

Expanding the Scope of ADR In the Criminal Justice System

By

Dr. K. I. Laibuta Carb FCI Arb

(Attorney at Law, Legislative Counsel, Chartered Arbitrator & Mediator)

Introduction

The maintenance of social order and the existence of communal life depend on the extent to which we are able to effectively satisfy our competing needs and interests. Our capacity to manage conflicting needs and interests is dictated by our dispute resolution strategies, some of which have yielded fruit while others have been less effective. For decades, the judicial system has been under scrutiny raising more questions than answers as to the suitability of civil litigation and the retributive approach to criminal justice. Today, we pose the question: “Is there room for ADR in the criminal justice system and, if so, to what end and degree?”

At the age of nineteen, Musa was charged with and convicted of theft by servant in late seventies. He served a jail term of eighteen months and received five strokes of the cane. Besides his scarred backside, he was sodomised while in prison, and his life has never been the same.

In 1989, a boy of fifteen was arrested by police officers on mistaken identity while walking along a Nairobi street and bundled into a waiting van. In less than a week, he was dumped into Shimo La Tewa Prison on the allegation that he had escaped from prison. He had never been imprisoned. No one would listen to his desperate plea that this was a case of mistaken identity. It was not until two years later that he met the boy who he was thought to have been. He was immediately set free to face a deaf world that would hear nothing of his simple truth.

I tell these stories to pose a number of questions. Are prison terms meant merely to punish, deter, reform, or redress the wrong done by the offender? Of what benefit is retributive justice to the victim? Do all terms of imprisonment really protect the public, or do they end up hardening the prisoner into an even more dangerous criminal? Are there ways in which the victim can be redressed while, at the same time, reforming the offender and letting him or her pay for the wrong done? Yes. A restorative approach works, and has been the practice in developed jurisdictions. In Kenya, it takes the form of reconciliation in minor offences against the person, such as assault, malicious damage to property, etc. But how about offences against the public? Hardly. Yet the pressing need to adopt an approach by which an offender is reintegrated into the society after paying for the wrong done should be addressed.

The Pressing Need to Heal

Our criminal justice systems would serve no useful purpose unless it is suitably designed to heal both society and the offender from the adverse effects of the wrong done. That cannot be done in cases where prison sentences become the rule rather than the exception. Granted, there are cases that call for long prison sentences to shield society from dangerous offenders. Even so, it is doubtful that enough is done to address the psychological needs of the prisoner. That explains why serial offenders, regardless of age, go to prison again and again at the taxpayers' expense. Yet, "the obligation of the legal [system] is...to serve as healers of human conflicts...." (Chief Justice Warren E. Burger of the US Supreme Court) The question is, to what extent do we seek to heal?

Think of the prevailing purge on corrupt state and public officers. Would forfeiture of ill-acquired wealth and lighter sentences suffice for those who find it in their heart to cooperate and surrender all? Would it serve any purpose to ignore the possibility of a collaborative approach to remedy the wrong, preferring to crash the villains, but end up with nothing in our hands despite long prison terms? I have no answers to these questions, and I am not sure that anyone does. What is true, though, is that plea bargains would bring us nearer home in our war against corruption. This would not only redress society, but also inflict reasonable punishment on cooperating offenders. In short, restorative justice works.

The Potential of ADR in Criminal Justice

Even though greater emphasis is often laid on market mechanisms in civil claims founded on contract and other private legal relationships, traditional societies in Africa make little or no distinction between civil and criminal liability except in their restorative and retributive approach to claim adjudication. More emphasis is laid on restoring the parties and their communities to the place they would have been but for the offending conduct. These informal justice systems not only seek to heal but also impose punitive sanctions in appropriate cases. In effect, their restorative approach to redress claimants and victims of offences does not ignore the need for retribution or corrective sanctions imposed in certain cases. Their underpinning principles are anchored on the needs and interests of both the parties and of the community at large. To my mind, restorative justice would, in the majority of cases, be a better approach toward redress, correction and punishment where necessary.

The ongoing debate on the extent to which ADR strategies should be applied to enhance criminal justice is of great interest to sociological jurists and criminal lawyers alike. While the Criminal Procedure Code permits reconciliation between a victim and the offender, and subsequent

withdrawal of charges in what is generally referred to as offences against the person, there is no consensus on whether reconciliation should be extended to all types of offences, including public and statutory offences, regardless of their gravity. Moreover, plea bargaining is common across the spectrum of criminal offences. In this regard, there is an ongoing debate as to whether ADR strategies, particularly mediation, should be entrenched into the criminal justice system, laying emphasis on restorative rather than retributive justice.

The ubiquity of plea bargaining demonstrates the relevance of ADR in the criminal justice system. This involves the prosecutor trading a reduction in the seriousness of the charges or the length of the recommended sentence for a waiver of the right to trial and a plea of guilty to the reduced charges. In such cases, the accused and the prosecutor have valid reason for bargain and settlement. In a case in which the evidence of guilt is overwhelming, the prosecution can avoid the inordinate expense and delay of a trial by offering modest concessions to the accused. When the evidence is less clear-cut, the State can avoid the risk of an acquittal by agreeing to a plea to a reduced charge. In view of the fact that substantive criminal law sanctions a wide range of charges and sentences for various types of criminal conduct, and because the procedural law allows prosecutors wide discretion in selecting charges, the prosecution has the discretion to give the defense a substantial incentive to plead guilty to a lesser charge, or to the offence charged in return for a lighter sentence.

In principle, plea bargaining (i.e., charge bargaining, fact bargaining or sentence bargaining) serves to enhance criminal case management and promotes the right to an expeditious trial. Moreover, the conception of social justice calls for “legal justice,” which means that the system for the administration of criminal justice must provide a cheap, expeditious and effective instrument for the realisation of justice for all sections of the society irrespective of their social or economic status.

Institutionalised plea bargaining is prevalent in India, Nigeria and the United States of America, only to name a few, where it plays a significant role in the disposal of criminal cases. Yet, there are those who argue that since a crime is an offence against society at large and the State, its very nature puts ADR out of the reach of the victim and the offender. This paper takes a contrary view

and posits that plea bargaining by means of mediation and reconciliation stand to serve the wider interest of society by taking on modern-day ADR strategies, In so doing, the court, the public prosecutor, the investigating officer, the offender and the victim of the offence charged collaborate in the alternative process towards a victim-centred restorative justice, an approach that meets the needs and interests of, and yields satisfaction for, both the victim and the offender despite the apparent leniency and general public disapproval.

As a means of restorative justice, ADR is used to facilitate the convergence of the needs and interests of the victim, the offender and their immediate community. As explained by Vikrant Sopan Yadav, "... restorative justice focuses on resolving the disputes between the parties[, restoring] and maintaining the harmonious relations between them. It creates opportunities for parties to crime to discuss the crime and its ramification, to repair the harm caused, and restore the amicable relations between [them]."¹

Tony Marshall defines restorative justice as "...a process whereby parties with a stake in a specific offence collectively resolve how to deal with the aftermath of that offence and its implications for the future."² In other words, it is a facilitative process for resolving crime by focusing on redressing the harm done to the victims, holding offenders accountable for their actions and, often also, engaging the community in the resolution of that conflict.³ Simply put, the conception of restorative justice denotes ADR as "... a road the parties must travel to arrive at their goal of mutually satisfactory settlement"⁴ in cases other than capital and sexual offences, which go against the grain of article 159(3) of the Constitution.

The need for restorative criminal justice cannot be overemphasized. Today's dynamic legal system demands a shift from the predominant retributive approach in which the offender is viewed as deserving punishment or rehabilitation in accord with the concept of distributive

¹ Prof. Vikrant Sopan Yadav "ADR as a means of restorative justice" in International Journal of Law Vo. 3(2) (March 2017) pp.59-61 available at www.lawjournals.org (last accessed on 6th August 2018).

² Theo Gavrielides *Restorative Justice Theory and Practice: Addressing the Discrepancy* (Criminal Justice Press Helsinki 2007) pp.2-3.

³ United Nations Office on Drugs and Crime *Handbook on Restorative Justice Programmes* (Criminal Justice Handbook Series New York 2006) p.6.

⁴ Lon Fuller "Mediation - Its Form and Its Functions" s. California Law Review (1971" Vo. 44 pp.305-27.

justice. The proponents of retributive and distributive justice view a crime as a violation of the State rather than the victim. This explains why the State takes charge of the proceedings in which the victim is denied active participation and relegated to the insignificant role of a prosecution witness with the primary objective of punishing or rehabilitating the offender instead of viewing the crime as a matter to be dealt with between the victim and the offender. In contrast, restorative justice is inclusive and focuses on restoring the harmful effects of the act of crime, and actively involves all parties in the criminal process.⁵

Rather than punish or rehabilitate the offender in total disregard for the needs and interests of the victim, restorative justice enables the offender to (a) repent for their crime; (b) strive to mend the injury done; and (c) be reintegrated into the community.⁶ Moreover, revenge in itself is counterproductive. As Ric Simmons rightly concludes, it does not redress the victim or relieve their fears. Neither does it heal or provide closure, or help the society to make sense of the resulting tragedy.⁷ On the other hand, ADR provides an opportunity for the victim, the offender and their community to participate in the process with the shared goal of redressing the harm done, reintegrating the offender into the society, and bringing closure to the matter. There is little doubt that widespread adoption of ADR in criminal proceedings will go a long way in enhancing criminal justice in our dynamic legal system.

Conclusion

Having recognised the need for policy, legislative and institutional reforms to support ADR, African states need to take decisive steps to regulate ADR practice and procedure in both civil and criminal cases. They need to harness and unlock the potential of the multiple legal orders in accordance with which individuals and local communities manage conflicts and resolve disputes in disregard of the popular distinction between civil wrongs and criminal offences.

⁵ Jim Dignan *Understanding Victims and Restorative Justice* (Open University Press 2005) p.94.

⁶ Ric Simmons "Private Criminal Justice" *Wake Forest Law Review* (2007) Vol. 42 p.945.

⁷ *ibid.*