

MECHANISMS OF ALTERNATIVE DISPUTE RESOLUTION IN THE MANAGEMENT OF CASES OF CORRUPTION IN NIGERIA

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ABSTRACT

Corruption is a perennial socio-economic cum political problem that undermines growth and development worldwide. In Nigeria, both private and public institutions have recorded horrendous corruption cases to the extent of seriously undermining the unity, peace and the development of the country. Various attempts to address the menace through the anti-corruption institutions, including the Economic and Financial Crime Commission (EFCC), Independent Corrupt Practices Commission (ICPC) and the conventional court system have always triggered a backlash. Most of these efforts have been well documented in the literature and the reports of government and non-governmental bodies. However, there exists a scanty body of knowledge on the components of Alternative Dispute Resolution in the management of such corruption cases. This paper is an appraisal of ADR mechanisms in the management of corruption cases in Nigeria. First, the paper dissects the contour of corruption and the extent to which it has adversely affected growth of the Nigerian economy. Second, the paper examines the factors that make prosecution grossly inadequate for dealing with corruption cases in Nigeria. It went further to identify and discuss the various alternative dispute resolution processes including plea bargaining, whistle blower policy and out-of-court-settlement that have been initiated and applied to corruption cases in Nigeria. Finally, the paper examines the prospects and challenges of application of ADR to the management of corruption cases in Nigeria.

Keywords: Corruption, Alternative Dispute Resolution, Whistleblowing, Plea Bargain

Introduction

Nigeria grapples with chronic multi-dimensional problems that impede its national growth and socio-economic development. These problems range from inept leadership to highly disillusioned citizenship, poor management of national resources to inadequate funds to service national budgets, external debts burden to inconsistent governments' policies and of course lopsided federal practice to massive corruption in public places. Corruption is one of the key challenges that have held the nation down for decades. The image of the country has been smeared by the involvement of public officials in the practice of grand corruption to the extent that a former British Prime Minister, David Cameron once described Nigeria as one of the fantastically corrupt nations.

This is also evident in the Transparency International's rating that once placed Nigeria as one of the top three most corrupt countries in the world (Ribadu, 2003). Several scholarly works (Maduagwu, 1996; Gboyega, 1996; Agaba, 2017) and other agencies' reports have further attested to the fact that Nigeria's growth and development are constantly being hampered by unbridled sleaze in the conduct of its public officials. For instance, as far back as 1987, the *Political Bureau* held that corruption remains 'the bedrock of Nigeria's political failure'. Also, the 2018 Report of Transparency International ranked Nigeria as the 11th most corrupt nation out of the 52 countries from sub-Saharan Africa. In the same vein, Maduagwu (1996: 13) had about two decades earlier submitted that:

Nigeria presents a typical case of a failed democracy in Africa due largely to corruption. The case of Nigeria is especially tragic because, given its enormous natural and human resources, it had, and still has, the potential of being a shining star for the rest of Africa.

This is an indication that Nigeria's efforts at stamping out corruption or reducing the menace to the bearing minimum are not yielding positive results. The scale of corruption in the country has reached the peak, hence further studies showed that the sum of between \$300 and \$400 billion was lost to corruption in Nigeria since independence (Martini, 2014). More so, the efforts to reduce the socio-economic menace at global level appear unyielding. Studies

by the World Bank place the global statistics loss to corruption at \$1 trillion annually out of which accounted for over 12% of the combined GDP of countries like Nigeria, Kenya and Venezuela combined (Nwabuzor, 2005). The 2021 Annual Report of Transparency International affirmed that over 131 countries had not made progress in their corruption rating despite their multiple commitments (TI, 2021).

In Nigeria, the complex and monstrous nature of corruption has attracted so much concerns that President Muhammadu Buhari had insisted in one of his campaigns that ‘if we do not kill corruption, corruption will kill Nigeria’ (Onoyume, (2015). Buhari vowed to end corruption in Nigeria (Vanguard, 2015: 1) Hence, since he assumed political power in 2015, the anti-corruption crusade has become the focal point of his administration. Addressing the gargantuan problems posed by corruption remains complex. Of course, the instrument of law and the establishment of anti-corruption agencies have been leading in the fight against corruption in Nigeria. To this extent, two major anticorruption agencies, namely Economic and Financial Crime Commission (EFCC) and Independent Corrupt Practices Commission (ICPC) had earlier been established by the previous government for the purpose of investigating and prosecuting corruption cases in Nigeria.

The most important and popular components of these processes include Plea Bargaining, Whistle-blowing and Out-of-court settlement, which have been described as Alternative Dispute Resolution mechanisms in this paper. This paper is an attempt to assess the prospects and challenges of these processes in managing corruption cases in Nigeria. The first section of the paper situates the key terms within a conceptual framework. The second section dwells on discussing the modalities for the application of Plea Bargaining, Whistle-blowing and out of court settlement as ADR processes to corruption cases management. The third aspect of the paper focuses on challenges and prospects of ADR in the management of corruption cases while the final section concludes the paper.

Alternative Dispute Resolution and Corruption: A Conceptual Framework

It is difficult to define the concept of Alternative Dispute Resolution without encountering some etymological challenges. This is because of the ambiguities often associated with the term and its bold applications to various areas of study. Hence, it is not necessary to pursue a definitional rigmarole of what ADR actually means. However, it is important to simply emphasize that ADR is used to describe the different mechanisms or options of conflict resolution procedures other than litigation. In other words, any process that does not follow the conventional court proceedings can be referred to as Alternative Dispute Resolution. In this case, Ware (2008) described Alternative Dispute Resolution as encompassing all legally-permitted processes of dispute resolution other than litigation. It can also be described as an umbrella term that refers generally to alternatives to the court adjudication of disputes such as negotiation, mediation, arbitration, mini-trial and summary trial (Nolan-Haley, 2008).

Other processes of ADR include facilitation, conciliation, executive tribunal and med-arb (or arb-med). In the context of this paper, ADR mechanisms represent those strategies that have been officially adopted to deal with corruption cases apart from litigation. The ones identified in this paper include Plea bargaining, Whistle-blowing policy and Out of Court Settlement. In other parlances, ADR is understood as African Dispute Resolution, Appropriate Dispute Resolution or Additional Dispute Resolution. The whole essence of ADR procedure is to create or explore more flexible, rational, proactive and friendly means of handling cases in a consensual, sustainable and satisfactory way to parties in dispute. Although ADR is recognized as alternative methods to litigation, it must operate with the existing legal framework. In other words, the provision for ADR is not in conflict but rather supports or compliments the law of the land. For instance, ADR cannot be applied to severe criminal cases, which would amount to the subversion of the law and public good (Nagle-Lechman, 2008). In the context of this paper, the most commonly used ADR process in corruption cases is negotiation. This usually takes the form of plea gaining, whistle-blowing and out-of-court

settlement depending on the most useful to the parties. The latter part of this paper will be devoted the aforementioned ADR strategies.

Corruption is a global social menace that could be viewed from different prisms. The definitions are as problematic as the term itself. This is because the term corruption covers a wide range of issues. One of the most generic definitions was offered by Sorkaa (cited in Barnes and Tsuwa 2011:222), which says that ‘corruption exists when an individual illegally or illicitly put personal interest above those of people and the ideals he or she pledges to serve’. It also suffices to state that different types of corruption have been identified and discussed in the literature. For Alatas (1990), there are seven types of corruption namely autogenic, defensive, extortive, invective, nepotistic, supportive and transactive. In a more elaborate form, Odekunle (1993:7) was more specific on the various dimensions of corruption:

...any of the following is corruption: asking or taking of fee, gift, or favour in exchange for the performance of such a legitimate task; the pervasion of obstruction of such a task or the performance of an illegitimate task; hoarding, collusion, price fixing, smuggling and intimidation, abuse or misuse of office powers, and privileges...unfair and unjust acquisition of wealth, forgery of any kind, diversion of public funds etc.

In view of Odekunle’s limitless dimensions of corruption, it is important to scope this paper such that it will be possible to track the key variables. Barnes & Tsuwa (2011) classified corruption into political corruption, economic corruption, bureaucratic corruption, judicial corruption and moral corruption. Since this paper will largely focus on political corruption, Adeyemi’s (1988:19) definition is instructive:

...an offence which aims mainly at the conduct public officials who take advantage of their positions within public administrations for the purpose of private gain.

The above definition largely aligns with Gboyega (1996:5), who defined corruption as ‘the giving or taking of bribe, illegal acquisition of wealth using the resources of the public office, including the exercise of discretion’. In other words, political corruption involves the abuse of public office through illegal acquisition for personal gain. In Nigeria, the humongous

amount of looted funds traced to politicians and civil servants are unimaginable. This has been the routine since the nation became an independent state. Fadaka (2002:11) raised this alarm when he lamented that ‘the incidence of corruption as we all know it, is ubiquitous in Nigeria and has increased exponentially since independence’.

Nigeria’s Complex Corruption Profile: A National Disaster

There is a general view that corruption represents the major factor that perpetually retards Nigeria’s growth and development. In the Anti-corruption Act of 2000, corruption was apparently described as antithetical to development and progress (Barnes and Tsuwa, 2011). This is because, the menace has permeated the various sectors of the Nigerian economy to the extent that it is now considered as a new culture of our people. According to Yelwa and Maijama’a (2014: 230):

...corruption is a phenomenon that has become a matter of great concern to Nigerians, as it has pervaded all levels of government and civil society. Thus, executive and legislative arms of government, the judiciary, religious institutions, the school system, law enforcement agencies, in fact, no part of the Nigerian society is spared...

It is necessary to point out that corruption in Nigeria takes different dimensions. The complexity of the Nigeria’s corruption index does not simply lie on the humongous or massive public funds being siphoned by key official or actors of government but the sophisticated networks of those involved in the illicit trade. For instance, it is difficult to prosecute perpetrators of political corruption in Nigeria because it involves men and women of influence and affluence. Also, mounting of anti-corruption campaigns and prosecuting trails have become a major distraction to government in power as it is almost impossible to find a public official who is not culpable in one way or the other. Alternative Dispute Resolution mechanisms have, thus, assumed global relevance with respect to its ability to make rational compromises in order to facilitate amicable and speedy settlement of disputes. It is not surprising that the whole world is moving from adversarial to non-adversarial modes of conflict settlement. This is because the dire consequences of litigation proceedings no longer predispose disputants to court trial. Apart from its prolonged processes, court system is costly, brings about unsatisfactory outcomes and ruins existing relationships such that partners do not get justice from courts. By implication, the prosecuting powers of the state diminish by the

day as it no longer has the capacity to bring powerful and criminally minded people to justice. ADR has the tendency that could mitigate some of these shortcomings.

ADR Mechanisms in the Management of Corruption in Nigeria. The dynamics and flexible nature of alternative dispute resolution clearly demonstrate that its versatile process can be applied to various complex modes and situations, in which the outcome will be mutually beneficial to the concerned parties. Within the anti-corruption crusades, several variants of ADR are being utilized to address difficult cases that the courts may not be able to achieve effective or optimum results. Some of such mechanisms including plea bargaining, whistle blowing policy and Out of Court Settlement represent a component of the ADR process and will be discussed in details under this section of the paper.

Plea Bargaining: Scholars, especially those of western extraction have written extensively on the concept and origin of plea bargain. This is a process through which a defendant pleads guilty to a criminal charge with the expectation of being granted a pardon or offer of a lighter sentence by the State. It is touted as a tool for decongesting the prisons as well as save the State, enormous resources and time involved in putting an accused through a full trial. According to Langbein (1978, cited in Tarhule, 2014), plea bargaining occurs when the prosecutor induces a criminal offender to confess guilt and to waive his right to trial in exchange for a more lenient criminal sanction that would be imposed if the offender were adjudged guilty following a full trial. For Garner (1990) it is a negotiated agreement between the prosecuting lawyer 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. Garner went further to state that the outcome of the process is often referred to as a 'plea agreement' or 'negotiated plea'. With regards to the origin of plea bargain, Alubo (2012) opined that plea bargain is a product of common law, from the Medieval English Common Law court of guilty pardons to accomplices in felony cases. He traced the first case of plea bargain to the 1960s when one James Earl pleaded guilty to the assassination of Martin Luther King Junior and traded an outright execution with a 99 years jail term. Logically, plea bargaining seemed to be preferred in the sense that the process saved the state from time wasting, enormous resources required to pursue criminal charges through a full-scale trial. According to Agaba (2017), Plea Bargain is consequent on the following:

- a) There must be a prosecutor and an accused person
- b) An existing negotiation between the prosecutor and the accused person
- c) The negotiation must have ended in an agreement with concessions and compromises between the prosecutor and the accused
- d) There must be a plea of guilt to be charged or a lesser charge
- e) The court must be involved in the whole process
- f) An acceptance of the plea by the court

The practice of plea bargaining in Nigeria is relatively a recent development. In other words, it was not known to the nation's legal or political parlance until 2004 when the Economic and Financial Crimes Commission (EFCC) was established. Specifically, Section 14(2) of the EFCC Act provides that the "Commission may compound any offence punishable under the Act by accepting such sums of money as it deems fit exceeding the maximum amount to which that person would have been liable if he had been convicted of that offence" (Tarhule, 2014:380). This provision empowers the EFCC to compound any offence for which a person is charged under the Act if the offender agrees to give up money stolen by him. Alubo (2012) however, clarified that the provision under reference is restrictive in nature, not applying to all criminal trials in Nigeria. Accordingly, negotiations are expressly limited to offences punishable under the Act. Also, Section 75 of the Lagos State Administration of Criminal Justice Law states that:

Notwithstanding anything in this law or other law, the Attorney General of the State shall have power to consider and accept a plea bargain from a person charged with any offence where the Attorney General is of the view that the acceptance of such plea bargain is of public interest, the interest of justice and the need to prevent the abuse of legal process.

There are specific cases of high-profile corruption cases in Nigeria, where the instrumentality of plea bargaining was applied to enhance the outcome of the process. For instance, a former Inspector General of Police, Tafa Balogun was accused of embezzling a whopping sum of ten billion Naira (N10b), while he served as the Inspector General of Police

in 2005 under the administration of Chief Olusegun Obasanjo. He was charged to court but later opted for a plea bargain arrangement, where he returned most of the funds for a six-month jail term in lieu of a maximum jail sentence of 5 years. Secondly, the former Managing Director of Eco Bank, Cecilia Ibru was charged before a Lagos Federal High Court in August 2009 on a 25-count charge that bothered on offering loans up o the tune of N20b to cronies beyond her credit limit. She entered into a plea bargain with the prosecution and pleaded guilty to a lesser three count charge. She was convicted and sentenced to six months on each of the three counts on October, 2010. As part of the plea bargain deal, she also forfeited over 100 choice properties valued at N191.4b across the globe.

Whistle-blowing: This is a deliberate policy of government used to describe an act to account, report as well as expose stealing, illicit transfer of funds, mismanagement of public funds or other wrongdoings that pertain to public corruption. According to Near and Miceli (1985: 4), whistle-blowing can be seen as:

“... the disclosure by organization members (former or current) of illegal, immoral, or illegitimate practices under the control of their employers, to persons or organizations that may be able to effect action.

Section 368 of the Criminal Code Act of Nigeria addresses the issues surrounding the Concealment of Matters Affecting Liberty and provides that ‘any person who refuses or neglects to give such information or to show such person or place to any such person to who is required to give such information or show the person or place... is guilty of felony and is liable for imprisonment for three years. Hence, the Whistle Blowing Policy represents on the one hand criminalizing the non-disclosure of information relating to the corrupt crimes and on the other hand serving as a critical support system and encouragement to individuals who willingly disclose useful information on how to discover and recover looted public funds. Whistleblowing can be categorized into two; internal and external whistleblowing. While internal whistleblowing involves disclosure of act of corruption to a person within an organisation, external whistleblowing is carried out to report such an act to external parties, who can take immediate action to address the problem (Puni et. al, 2016).

However, it is important to note that there is a linkage between the internal and the external whistleblowing in the sense that the former is usually regarded as the precursor of the latter. When the internal whistleblowing fails to rectify the problem, there is usually a resort to the external option. Historically, the whistleblowing policy is traceable to the British and American Police Officers, who traditionally blow their whistles in order to alert members of the public about the criminal elements in the society. In Nigeria, the whistleblowing is an official policy of the government instituted around the anticorruption programme to encourage people to voluntarily disclose information about fraud, looted public funds, financial impropriety or any other forms of corruption to the government. The Bill was initially introduced by the National Assembly but was later taken up by the Ministry of Finance under the erstwhile Minister of Finance, Mrs. Kemi Adeosun. The policy was given an expedited executive approval by the Federal Executive Council in December 2016. It provides that a person may make a protected disclosure whether or not the person is able to identify a particular person to whom the disclosure relates. The policy does not provide any form of immunity from prosecution to the whistleblower if he or she partakes in the proceeds of the crime.

The question may be asked; how does the Whistleblowing Policy relate to ADR? ADR as a dispute resolution and management strategy has different components, which include negotiation, mediation arbitration, facilitation, early neutral finder, judicial appraisal among several mechanisms that can be utilized as considered appropriate to address any form of dispute. In this context, whistleblowing policy is consistent with the negotiation strategy, where the body or institution saddled with responsibility of investigating, prosecuting and recovering illicit stone negotiates directly with the whistleblower in order to access the relevant information that may facilitate the processes. In essence, whistleblowing policy is basically relevant at the investigation stage of a particular corruption case to gather intelligence before proceeding to trial or any other forms of intervention that may be required for such cases. Furthermore, the act of whistleblowing is not just purely a moral and altruistic

ventures, it provides accompanying financial incentives for those come out to blow the whistle on any confirmed cases of corruption. Based on this, a whistle blower is entitled to a payment of between 2.5% to 5.0% of the total funds recovered through him or her.

So far, no fewer than 2,000 cases of corrupt practices have been received by the Ministry. Some of the cases exposed by the Whistle Blowing Policy include the discovery of \$9.8 cash discovered in a slummy district of Sabo-Tasha in Kaduna in April 2017; a \$30m cash was locked up in an Ikoyi apartment in Lagos State, in Kaduna, the sum of \$9.2 million was recovered from the former Group Managing Director of the Nigerian National Petroleum Corporation, (NNPC), Mr. Yakubu, on June 12, 2020, President Muhammadu Buhari announced during his Democracy Day broadcast that the Whistle Blowing Policy has recovered an estimated sum of N800 billion in cash and landed properties (Edih, 2020).

Out-of-Court Settlement

This is another potent tool of ADR that is commonly used for managing corruption related cases in Nigeria. It is the amicable resolution of dispute between a Claimant and a Defendant outside the direct involvement of the court or the presiding judge. It is basically hinged on the assumption that pending cases can either be negotiated or mediated out of court. The court has benchmarks for deciding cases that can be referred for out of court-settlement. For instance, private disputes (including criminal matters) between individuals can expressly be settled out of court. Criminal cases against the state or heinous crimes are not readily amenable to Out-of-court-settlement. Basically, there are two main factors that influence Out-of-Court-Settlement. These include the willingness of the disputing parties to settle out of court and the nature of the dispute in question.

Out-of-Court-Settlement is slightly different from Plea Bargaining in the sense that the role of the court is far limited as the direct parties involved in the matter are at liberty to take the case out of court for resolution; although the court can help facilitate the process or play a mediating role. But in Plea Bargaining, the judiciary is an active party to the whole process of bargaining. Although there are procedures for achieving Out-Of-Court-Settlement,

it has proven to be widely used in a condition where technicalities and overall interests of parties hang in the balance. Out-of-Court Settlement relies primarily on the goodwill of conflict parties to pursue their matter using the problem-solving approach rather than litigation.

There are no extant laws directly used for initiating Out-of-Court-Settlement proceedings; but there exist provisions that encourage it if the parties involved in the matter are predisposed to the process. For instance, most states in Nigeria have included ADR in their Civil Procedure Rules: Order 19 of FCT Rule for instance provides that a court or Judge, with the consent of the parties may encourage settlement of any matter (s) before it, by either-Arbitration, Conciliation, Mediation and any other lawfully recognized method of dispute resolution or **Section 18** of the High Court Act of the Federal Capital Territory, Abuja provides that: “Where an action is pending, the court may promote reconciliation among the parties thereto and encourage and facilitate the amicable settlement thereof (Cap. 510, LFN Abuja 1990). To this end, a number of high-profile cases have relied on Out of Court-Settlement for amicable resolution even at the international level. The Federal government of Nigeria has signed an Out-of-Court-Settlement agreement with some defendants involving the late Head of State, General Sani Abacha’s looted funds. As far back as 2002, the Swiss Government was informed about the transfer of the sum of over one billion naira (blocked in foreign countries) to Basel in favour of the Federal Government of Nigeria as part of the out of court settlement deal. (Swiss Federal Office of Justice, 2021).

Prospects and Challenges of Alternative Dispute Resolution in Managing Corruption Cases

It is incontrovertible that ADR is an essential tool for complementing the prosecution of corruption related cases in our courts. Whistleblowing for instance is an investigation and intelligence gathering policy that helps to expose fraud and large-scale corruption that could have been concealed. Oguche (2012) believes that ADR enables prosecution to concentrate on serious offences and dispense of less serious offences by way of plea bargain or out of court settlement. Secondly, it was argued that plea bargain and other processes save the time of the

court, of the prosecutor and of the defendant, reduces public expenditure on trials and at the same time avoids the necessity of public trial.

Another argument in favour of plea bargain according to the promoters of plea bargain is that it is not a punishment but an aspect of alternative dispute resolution mechanism, thereby bringing it closer to the reparatory theory of corrections (Tarhule, 2014) and of course, Oguche (2012) further argues that plea bargaining facilitates the decongestion of prisons, and given the level of congestion of prisons, the poor sanitary system, plea bargain is thus, a sure therapy to solve these multi-faceted problems of the prisons. However, there are obvious challenges that confront the application of ADR in corruption related matters. The Whistleblower policy has suffered a severe setback due to the constant of threats to the lives of those who chose to blow the whistle. The Federal Government of Nigeria, has, on several occasion reneged on the 5% compensation or reward promised to whistleblowers.

A major challenge of plea bargain is that victims often decry the lighter sentences that the process produces, thereby raising issues about the supposedly deterrent value of the criminal process. This situation is particularly true in Nigeria where the citizens have always genuinely felt short-changed any time a plea bargain arrangement has been entered into. Finally, it is generally believed that plea bargain is discriminatory against the poor. Accordingly, plea bargain as it is presently practiced in Nigeria only targets high profile mega corruption cases. This leaves the begging question as to whether persons charged with petty offences of theft and the poor arrested for aimless wandering that populate detention facilities, could also take advantage of it.

Concluding Remarks

Pleas bargaining, whistleblower policy and out-of-court-settlement were identified as emerging ADR processes that are amenable to corruption cases. The application of ADR holds a lot of prospects for addressing chronic corruption matters. Apart from the speedy mode of dispensing such cases, ADR saves time, energy and cost. It also goes a long way to help in reducing courts dockets and decongesting prisons that is notorious for overcrowded inmates.

However, ADR does not come without its own challenges. Plea Bargaining is considered to be elitist in orientation in the sense that it was conceived originally to deal with high level cases or matters that are difficult to be prosecuted in court. Also, there is a lack of political will on the part of the Federal Government to faithfully implement the Whistleblower Policy with respect to paying whistleblowers their agreed entitlements. Despite these shortcomings, the application of ADR mechanisms remains an innovative strategy of managing corruption related cases in Nigeria.

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