

MEDIATION IN CRIMINAL MATTERS: SCOPE, CHALLENGES AND PROSPECTS UNDER NIGERIA'S CRIMINAL LAW JURISPRUDENCE

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Presentation Outline

- Introduction
- The Concept of Mediation
- Criminal Jurisprudence
- Mediation in Criminal Matters - Restorative Justice - Victim-Offender Mediation
- Scope, Challenges and Prospects Under Nigeria's Criminal Law Jurisprudence
- Concluding Remarks

Introduction

- There are various dispute resolution processes including litigation and arbitration
- Litigation has been used essentially for both criminal and civil matters while arbitration and other Alternative Dispute Resolution (ADR) processes have been used for civil disputes
- In arbitration, there is the principle of arbitrability - not every dispute is capable of resolution by arbitration
- At the core of the ADR processes is mediation or conciliation

.... Introduction

- A mediator, unlike an arbitrator, is a facilitator or evaluator - decides nothing and awards nothing
- The criminal justice system is largely based on the proposition of crime being an offence against the State - State (or Police) versus Accused Person
- Thus the state prosecutes offenders and exacts retribution by way of punishment
- **This overlooks the relationship that the victim has with the crime and the offender and sometimes neglect the victim**

..... Introduction

- Restorative justice involves a different way of viewing crime by focusing on the injury to the victim and the community, rather than to the State and by aiming for restitution rather than punishment (retribution) as a primary goal
- There are different models of restorative justice - victim-offender mediation, Family Group Conferencing and Sentencing Circles
- Our focus is victim-offender mediation
- This method of restorative justice is growing internationally but remains diverse in the ways in which it might achieve its broad aim of transforming the way society responds to crime.

6 Introduction

- We have criminal enactments including the Child Rights Act and Violence Against Persons Act
- Their focus is generally on the offender and not the victim
- Customarily, the aim of customary criminal jurisprudence is reconciliation especially for minor crimes
- Can't we extend this to serious crimes?
- Arguments vary - what do victims want - retribution or restitution?
- In this presentation, we will interrogate the scope, prospects and challenges of restorative justice in our criminal jurisprudence

The Concept of Mediation

- There are various definitions - essentially a facilitative or evaluative process where a neutral third party assists the disputing parties to settle their differences
- The neutral decides nothing and awards nothing - major difference between arbitration and mediation
- There are different bodies and rules on mediation eg LCIA
- Procedure essentially the same
- Art 1(3) of the UNCITRAL Model Law on International Commercial Mediation, 2018 defines 'mediation' thus:

..... The Concept of Mediation

“mediation” means a process, whether referred to by the expression mediation, conciliation or an expression of similar import, whereby parties request a third person or persons (“the mediator”) to assist them in their attempt to reach an amicable settlement of their dispute arising out of or relating to a contractual or other legal relationship. The mediator does not have the authority to impose upon the parties a solution to the dispute.

- Just like the 1958 NY Convention on the Recognition and Enforcement of Foreign Arbitral Awards, we have the Singapore Convention, 2018 for Enforcement of Settlement Agreements

..... The Concept of Mediation

- If we concede that mediation includes conciliation, the Nigerian Arbitration and Conciliation Act, 1988 has not defined 'conciliation' but the title of the enactment is being changed to Arbitration and Mediation Act, 2020 - to conform to international best practice.
- There is a broad universal acceptance that conciliation has broadly the same attributes as mediation - use of impartial third party but there seem to be variation of understanding as to what each concept involves

... The Concept of Mediation

- Principles of mediation include:
 - Impartiality and independence
 - Confidentiality
 - Facilitation
 - Party self-determination
 - Authority derived from the parties
 - Consensual decision-making
 - Empowerment of the parties

Criminal Jurisprudence

- In Nigeria, a crime must be in a written form - in an instrument defining the offence and prescribing punishment (s36(12), CFRN, 1999)
- In the Criminal Code, the word used is an 'offence'. Accordingly section 2 of the Criminal Code provides thus:
"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, is called an offence"

..... Criminal Jurisprudence

- Similarly section 28 of the Penal Code provides thus:
Except where or otherwise appears from the context, the word 'offence' includes an offence under a law for the time being in force.
- Criminal law has different purposes including protection of life, regulation of society, guaranteeing security of property, discouraging the employment of self-help and provision of comprehensive punitive structure to address the commission of crimes.

..... Criminal Jurisprudence

- One significant feature of our criminal jurisprudence is that the parties to criminal proceedings are usually two, the State or Police or Prosecutor on the one hand and the accused person or persons on the other
- Another feature is the standard of proof - proof beyond reasonable doubt and the burden of proof rests on the prosecution generally.
- The focus is retribution - punishment and not restitution and therefore the interest of the victim is not the focus

Mediation in Criminal Matters - Restorative Justice - Victim-Offender Mediation

- The restorative concept has as its root the principle that where a person has been harmed by the wrongful actions of another, opportunities should be provided for
 - (i) some form of healing and possible restitution for the harmed person and others affected by those actions, and
 - (ii) some way to engage the wrongdoer more directly with his actions and their consequences and prevent any repetition
- The concept has three forms - restorative justice, restorative practices and restorative approach

..... Mediation in Criminal Matters - Restorative Justice

- While restorative justice focuses on criminal justice, restorative practices focuses on non-criminal matters, eg workplace or school bullying or anti-social behaviour and restorative approach is the adoption of restorative practice.
- In this presentation, our focus is restorative justice in relation to the criminal justice system.
- An important kind of restorative justice is victim-offender mediation which combines concerns for the victims of crime, the rehabilitation of offenders and the notion of appropriate reparation.

Scope, Challenges and Prospects

- Restorative justice seeks to repair or make up for the damage and hurt caused by the crime and guided by the following principles:
 - The offence is primarily against the victim and secondarily against the State
 - Society's values should be recognized such as respect for others
 - The needs of the victim are important and restitution may be required to restore the relationship between the victim and offender - achievable by way of reparation - compensation, apology or community service
 - Reconciliation between victim and offender
 - Offenders are required to take responsibility for their actions and have the opportunity to make amends
 - Element of empowerment of those affected by the crime

.....Scope, Challenges and Prospects

- **The Administration of Criminal Justice Act, 2015 has elaborate provisions on restitution and compensation in Parts 32 and 33 - ss 319 and 331**
- Section 319(1) A court may, within the proceedings or while passing judgment, order the defendant or convict to pay a sum of money
 - (a) as compensation to any person injured by the offence, irrespective of any other fine or other punishment that may be imposed or that is imposed on the defendant or convict, where substantial compensation is in the opinion of the court recoverable by civil suit
 - (c) in defraying expenses incurred on medical treatment of a victim injured by the convict in connection with the offence

..... Scope, Challenges and Prospects

- Section 331 (1)
- Where any proceeding or trial in a criminal case is concluded, the court may make such order as it thinks fit, for the disposal by destruction, confiscation or delivery to a person appearing to be entitled to the possession or otherwise, of any movable property or document produced before it or in its custody or regarding which an offence appears to have been committed or which has been used for the commission of an offence
- Generally, the restorative process can take place at different levels - police station, during trial or sentencing or after conviction

.....Scope, Challenges and Prospects

- Apart from the statutory provisions, conducting victim-offender mediation has its own challenges
- The process is usually the same as a normal mediation - preliminary communications and preparation; commencing and establishing the issues; information gathering; conducting the mediation and concluding the process
- However, there can be an impasse - need to develop impasse strategies - pause and reflect on why the process is stuck or why the deadlock, conversion of a direct process to indirect
- Never press parties to find a resolution
- Need to maintain confidentiality unless waived
- One major challenge is: What can be restored eg in a rape case or death?

..... Scope, Challenges and Prospects

- Although the concept of victim-offender mediation is well developed in other jurisdictions especially in the United States, Canada and United Kingdom, it is not well developed in Nigeria
- In Nigeria, we have many mediation practitioners who belong to different bodies like the Institute of Chartered Mediators and Conciliators, Restorative Justice Council of the UK, Chartered Institute of Arbitrators, Centre for Effective Dispute Resolution, among others
- What remains is for these practitioners to deploy their skill in this area of practice

..... Scope, Challenges and Prospects

- The prospects -
- Victim-Offender Mediation allows victims and offenders an opportunity, either directly or indirectly, to work with a facilitator to discuss the crime, its consequences and effects, and to consider how the offender can best make amends for the crime
- This can be by way of apology, reparation, community service or any other agreed form
- In developing such schemes, there must be a policy on the types of offences that can be subjected to this process
- Should serious violent and sexual offences be included?
- What of murder and manslaughter?

..... Scope, Challenges and Prospects

- Facilitators should be highly skilled in this area
- Facilitators should be careful to screen out parties who are too emotional or disturbed to handle direct meetings.
- Some believe that it is in more serious cases such as aggravated burglary or sexual assault, that victims may have more to gain from being able to express their feelings and come to some sort of resolution of the aftermath of the crime
- Question is 'what is justice' to a victim - retribution, compensation, validation, vindication, recognition, apology, etc

..... Scope, Challenges and Prospects

- In all forms of mediation, voluntariness is essential but where someone has been harmed, and especially by criminal actions, it is vital to ensure that both parties voluntarily and without coercion wish to enter into the process, understand it and its implications.
- It is dangerous for the person harmed to agree only to find that the wrongdoer does not agree
- If face-to-face is impossible, the facilitator may shuttle
- In which case the facilitator has the opportunity to assess the victim's concerns and needs and to put these to the offender and carry back the offender's response

Concluding Remarks

- Restorative justice has developed in the field of criminal justice, combining concern for those harmed and the rehabilitation of wrongdoers with the notion of reparation
- Victim and offender schemes have been established in North America and Europe including the UK under which victims meet their offenders in the presence of a third party (mediator/facilitator) to afford them the opportunity for discussion and to arrive at agreed terms of restitution, whether financial or for services to be performed to the victim or the community

..... Concluding Remarks

- People respond better to participating and being involved in the process of addressing issues arising from the wrongful actions of others than when these are imposed in a punitive and authoritarian or paternalistic mode
- We must bear in mind that a significant proportion of crimes involving personal victims are committed by someone who is acquainted with the victim
- The victim and offender may have known themselves either by sight and often lived in the same neighbourhood

..... Concluding Remarks

- Such situations offer opportunities for better understanding through mediation
- However, the mediators (facilitators) should be highly skilled in this area
- It is noteworthy that the criminal justice system has also embraced restitution and compensation by provisions in the ACJA and ACJL.
- Victim-offender mediation is an evolving area and quite promising - a process whereby all the parties with a stake in a particular offence come together to resolve it collectively

27 Concluding Remarks

- Today, we have cases of Sexual and Gender Based Violence and Domestic Violence
- There are candidates for Victim-Offender Mediation
- One challenge is that the focus is shifted from the offender in a criminal trial to the needs of the victim
- How do we strike a balance - between the needs of the offender and that of the victim?
- Voluntariness is key - the parties must consent to the mediation
- However, does restorative justice bring attitudinal change on the part of the offender?

28 Concluding Remarks

- If restorative justice is about giving victims a voice, about empowering them to speak out about their experiences and seek reparation, why keep it only in the shallow end of criminal justice
 - Cunneen Chris & Hoyle Carolyn
- THE END

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