute in which he has being called upon to conciliate.

2.4 Negotiation

Negotiation is a process whereby parties discuss and agree to terms or reach certain agreement without the aid or intervention of a third party. Negotiation basically involves some form of ‘give and take’ from either parties or some form of compromise by the disputing parties. It is important to note that the law does not prohibit parties to a dispute from engaging in negotiation for the purpose of settling their dispute.

3. The Place of ADR in the Determination of Criminal Proceedings

The institution of criminal proceedings by the state against an offender means that an offence or a crime has been committed for which the person is to be tried and punished when and if convicted. It is important to note that the Nigerian Criminal Justice System is retributive in nature. It places much premium on inflicting punishment and pain on the offender than any real attempt to reform and reintegrate the offender back into the society. From the time an offence is committed to the trial and judgment, all our legal rules is concerned with is proving guilt according to the letters of the law. Little or nothing is done about repairing the damage done by the crime. Victims of crime and even the community who suffer the direct impact of the offence are relegated to the background. Our culture of “an eye for an eye” and “a tooth for tooth” which most times influences the criminalization of certain acts or conducts is most probably informed by the punishment imposed by Almighty God in the Bible on Adam and Eve after they disobeyed him. Apart from other forms of punishment and sanctions, they were also banished so to say from the Garden of Eden. This is where we believe ADR could be employed in the resolution of criminal proceedings so as to cure the defect as it were and cater for all parties affected by the commission of a crime which is subject of criminal proceedings. At this point, it would be necessary to


13 On whether the courts will treat the terms of settlement arrived at by the party lightly, it was held in MR. Tunde Folotin & Anor. v. Comrade Sam A. Idowu (2013) LPELR-22123 that: “A party shall not be allowed to blow hot and cold in an agreement he had tacitly endorsed and subscribed to, this will be contrary to public policy and as it relates to our jurisprudence it is irrational and unacceptable. This court made a commendable point on it in the case of Ezirioha v. Ihezuo (2009) LPELR (4122) where it held at page 20 thus:- “where parties and concerned members of the community elect that a dispute be settled out of court and in furtherance of the same there was mediation and the terms of settlement announced which are acceptable to the parties, the court of justice should not treat such mediation lightly. Since agreement are meant to be honoured and equity acts in personam the law and equity will act in unison to stop a party to such mediation or out of court settlement from reneging and acting to the contrary of what he had accepted.”

14 A.D. Abimbola: Applicability of Alternative Dispute Resolution in Nigerian Criminal Law; LL.M. Student at the Faculty of Law, University of Ibadan.

15 NNPC V. Iorshase (2008) All FWLR (PART 403) 1299 @ 1230 Paras. A-B(CA).

16 O.B. Uruchi, LL.M; ACIArb(UK); Pnm. Coordinator, Legal Clinic/Lecturer, Department of Public Law, Faculty of Law, Nigeria Police Academy, Wudil, Kano State: Creative Approaches to Crime: The Case for Alternative Dispute Resolution (ADR) in the Magistracy in Nigeria; Journal of Law, Policy and Globalization, VOL. 36, 2015.

17 Genesis 3:11-14. KJV.
define what a crime or an offence is. Section 2 of the Criminal Code, which is applicable to Southern Nigeria, provides that an act or omission which renders the person doing the act or making the omission liable to punishment under this code, or under any Act, or Law or under any Statute is called an offence. Section 28 of the Penal Code Act, applies to the Northern Nigeria. In defining the word “offence” it provides that except where otherwise appears from the context, the word ‘offence’ includes an offence under any law for the time being in force while Section 29 defines “illegal” as everything which is prohibited by law and which is an offence or which furnishes ground for a civil action is said to be illegal.

Punishment on the other hand could be defined as a penalty or sanction imposed on an individual having been found guilty of an offence. In most cases, punishment ranges from terms of imprisonment (custodial sentence) with or without payment of fines to sometimes forfeiture of confiscated assets depending on the nature of the offence. For example, in corruption and fraud related cases, punishment is also imposed in the form of forfeiture of the proceeds of the corrupt or fraudulent acts which deprives the offender the fruits of his/her fraudulent actions.

The Criminal Justice System could be said to refer to those processes that lead to the investigation, trial and punishment of crimes. It includes the effective exercise of investigatory and prosecutorial powers of the Police and other law enforcement agencies, the judicial functions of the law courts as well as the duties and functions of the Nigerian Prisons Service. It should be noted that the courts in Nigeria are enjoined to encourage and promote the amicable settlement of dispute wherever possible and at any state of the proceedings. Appreciating the importance of ADR mechanism in the speedy dispensation of justice even at the apex court, the Rules Advisory Committee of the Supreme Court is currently reviewing the Supreme Court Rules to accommodate the establishment of the Supreme Court Mediation Centre (SCMC) similar to other court connected ADR centres that exists in some State High Courts. Also, the Rules of Professional Conduct for Legal Practitioners made pursuant to the Legal Practitioners Act 2007, enjoins a legal representative to inform his client of the option of ADR mechanism before resorting to or continuing litigation on behalf of his client. If and when parties do arrive at some form of settlement, they simply submit their terms of settlement to the court which then is adopted by the court as consent judgment.

Alternative Dispute Resolution (ADR) is mostly employed in the resolution of civil matters like dispute arising out of commercial transactions or contracts, labour/industrial dispute between employer and employee, environmental disputes, family/matrimonial dispute especially in relation to custody and maintenance. Although, the Arbitration and Conciliation Act does not

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19 Section 28 Penal Code Act, Cap P3. LFN 2004
20 Section 29 Penal Code Act, Cap P3. LFN 2004
21 See Section 17 of the Federal High Court Act, dealing with reconciliation in civil and criminal cases.
23 In Tunde Folarin & Anor. v. Comrade Sam A. Idowu (2013) LPELR – 22123, it was held thus: “In Woluchem v. Wokoma (1974) 3 SC 153 at 166 the Supreme Court per Ikekwre JSC explained features of a consent judgment as follows:- “In order to have a consent judgment, the parties must be ad idem as far as the agreement is concerned; their consent must be free and voluntary; and the terms of settlement must be filed in court. When the court makes an order based upon such terms of settlement, there emerges a consent judgment, from which the parties could appeal only by the leave of the court.” Also in Adedeji v. Olosso (2007) 5 NWLR (Pt. 1026) 123 the Apex court further defines consent judgment thus:- “A consent judgment means when the parties unequivocally agree to Terms of Settlement which they mutually refer to the court as a basis for the court’s judgment. By their mutual agreement to settle the matter, the have given their consent to end the litigation. That makes it a consent judgment. “Per Oseji, J.C.A. (Pp. 39-40, paras. C-A).
specifically set out subject matter that it considers amenable to arbitration, section 57 of the said Act defines “arbitration” as a “commercial arbitration …” and the word “commercial” is also defined as “all relationship of a commercial nature including any trade transactions. It is however rarely employed in the resolution of criminal matters. In fact, B.J. Export & Chemical Co. Ltd., it was held, on the nature of arbitrable dispute that:

It is trite that the dispute 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 KSUB v. Franz Const. Co. Ltd.

The above notwithstanding, there are a few ways in which ADR can lead to a just, effective and speedy determination of criminal proceedings.

3.1 Plea Bargain as a Form of ADR in Criminal Proceedings

Plea bargain can be defined as a process whereby an accused person and the prosecutor enter into negotiation towards an agreement under which the accused person will enter a plea of guilt in exchange for a reduced charge or a favourable sentence recommended to the judge by the prosecutor. In FRN v. Ighinedion & Ors, it was held thus:

What is a plea bargain arrangement? Bryan Garner’s Black’s Law Dictionary 8th Edition at pg. 1190 defines plea bargain as “A negotiated agreement between a prosecutor and a criminal defendant whereby the defendant pleads guilty to a lesser offence or to one of multiple charges in exchange of some concession by the prosecutor usually a more lenient sentence or a dismissal of the other charges. Per Ogunwumiju, J.C.A. however in Gava Corporation Ltd V. FRN, on the meaning, concept and types of plea bargain, it was held thus:

However, Black’s Law Dictionary (Ninth Edition) on page 1270 provides the meaning of some of the concepts which aid or designed for the quick or expeditious disposal of criminal cases such as plea bargain, in my considered view is. The concepts are: 1. “Plea bargain” – A negotiated agreement between a prosecutor and a criminal defendant whereby the defendant pleads guilty to a lesser offence or to one of multiple charges in exchange for some concession by the prosecutor, usually, a more lenient sentence or a dismissal of the other charges. – Also termed plea bargain agreement; negotiation plea; sentence bargain. 2. “Charge bargain” – A plea bargain in which a prosecutor agrees to drop some of the counts or reduce the charge to a less serious offence in

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25 (2002) LPELR – 12175 (CA)
26 (1990) 4 NWLR (Pt. 142)1.
28 The Respondent was the Executive Governor of Edo State between 1999 and 2007. A charge was preferred against the Respondent along with six(6) others natural and juristic persons on 31st January, 2011 before the Federal High Court Benin, for offences of money laundering of funds allegedly belonging to the Edo State Government and Local Governments in Edo State. After the Accused persons were served with the charge along with the proof of evidence, all the accused persons jointly filed a motion on notice dated and filed on 4th February, 2011 praying the trial court to set aside the charge preferred against them for want of jurisdiction on the ground that the charge is caught by the doctrine of double jeopardy and condemnation. The position taken by the Respondent was that he and the other accused persons had earlier been charged in Charge No. FHC/EN/6C/2008 between the Federal Republic of Nigeria v. Lucky Nosakhare Ighinedion & Ors and that judgment was entered after a plea bargain agreement and that the prosecution was in law, barred from initiating any further proceedings against all the accused persons including the Respondent herein. (2014) LPELR – 22760.
29 This was also the decisions in Romrig Nig Ltd v. FRN (2014) LPELR – 22759(CA)
30 (2014) LPELR - 22749
exchange for a plea of guilty or no contest from the defendant. 3. “Sentence bargain” — A plea bargain in which a prosecutor agrees to recommend a lighter sentence in exchange for a plea of guilty or no contest from the defendant. The term “no contest” mentioned in the definitions of “charge bargain” and “sentence bargain” is defined on page 1146 thus: “no contest” — A criminal defendant’s plea that while not admitting guilt, the defendant will not dispute the charge. “No contest plea is said to be often preferable to a guilty plea, which can be used against the defendant in a later civil law suit”. Per Lokulo – Sodipe, J.C.A. this position was re-echoed in PML (Nigeria) Ltd v. FRN where it was held that:

In the criminal jurisprudence in this country, it would appear that plea bargain as a prosecutorial strategy or tool is an emerging phenomenon thus there would appear to be no codified guidelines in relation to it as it obtained in some other jurisdictions.... It is in my considered view obvious from the definitions reproduced above, that plea bargain must be a conscious and deliberate act between the prosecution and an accused with a plea of guilty being an overt act on the part of the accused in evidence of the plea bargain. The offence or offences to which the accused must enter a plea of guilty is/are for them to decide or agree upon. Learned lead counsel for the Appellant would also appear to share this view in the portion of the Appellant’s Reply Brief 1 earlier referred to.

The concept of plea bargain in my considered view clearly operates in personam, so to say, and not by privy or proxy. By this I mean that a plea bargain must be a deliberate and conscious act taken by the prosecutor and a particular accused person or specific accused persons in a charge wherein the accused person or each of the specified accused persons must suffer a conviction (I have advisedly not used the word sentence) no matter how insignificant or trivial the offence to which the conviction relates. Undisputedly, the Appellant personally never suffered a conviction of any kind in respect of any of the charges that came up before the FHC Enugu. This condition is sine qua non for a plea bargain to be in place between the prosecutor and an accused relying on plea bargain. An accused person who alleges that he had a plea bargain with the prosecutor cannot emerge from the matter unscarred or without blemish or stigmatization of conviction. Per Lokulo – Sodipe, J.C.A.

Plea bargain also known as plea agreement or plea deal, although not expressly stated to be an ADR mechanism, can be regarded as such because its form and effects conforms to the principles and aims of ADR. For instance, plea bargaining is a case management strategy just like other ADR mechanism also brings about effective case management. Thus plea bargain assists the court and prosecutors to manage their case loads in ensuring that cases that need not go through full trial with the attendant frustrations are not allowed to linger on. It may also contribute towards the successful prosecution of serious offences because prosecution will devote more time and resources to more serious matter. In FRN V. Ighinedion & ORS supra, it was held that:

The advantages of plea bargain include: (1) Accused can avoid the time and cost of defending himself at trial, the risk of harsher punishment, and the publicity the trial will involve. (2) The prosecution saves time and expense of a lengthy trial. (3) Both sides are spared the uncertainty of going to trial. (4) The court system is saved the burden of conducting a trial on every crime charged. Per Ogunwumiju, J.C.A.

31 (2014) LPELR – 22767 (CA)
32 A.D. Abimbola, LL.M. Student at the Faculty of Law, University of Ibadan: The Applicability of Alternative Dispute Resolution in Nigerian Criminal Law.
33 FRN V. Ighinedion. supra
Additionally, plea bargaining is based on the freewill of the accused persons just like the parties in an ADR process must consent to the process (party autonomy). Plea bargain before now was a concept unknown to the Nigerian Legal System. Honourable Justice Dahiru Musdapher, former Chief Justice of Nigeria (CJN), in his opening remarks at the All Nigerian Judges’ Conference on 21 November, 2011 in Abuja, Nigeria, dismissed plea bargain as “a novel concept of dubious origin”, and insisted that “it was invented to provide soft landing to high profile criminals who loot the treasury entrusted to them. He remarked that “plea bargain was never part of our legal system until it was surreptitiously smuggled into our statutory laws with the creation of the EFCC”. Section 14(2) of the Economic and Financial Crimes Commission (Establishment) Act\(^\text{34}\), provides as follows:

(2) Subject to the provisions of section 174 of the Constitution of the Federal Republic of Nigeria 1999 as amended (which relates to the power of the Attorney-General of the Federation of institute, continue, takeover or discontinue criminal proceedings against any person in any court of law), the Commission may compound any offence punishable under this Act by accepting such sums of money as it thinks fit, exceeding the maximum amount to which that person would have been liable of he had been convicted of that offence\(^\text{35}\).

By virtue of this said provision, a number of cases prosecuted by the Economic & Financial Crimes Commission were compounded or determined through plea bargain. Such cases include FRN V. Tafa Balogun\(^\text{37}\) where Tafa Balogun was arraigned at the Federal High Court, Abuja, on charges involving about ₦13 billion obtained through money laundering and theft. The Economic and Financial Crimes Commission (EFCC), in a suit No. FHC/ABJ/CR/14/2005, brought 70 charges against Tafa Balogun covering the period from 2002 to 2004. He entered a plea bargain with the court in exchange for returning much of the property and money. The charges were collapsed into eight counts and the former IGP was given a six-month jail term for each of the eight counts, to run concurrently, as well as a fine of ₦500,000.00 for each count\(^\text{38}\). Others include FRN V. Cecilia Ibru\(^\text{39}\), FRN V. Alameyeisegha\(^\text{40}\), FRN V. Igbinedion\(^\text{41}\) to mention a few.

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\(^{34}\) Section 14(2) of the Economic and Financial Crimes Commission (Establishment) Act 2006.

\(^{35}\) See FRN V. Igbinedion (2014) LPELR – 22760 (CA) where to “compound” was held to mean: “to settle a matter (especially a debt) by a money payment in lieu of other liability or to agree for a consideration not to prosecute a crime. “Per Ogunwumiju, J.C.A. (P. 66, paras. E-F) and where it was also held, on element that must be present before an offence can be compounded by virtue of S. 14(2) of the Economic and Financial Crimes Commission (Establishment) Act, 2004 that: “It is clear to me that the circumstances being relied on by the Respondent as amounting to a compounding of all his total offences by the appellant cannot amount to the situation contemplated by S. 14(2) of the EFCC Act. This court in Chief Patrick Chidolue V. EFCC Appeal No: CA/A/122/2010 delivered on 7/3/2011 had this to say: “The same dictionary gives three elements at common law and under the typical compound statute that must be present before an offence can be compounded. These elements are (1) An agreement not to prosecute (2) knowledge of the actual commission of crime (3) The receipt of some consideration...” Per Ogunwumiju, J.C.A. (Pp. 66-67, paras. (G-C).

\(^{36}\) Plea bargain is also provided for under Sections 74-76 of the Administration of Criminal Justice Law of Lagos State, 2007 which can be the first legislation to localize and import plea bargain into Nigeria’s criminal jurisprudence.

\(^{37}\) A total of 15 Spring Bank accounts were forfeited by Mr. Tafa Balogun. of this number, 4 accounts had zero balance. The total balance in the remaining 11 accounts as of January, 2005 was ₦1,226,518,163.09. In addition to this, 7 treasury bills/commercial papers in the same bank had a total balance of ₦1,017,178,719.42. The two added together came up to ₦2,258,100,516.87. With the addition of the accrued interest of ₦14,403,634.36, the figure came to ₦2,258,100,516.87.

\(^{38}\) A.Y. Shehu; School of Arts and Social Sciences, National Open University of Nigeria, Lagos, Nigeria: Key Legal Issues and challenges in the Recovery of the Proceeds of Crime: Lessons from Nigeria published in International Law Research; Vol. 3, No 1; 2014 ISSN 1927-5234 E-ISSN 1927-5242 Published by Canadian Centre of Science and Education.

\(^{39}\) The accused person, a former Managing Director/CEO of Oceanic Bank, was arraigned before the Federal High Court, Lagos on a 25-count charge alleging financial crimes. 70% of ₦278 billion non-performing loans (NPLs) that bought the bank to financial distress went to Mrs Ibru and members of her immediate family. She had used some companies or nominees (including Oceanic Homes Savings & Loans Limited, certain professional advisers, her son and daughter, her son’s nanny and daughter-in-law) to acquire and mask ownership of assets, including shares of companies and several choice real properties in Nigeria and abroad. Mrs. Ibru pleaded guilty to a less serious charge on the basis of a plea bargain. She was sentenced to a term of six months in prison and a fine, involving a forfeiture of 199 assets scattered all over the world, especially the United State, Nigeria, Europe and the Middle East and shares, worth over ₦190 billion (over US$1.5billion). Had she been found guilty on the more serious
In the TSKJ Consortium (Bonny Island Liquefied Natural Gas) Bribe Scheme, The TSKJ Consortium (consisting of Technip, Snamprogetti Netherlands B.V, Japan Gas Company, Kellogg-Brown Root, a subsidiary of Halliburton) was formed to bid for contracts to build the Bonny Island Liquefied Natural Gas Plant in Bonny, Rivers State. In order to secure the contract, the consortium paid bribes amounting to $170,000,000 to various low and mid-level public officers. When the consortium was charged in CHARGE No. CR/95/10 at Federal Capital Territory High Court of Nigeria, Abuja, AVM Abdullahi Dominic Bello, Mohammed Gidado Bakari, Urban Shelter Limited, Intercellular Nigeria Limited, Tri-Star Investment Limited, TSKJ Nigeria Limited, Technip S.A, Snamprogetti, Kellogg, Brown and Root Inc, Japan Gasoline Corp of Japan, TSKJ Consortium, they separately agreed to an out of court settlement. Among other terms, the following were paid as follows: (a) Technip $30,000,000.00 (b)Snamprogetti Netherlands B.V. - $32,500,000.00 (c) Japan Gas Company $24, 385,000.00 (d) Kellogg-Brown (Halliburton) - $35,000,000.00. The Nigerian Attorney – General, Mohammed Bello Adoke (SAN) in a press conference stated that apart from these fines, the consortium was forced to disgorge profits already made, which pushed the total figure recovered to $170,000,000.00\(^{42}\).

The use of plea bargain in the resolution of these cases however generated some controversy, probably due to the manner in which it was applied. The most recent and most criticized case was that of one Mr. John Yakubu Yusuf who embezzled ₦27.2 billion from the pension fund of retired police officers. He was sentenced to two years imprisonment with the alternative of a fine of ₦750,000,00. He naturally paid the fine. Because of many legal issues this court decision generated, the judge was suspended for one year on account of abusing the legal process even though there was no where he was faulted of misapplying the law.

These controversies probably informed the decision of the National Assembly in its legislative wisdom to include plea bargain in the Administration of Criminal Justice Act 2015\(^{43}\), has made extensive provisions guiding the application of plea bargain. It provides as follows:

\[270(1)\] notwithstanding anything in this Act or in any other law, the prosecutor may:

(a) Receive and consider a plea bargain from a defendant charged with an offence either directly from that defendant or on his behalf;

(b) Offer a plea bargain to a defendant charged with an offence;

\(^{40}\) On or about July 25, 2007, Alamieyeseigha entered a guilty plea as to six counts of knowingly making a false declaration by or about July 25, 2007, Alamieye- isega entered a guilty plea as to six counts of knowingly making a false declaration by or about July 26, 2007, the trial court convicted Alamieyesegha on or about July 26, 2007, imposing a sentence of two years imprisonment and forfeiture of the property involved in the offences for which he was convicted. On or about July 25, 2007, Alamieyeseigha entered into a plea agreement on behalf of his corporation, S & P and Santolina, entering a guilty plea to four counts of money laundering by S&P and a guilty plea to fifteen counts of money laundering by Santolina. On or about July 26, 2007, the trial court convicted S&P, Santolina, and other corporate entities of money laundering and ordered the companies to be wound up. The trial court also ordered the forfeiture of real estate located in Nigeria and three properties held in the name of S&P in London. In addition, the trial court ordered the forfeiture of sums of monies totaling more than $3,700,000. On 9th July, 2009, the total sum of ₦3, 128,230,294.83 realized from the assets was remitted to the Federal Government through the Federal Ministry of Finance in favour of Bayelsa State. A summary of the assets recovered from DSP Alamieyeseigha are as follows: (i) Sales of 5 real estate ₦1,982,915,352.22 (ii) Recovery from Bond Bank ₦1,000,000,000.00 (iii) Legacy Bond recoveries ₦105,314,942.61 (iv) Proceeds from Chelsea Mgt ₦40,000,000.00 (v) proceeds from rent collection ₦60,000,000.00 (vi) Pesal Nig. Ltd bank account ₦ 97,708,387.64 other recoveries are (vii) USA Treasury Cheques $215,000.00 (viii) Chelsea Hotel Management $226,000.00 (ix) Chelsea Hotel Management $226,000.00 (x) Chelsea Hotel Management $2,000.00 (xi) Two properties were returned directly to Bayelsa State i.e. Chelsea Hotel and No. 2 Marscibit Street, Ishaku Rabiu, Wuse II Abuja.

\(^{41}\) Paragraph 270 of the Administration of Criminal Justice Act 2015.

\(^{42}\) G. Obita SAN, FCIArb: Prosecution and Recovery of the Proceeds of Complex Cross Border Corruption Cases held between April 30-May 2, 2014 at Gaborone, Botswana.

\(^{43}\) Section 270 of the Administration of Criminal Justice Act 2015.
(c) where the prosecutor is of the view that the offer or acceptance of a plea bargain is in the interest of Justice, the public interest, public policy and the need to prevent abuse of legal process, he may offer or accept the plea process, he may offer or accept the plea bargain.

The above Section allows the prosecutor and the defendant to enter into an agreement as to the sentence to be recommended for the offence charged or for a plea to a lesser offence. It also states that the prosecutor shall consult the Investigating Police Officer and the victim who is entitled to make representations under (5) to the agreement. Several factors are to be considered in entering a plea bargain agreement which include the defendants cooperation in the investigation and prosecution of other persons; the defendant’s criminal history; the defendants remorse and contrition for the offence committed; prompt disposition of the case bearing in mind the cost of trial and effect on witnesses and possible appeal in addition to the likelihood of obtaining a conviction and need to avoid delay. Due consideration will also be given to the defendant’s willingness to restitute the victim of the crime. The plea bargain shall then be reduced into writing and the Presiding Judge shall be informed accordingly who shall then confirm from the defendant that he voluntary and in the absence of undue influence entered into the said plea bargain agreement.

From the above stated provisions, appropriate guidelines have now been set in place for plea bargain in the resolution of criminal proceedings which will ensure its effective and diligent application in deserving cases. Due to the nature of our retributive criminal justice system coupled with the devastating effect of corruption in our country, the belief is that plea bargaining in most cases renders custodial sentence ineffective. This in turn encourages potential corrupt public officials to perfect their corrupt acts after all, plea bargain will be available to them for them to forfeit some of the stolen wealth and assets in return for pleading guilty to the various charges filed against them. As stated by most prosecutors, it is difficult most times to determine the actual amount stolen or embezzled and then actually recover all of such stolen funds. It is the general belief that custodial sentence should never be taken off the table or open for negotiation in a plea bargain arrangement. Custodial sentence acts as a form of reprise or comfort or consolation to Nigerians that indeed convicted corrupt public officials can indeed go to prison. At the end of the day, it is the researchers humble view that; the problem is not with the idea of plea bargain or plea bargain as a concept. Rather the problem lies in the implementation and the manner it is adopted in the determination of criminal proceedings instituted against corrupt public officials.

4. Other ADR Mechanism Employed in Criminal Proceedings.

Another criminal ADR mechanism is Victim-Offender mediation. This is also known as the victim-offender reconciliation programme or victim reparation program. The use of mediation is expanding in the criminal justice system, raising both exciting possibilities and troubling issues. The purpose of this is to promote direct communication between the victim and the offender. The victim has the opportunity to ask questions, address the mental, psychological and emotional trauma caused by the crime and its aftermath and seek reparation. That is it focuses on restitution and reconciliation of crime related offenders through one on one meeting between

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44 See Section 270(3)-(18) of the Administration of Criminal Justice Act, 2015.
45 This might have also informed the Federal High Court (Corruption and other Related Offences) Sentencing Guidelines & Practice Direction, 2015 which came into effect on 12/5/15. The objective of these Guidelines and Practice Direction is to set out the procedure for sentencing of corruption and other related offences for the purpose of ensuring uniformity in sentencing in the Federal High Court.
victims and offenders between trained mediators. This method is the oldest and most widely used form of ADR in criminal cases in other jurisdiction especially when juveniles are involved. Conferencing is another ADR criminal mechanism. This process build on the victim-offender mediation programme by bringing together the individuals involved in the criminal offence, members of their families and the broader community. In conferences, family members of victims and offenders can provide support and additionally can describe their ‘secondary victimization’. It is used in a number of foreign jurisdictions especially New Zealand and Australia which have statutory based schemes for such criminal ADR mechanism48.

Conclusion

It is our belief that the Nigerian Criminal Justice System should and can evolve more than it has to accommodate the utilization of ADR mechanisms. However, this should be in deserving cases. We do not think that we have evolved to the point where ADR is applied across board in all criminal matters. Plea bargain has been applied mostly in corruption and other fraud related cases. It seem it would be ridiculous in applying plea bargain in cases involving homicide, armed robbery, kidnapping, rape and other sexual offences, terrorism related cases etc where the punishment is either death or life imprisonment. Due to the retributive nature of our criminal justice system, it is expected that harsh criticisms and opposition would herald the attempt to plea bargain in such cases not to mention its actual application and implementation. Another factor for such opposition is due to the heinous nature of such crimes or offences which is such that life is taken or destroyed or the quality of life is so reduced to the barest minimum that it is no longer worth living owing to either the physical, emotional or psychological harm occasioned by the commission of such crimes. In view of all that has been discussed and examined, it is applied in the determination and resolution of criminal matters. Its application should be encouraged considering the power of ADR and its ability to stretch beyond the norm and still stay true to its form.