

Restorative Justice: A Means to Reduce Imprisonment, Instigate and Implement Rehabilitation and Reintegration. (A Comparative Study of Canadian and Nigerian criminal justice system)

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## **ABSTRACT**

Some legal practitioners may disagree with the idea of a restorative criminal justice system as a better solution than retributive one. Can a criminal justice system provide justice for all while concurrently reducing the use of imprisonment? Is it possible to keep the community safe, punish and correct offenders, and reduce crime rate while reducing the use of imprisonment as deterrence?

The criminal justice system is in place to do justice to victims, the state and the offender. Justice is not just for the state and the victim with exclusion of the offender. If it were so there would be no need for re-integration.

Canada has a growing restorative justice system; this system brings to light the possibility of implementation of restorative element in an existing retributive system to produce a workable hybrid. This thesis seeks to explore these possibilities. Although this does not imply that the Canadian criminal justice system is perfect, quite the contrary it is a work in progress. However, this is an attribute that Nigeria and many other common law countries can learn from and emulate. This paper explains how.

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*“You are a Fadeyi; nothing can stop you from getting what you want if you put your mind to it”*

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## CHAPTER ONE – INTRODUCTION

Nigeria is one of the largest African countries that have been colonized by Britain. As a result, many Western practices were adopted by the colony. This thesis is particularly concerned with incarceration, a practice almost unused before colonization, became a practice so common in Nigeria. Incarceration is now so common that the system is virtually collapsing because of its over use.<sup>1</sup> This thesis identifies this problem and investigates the potential for restorative justice to provide a remedy.

First I carry out an analysis of the Nigerian criminal justice system and how incarceration came to be such a predominant method of correction. From this point the thesis draws out pre-trial and post-trial practices in Nigeria and the problems that need to be addressed. This thesis then explores restorative justice principles, identifying how restorative justice can influence the Nigerian criminal justice system, and what it has to offer.

In the course of this thesis I will carry out a study of Canadian restorative justice practice. The thesis will examine how the restorative justice principles have positively impacted the Canadian criminal justice system to limit the use of incarceration. However, I should note that the Canadian criminal justice system is not without its own problems (including a remand population that is growing at a rapid rate<sup>2</sup>) but amongst its counterparts such as the United States

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<sup>1</sup> Shajobi-Ibikunle, D. Gloria, "Challenges of Imprisonment in the Nigerian Penal System: The Way Forward" (2014) 2:2, American Journal of Humanities and Social Science 94-104. Online: ISSN 2329-079X / World Scholars, <http://www.worldscholars.org>.

<sup>2</sup> Statistics Canada, Trends in the use of Remand in Canada, 2011, by Lindsay Porter & Donna Calverley, Catalogue No 85-002-X (Ottawa: Statistic Canada, 11 May 2011)

England and Wales, Canada has been able to maintain a stability which contrasts the increase imprisonment rate of its counterparts.<sup>3</sup>

Finally I will return to the Nigerian context, discussing lessons from the Canadian experience that may provide useful examples for the Nigerian criminal justice system. The recommendations are to identify adjustments needed in legislation and judicial practices, as further described below, to stem the tide of incarceration and address crime in Nigeria in a more productive way. It will also recommend the development of a system of record-keeping for the purpose of research that would be beneficial to Nigeria in monitoring its criminal justice system progress.

### **Introduction of Incarceration to Nigeria**

A brief history of how incarceration came to be such predominant use in Nigeria is in order. Prior to colonization Nigeria did not exist as a country. What we now know as the country called Nigeria was once a geographic area with different groups of people who had different cultures and identified themselves as separate and unique tribes<sup>4</sup>. Each of these tribes had different ways of handling its people, particularly ways of dealing with those who broke the laws of the land (committed taboos or abominations as they were called).<sup>5</sup>

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<sup>3</sup> Anthony N. Doob & Cheryl M. Webster, "Countering Punitiveness: Understanding Stability in Canada's Imprisonment Rate" (2006) 40:2 Law & Society review 338-43

<sup>4</sup> Answer Africa, "Nigerian Tribes: List of Major Tribes in Nigeria" 17 June 2013; See also Wikipedia - The Free Encyclopedia, "List of Tribes in Nigeria" Online: [https://en.wikipedia.org/wiki/Colonial\\_Nigeria](https://en.wikipedia.org/wiki/Colonial_Nigeria). This depicts that within a geographical area there exist different tribes. In July 2012 an estimate was released by FBI Fact book of the percentage of the different tribes in the Nigerian population.

<sup>5</sup> O. Oke Elechi, *Doing Justice without the State: The Afikpo (Ehugbo) Nigeria Model*, (New York & London: Routledge, 2006) ch 8 at 181-224. Here the Afikpo peoples' system is described; for Igbo culture see Nonso Okafo "Relevance of African Traditional Jurisprudence on Control, Justice and Law: A Critique of the Igbo Experience" (2006) 2:1 African Journal of Criminology & Justice Studies (AJCJS) 36-62. Osaro Ollorwi, *Community Policing & Crime Control in Pre-Colonial Eleme: Issues & Perspective* 1ed (Nigeria: Nigerian Institute of Security, 2013) ch. 2

At the time most of these tribes did not use incarceration as a means of punishing offenders, and those who did only used it to detain offenders until they could defend themselves before the community and its leaders, In order words detention was not used long term.<sup>6</sup> Later in chapter three of this thesis rehabilitation and reintegration will be highlighted while discussing the role of community in restorative process of correction. The impact of community in reducing incarceration in Nigeria will also be discussed.

There were more informal systems of governments among the tribes when the British began the legal colonization process of what is now Nigeria. The process began in the 19<sup>th</sup> and 20<sup>th</sup> century. To effectively infiltrate the diverse systems the colonial government used the existing monarchy or systems of government such as kings and chiefs thereby practicing indirect rule. After colonization many tribes were combined. With colonization came the adoption of the colonial laws such as the criminal laws, property laws, civil laws and so on.<sup>7</sup>

During the early colonial rule years, incarceration was a way of protecting the colonial government and its activities in the colony. In 1861 the colonial government formalized its government in the colony of Lagos and along with it a prison system. This was done so the colonial government could protect legitimate trade, guarantee the missionaries activities and guarantee profit for the British government.<sup>8</sup> Later, the amalgamation in 1914 brought the colony of Lagos, the northern protectorate, and southern protectorate together to create the country we now know as Nigeria.<sup>9</sup> In order words, colonization brought about the creation of Nigeria as a

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<sup>6</sup> Oguleye A, *The Nigerian Prison System* (Lagos: Specific Computers Publishing Ltd, 2007) as referred to by Shajobi-Ibikunle, D. Gloria, "Challenges of Imprisonment in the Nigerian Penal System: The Way Forward" (2014) 2:2, American Journal of Humanities and Social Science 95.

<sup>7</sup> Noel Otu, "Colonialism and the criminal justice system in Nigeria" (1999) 23:2 International Journal of Comparative and Applied Criminal Justice 293-306.

<sup>8</sup> Noel Otu, supra notes 7 at 294; See also Dr. I. W Orakwe, "The Origin of Prison in Nigeria", (copyright 2016) Nigerian Prison Services (website), online: <http://www.prisons.gov.ng/about/history.php>.

<sup>9</sup> Noel Otu, supra note 7 at 294.

country. It also brought the use of incarceration as long term punishment for crimes although it was initially aimed at protecting the colonies.<sup>10</sup>

### **The Problem of Incarceration in Nigeria**

A major problem of the criminal justice system in Nigeria is the over use of imprisonment,<sup>11</sup> perhaps most disturbing is the rate of pretrial incarceration. Over 60 percent of the Nigerian prison population consists of accused awaiting trial.<sup>12</sup> In Nigerian the grant of interim release is based on a presumption of innocence. An accused person is presumed innocent until proven guilty. This right emerges from section 36(5) of the *Constitution of the Federal Republic of Nigeria*. And it has been in place since 1999.<sup>13</sup> It is on this constitutional ground that the Nigerian bail system is rooted.

Other laws supporting the bail system include the *Criminal Procedure Act (CPA)*<sup>14</sup>, *Criminal Procedure Code (CPC)*<sup>15</sup>, *Police Act (PA)*<sup>16</sup> and the *Administration of Criminal Justice Law (ACJL)*<sup>17</sup>. In present day Nigeria bail arises in three stages. It may arise pending further investigation (also known as police bail or administrative bail). It could also be pending determination of the case, or pending determination of an appeal against a conviction. With respect to bail pending further investigation, the bail may be granted by the police. The second

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<sup>10</sup> Noel Otu, supra note 7 at 294.in chapter two of this thesis detailed information will be given on the imprisonment rate and impact in Nigeria.

<sup>11</sup> In 2012 the prison population was 51,560 by 2013 it was 53,841 and the most recent statistical information by the Nigerian Prison Services show an increase to 57,121 as of October 2014. A recent statistic posted in this day news shows a 10% increase in the awaiting trial prison population.

<sup>12</sup> Nigeria Prison Service, “Statistical Information” (31st October 2014), Nigeria Prison Service, online: <http://www.prisons.gov.ng/about/statistical-info.php>. See also Daily Post, “70 Per cent of inmate in Nigerian Prison Awaiting Trial-NHRC”

<sup>13</sup> *Constitution of the Federal Republic of Nigeria*, LFN 2004 s 36 (5)

<sup>14</sup> *Criminal Procedure Act*, LFN 2004, C41

<sup>15</sup> *Criminal Procedure Code, Northern Nigeria*, 1963, C30

<sup>16</sup> *Police Act*, LFN 2004 C-P19

<sup>17</sup> *Administration of Criminal Justice Law*, LFN 2007, No. 10

and third type may be granted by judges (court of first instance and the appellate court respectively).<sup>18</sup>

However, it is important to note that although bail is only a right that can be inferred from section 36 of the Nigerian Constitution, judicial discretion greatly affects the granting of bail in the second and third instance mentioned above. Also it is not uncommon that other factors may hinder an accused from receiving bail, such as the nature of the offence, the prevalence of the offence in the community, the offender's past criminal record, access to legal representation, and other factors.<sup>19</sup> This chapter will not discuss these factors in detail. They will be further discussed in chapter two.

This thesis compares the Canadian and Nigerian systems. However, it is not intended to infer that the Canadian criminal justice system is better than the Nigerian criminal justice system. Rather it aims to provide useful information that could guide the development of the Nigerian criminal justices system. I choose to compare Nigeria with Canada because of the similarities between the two countries' criminal justice systems. A major setback for the Canadian criminal justice system is its growing number of accused in pre-trial detention.<sup>20</sup> However, some of Canada's provinces have adopted a few restorative justice principles to help combat its pretrial detention crisis.<sup>21</sup>

Restorative justice practices have been implied to have impacted the imprisonment rate in Canada compared to a decade ago.<sup>22</sup> Although some of the most recent bills in Parliament need

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<sup>18</sup> J.A Agaba, *Practical Approach to Criminal Litigation in Nigeria: Pre-trial & Trial Proceeding* 1<sup>st</sup> ed (Nigeria: Lawlord Publications, 2011) at 251.

<sup>19</sup> *Ibid* at 246-304.

<sup>20</sup> Statistics Canada, *supra* note 2 at 5.

<sup>21</sup> Anthony N Doob & Cheryl M Webster, *supra* note 3 at 344.

<sup>22</sup> *Ibid* at 331

close attention<sup>23</sup> Canada still has a lower imprisonment rate compared to its Western counterparts such as the United States of America, United Kingdom and Australia.<sup>24</sup>

In 1976 the Law Reform Commission of Canada encouraged restraint in the use of incarceration.<sup>25</sup> In 1982 the government of Canada reiterated the use of restraint in a statement of policy on criminal law.<sup>26</sup> Although the recommendations were never adopted, in 1996 the principles of non-prison sanctions were made part of the *Canadian Criminal Code (CCC)*.<sup>27</sup> The use of conditional sentencing also became a means to reduce custodial punishment of less than 2 years.<sup>28</sup> In 2002, the then Minister of Justice (The Honorable Martin Cauchon) reaffirmed that the criminal law should only be used as a last resort while giving a speech to the Canadian Bar Association. He also mentioned that there may be alternative ways to achieve positive social outcomes.<sup>29</sup>

The Nigerian statutes provide for probationary sentences. However, except for juvenile judges and magistrate rarely make use of this provision.<sup>30</sup> Section 345 of the *Administration of Criminal Justice Law Lagos 2007(ACJL)*<sup>31</sup> provides for community service and conditional release. The use of conditional sentencing and community service was one of the

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<sup>23</sup> Ibid at 333. Such bill that require mandatory minimum sentences for serious crimes like armed robbery and drug offences; *Safe Streets and Communities Act* S.C. 2012, c.1 (Royal Assent March 13, 2012)

<sup>24</sup> Ibid at 329-31.

<sup>25</sup> Ottawa, Law Reform Commission of Canada, Ministry of Supply and Services “Recodifying Criminal law” in *Our Criminal Law* No30 (1977) 24-5.

<sup>26</sup> Ottawa, Government of Canada “The Criminal Law in Canadian Society” Honorable Jean Chretien (Ottawa: August 1982) 51

<sup>27</sup> *Canadian Criminal Code* RSC 1985, c C46, s.718.2 (e). [CCC]

<sup>28</sup> Anthony N Doob & Cheryl M. Webster, supra note 3 at 345. Instances where conditional sentence can be imposed are listed in section 742.1 of the *Canadian Criminal Code*. However some conditions are imposed under section 742.3 of the *Canadian Criminal Code* and they must be met if a conditional sentence is to be imposed; there are also some other are optional condition.

<sup>29</sup> Cauchon Carla & Anthony N. Doob, “The Decline in Support for Penal Welfarism: Evidence of Support among the Elite for Punitive Segregation” (2002) 43 *British J. of Criml* 434-41.

<sup>30</sup> Comfort Chinyere Ani, “Reform in the Nigerian Criminal Procedure Laws” (2011) 1 *NIALS Journal on Criminal Law and Justice* 87.

<sup>31</sup> *ACJL*, supra note 17, s. 345

recommendations made by the National Working Group on the reform of the Nigerian criminal justice. Their recommendation brought about the draft of the *Criminal Justice Reform Bill* of 2005.<sup>32</sup>

There are some terms that will reoccur in the course of this paper. Hence it is pertinent to provide definition of these terms. This will enable reader to have an idea of the terms and served as a form of highlighting them. It will also assist readers in recognizing their significance from the onset of the paper.

### **Definition of Terms**

#### Conceptions of Justice

There is no precise definition of justice. However, theories exist that have sought to define and explain justice. Three groups of theories are the substantive theories, the procedural theories, and the liberal or utilitarian theories.<sup>33</sup> These theories are the foundation on which many definitions of justice have been based.

Substantive justice theories focus on moral framework and the substance of what is just. Procedural theories of justice define justice as a procedure through which fair and agreed upon decisions are made. Procedural theories of justice do not concern themselves with the substance of justice. They only assert a framework and procedure to achieve fair and just result. Liberal and utilitarian theories argue that whatever is of most the most social utility to the most people is just and anything that violates this is unjust<sup>34</sup>

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<sup>32</sup> Comfort Chinyere Ani, *supra* note 30 at 87. Don John Omole, *Towards Implementing RJ in Nigeria: The Nigerian Criminal justice Reform Bill (2005)*, Restorative Justice Consortium: Resolution 23 7.

<sup>33</sup> Elizabeth M. Elliot, *Security with Care (Restorative justice and Healthy societies)* (Halifax & Winnipeg: Fernwood Publishing 2011) at 47-52.

<sup>34</sup> Amanda Nelund, Restorative Justice Class notes (University of Manitoba 2015); Utilitarian theories are often willing to accept that a law or policy may have some detrimental effect, or negatively affect some people, but

While theorists like Jennifer Llewellyn and Robert Howse argue for substantive justice, they start from the idea that we are all relational beings and justice therefore needs to concern itself with relations.<sup>35</sup> Key to this argument is that right relations require equal dignity, concern, and respect and that ignoring social context amounts to ignoring the fact that we are relational.<sup>36</sup> To them justice is concerned with creating equals, restoring relationships to the place of equal concern and respect and transforming relationships.<sup>37</sup>

Fisk Milton defines justice as a means to solving problem by offering a way out of a morass of conflicting claims.<sup>38</sup> According to Kant Immanuel and Rawls John,<sup>39</sup> justice has no substance and is just procedural. Norms, rules and decision are just if they are approved by all the parties. This theory poses the question; what happens when there are different perspectives and the norms and procedure are not approved by all? Rawls' solution to this is that society should pursue the greater good for the greatest number of people.<sup>40</sup> He argues that we need to step away from personal belief and into the core values of equality and liberty, and make decisions behind the veil of ignorance and appeal only to democratic principles.<sup>41</sup>

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as long as the net social gain exceeds the detriment, than that is acceptable. See also Elisabeth M. Elliot, *ibid* 33 ch 3 at 47-52

<sup>35</sup> Jennifer Llewellyn & Robert Howse, *Restorative Justice- A Conceptual Framework* (Ottawa: Law Commission Canada, 1998) at 16

<sup>36</sup> *Ibid* at 16

<sup>37</sup> *Ibid* at 16-7

<sup>38</sup> Fisk Milton, "Introduction: The Problem of Justice" ed, *Key Concepts in Critical Theory: Justice* (New Jersey: Humanities Press, 1993) at 1

<sup>39</sup> Amanda Nelund *supra* note 34; see also John Rawls, *A Theory of Justice* (MA: The Belknap Press of Harvard University Press, 1971) at 38-43, 136; and Andrew, Woolford, *The Politics of Restorative Justice: A Critical Introduction*, (Halifax & Winnipeg: Fernwood Publishing 2009) at 33; Kant Immanuel, *Fundamental Principles of the Metaphysics of Morals* (London: Longmans, Green & Co 1873) as referred to in chapter 3 of Woolford's book at 33

<sup>40</sup> John Rawls, *A Theory of Justice* (MA: The Belknap Press of Harvard University Press, 1971) at 38-43, 136

<sup>41</sup> Andrew Woolford, *supra* note 39 at 34; see also John Rawls, "Justice as Fairness: Political not Metaphysical" In M. Fisk ed *Key Concepts in Critical Theory: Justice* (New Jersey: Humanities press 1993) or John Rawls *supra* note 40 at 136

A question arises when the issue of the veil of ignorance arises. Are we willing to step behind the veil of ignorance? And if we are is it possible to do so? Although we think we are taking a general position we are really just taking the dominant position. This is because utilitarian theory assumes that we have wide spread norms and values.<sup>42</sup> However, utilitarian theories do not account very well for multiple perspectives on justice.

Habermas offers a different perspective from Rawls, he provides a communicative ethics which is procedural.<sup>43</sup> He argues that through active participation of agents in a reasonable discussion of right and wrong we can reach an agreement of norms. He states that one cannot argue against reasonable argument except by reason. However, there are conditions that must be met in the communicative ethics.<sup>44</sup>

1. Every competent subject is allowed to take part
2. Everyone is allowed to make assertions, question assertions, express their attitude, desire and needs
3. No one may be prevented by coercion (internal or external) from expressing the right in 1 and 2 above.<sup>45</sup>

In the course of this research I adopt a substantive concept of justice with the view that justice cannot be purely procedural. I concurred with the concept that justice is relational and though it requires some procedure, these procedures should serve as guide line to achieving justice as opposed to being the focus when we seek to achieve justice.

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<sup>42</sup> Amanda Nelund, supra note 34; Andrew Woolford, supra note 39 at 35-6

<sup>43</sup> Jurgen Habermas, *Moral Consciousness and Communicative Action* (MA: MIT Press 1990) at 89

<sup>44</sup> Ibid at 89

<sup>45</sup> Ibid at 89

## Restorative justice:

Restorative justice has been defined by many theorists and bodies differently, among them are the following definitions. According to the Law Commission of Canada, restorative justice refers to a process for resolving crime and conflict that focuses on redressing the harm to the victims, on holding offenders accountable for their actions and on engaging the community in a conflict resolution process.<sup>46</sup> A restorative justice paradigm asks questions like what harm and who was affected by it? What are their needs? Whose obligations are these? Sharpe defines restorative justice as a justice that put its energy into the future not the past.<sup>47</sup> It is defined as one that focuses on what needs to be healed or repaid or what is to be learned in the wake of crime. It looks at what needs to be strengthened to avoid re-occurrence.<sup>48</sup> The *Restorative Justice Act of Manitoba* defines restorative justice as:

“... an approach to addressing unlawful conduct outside the traditional criminal prosecution process that involves one or both of the following:

- (a) providing an opportunity for the offender and the victim of the unlawful conduct or other community representatives to seek a resolution that repairs the harm caused by the unlawful conduct and allows the offender to make amends to the victim or the wider community;
- (b) requiring the offender to obtain treatment or counselling to address underlying mental health conditions, addictions or other behavioral issues.”<sup>49</sup>

This leads us to discuss what restorative justice seeks to repair. Crime is a violation of laws or rules where culpability is determined and the guilty are punished.<sup>50</sup> Howard Zehr used a

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<sup>46</sup> Canada, The Law Commission of Canada, *Transforming Relationship Through Participatory Justice*, (Ottawa: Minister of justice 2003) at 3

<sup>47</sup> Susan Sharpe, *Restorative Justice: A Vision for Healing and Change*, (Edmonton AB: Edmonton Victim Offender Mediation Society, 1998).

<sup>48</sup> Elizabeth M. Elliott, supra note 33 at 67 while quoting Susan Sharpe formerly of Victim Offender Mediation Society 64

<sup>49</sup> Restorative Justice Act (2014) SM C 26. <http://web2.gov.mb.ca/laws/statutes/2014/c02614e.php>. The Act supports the development and use of restorative justice programs in Manitoba. It provides authorization for alternative programs that can be used under Section 717 of the *Canadian Criminal Code* or section 10 of the *Youth Criminal Justice Act*.

<sup>50</sup> Elizabeth M. Elliott, supra note 33 at 65.

restorative lens when he defined crime as a violation of peoples and relationships; it creates obligation to make things right. Justice involves the victim, the offender and the community in a search for solution which promote repair, reconciliation, and reassurance.<sup>51</sup> We must first understand that when crime is committed the criminal justice system first seeks to protect the community or society and to do so it uses the instrument of incarceration.

### Incarceration

Incarceration is the act of restraining the personal liberty of an individual; through confinement in a prison.<sup>52</sup> Imprisonment is the restraint of a person against their will. This can either be lawful or unlawful. A lawful imprisonment is used when executing an arrest, to ensure appearance in a civil suit or when a crime is committed. Imprisonment can also be used to ensure appearance (where bail cannot be made) or as a sentence (part of the punishment).<sup>53</sup> Restorative justice is meant to be a more constructive alternative to prison, by focusing on the future and preventing recidivism.

### Rehabilitation and Re-integration

Rehabilitation means to prepare a prisoner for a productive life upon release from prison.<sup>54</sup> Although rehabilitation is seen as a type of punishment for criminals within criminal justice system, rehabilitation is not a punitive measure but a therapeutic one.<sup>55</sup> It is believed that criminal behaviors are caused and not just acts of free will. In other words they can be changed by positive influences or other factors.

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<sup>51</sup> Howard Zehr, *Changing Lenses*, (Waterloo ON: Herald Press 1990) at 181

<sup>52</sup> *West's Encyclopedia of American Law, edition 2. (2008)*. Retrieved March 1 2016 from <http://legal-dictionary.thefreedictionary.com/imprisonment>

<sup>53</sup> A Law Dictionary, Adapted to the Constitution and Laws of the United States by John Bouvier. (1856). Retrieved March 1 2016 from <http://legal-dictionary.thefreedictionary.com/imprisonment>

<sup>54</sup> *West's Encyclopedia of American Law, edition 2*. S.v. "rehabilitation" Retrieved March 1 2016 from <http://legal-dictionary.thefreedictionary.com/rehabilitation>

<sup>55</sup> Nick Smith, "Encyclopedia of Criminal Justice" in University of New Hampshire Department of Philosophy

The concept of rehabilitation rests on the assumption that criminal behavior is caused by some factor. This perspective does not deny that people make choices to break the law, but it does assert that these choices are not a matter of pure "free will." Instead, the decision to commit a crime is held to be determined, or at least heavily influenced, by a person's social surroundings, psychological development, or biological makeup.<sup>56</sup>

Rehabilitation aims for the re-integration of offenders. Offender reintegration involves all activities and programs conducted to prepare an offender to return safely to the community and live as a law abiding citizen. Re-integrative programs are to be carried out only through effective partnership with the court, police, other federal departments and agencies, provincial government, municipalities and voluntary organization.<sup>57</sup> The restrictive conditions for carrying out integrative programs are in place because community safety or security is of paramount consideration.<sup>58</sup> Curt Griffiths and others warn against the use of the word re-integration as it is possible that an offender was never successfully integrated into the society or community prior to the incarceration. This could be due to marginalization or failure to acquire the attitude and behaviors of functional and productive people. Social re-integration is the support given to offenders during reentry from prison into society<sup>59</sup>

In chapter two we would delve into the Nigerian criminal justice system. There will be a focus on interim release and sentencing. We will highlight the statutory provision and legal practices in the aspect of interim release and sentencing detention. The chapter will also focus on discussions about restorative justice possibilities in these practices within the Nigerian context.

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<sup>56</sup> Francis T Cullen & Shannon A. Santana, Encyclopedia of Crime and Justice (2002) COPYRIGHT 2002 The Gale Group Inc. <http://www.encyclopedia.com/topic/Rehabilitation.aspx>

<sup>57</sup> Arden Thurber, "Understanding Offender Reintegration" Research In Brief at 5. Online: [http://www.csc-scc.gc.ca/research/forum/e101/101c\\_e.pdf](http://www.csc-scc.gc.ca/research/forum/e101/101c_e.pdf)

<sup>58</sup> Ibid at 4. Online: [www.csc-scc.gc.ca/research/forum/101/101c\\_e.pdf](http://www.csc-scc.gc.ca/research/forum/101/101c_e.pdf)

<sup>59</sup> Curt T Griffiths, Yvon Dandurand & Danielle Murdoch, "The Social Reintegration of Offenders And Crime Prevention" 1CCLR 2007 Public Safety Canada. Online: <http://www.publicsafety.gc.ca/cnt/rsrscs/pblctns/scl-rntgrtn/index-en.aspx>

## **CHAPTER TWO – NIGERIAN BAIL SYSTEM**

As at June 2014 statistics from the Nigerian Prisons Service shows that 68 percent of the Nigerian prison population are un-convicted prisoners<sup>60</sup>. It is therefore worthwhile to explore whether restorative justice at the bail and pretrial stage could have significant impact. This chapter is descriptive of the Nigerian conventional bail system. It is an avenue to discuss pretrial detention and sentenced detention, identify the problem that need to be addressed and briefly touch on how restorative justice can impact the Nigerian Criminal Justice system. Details on restorative justice possibilities during sentencing are discussed in chapter four.

In Nigeria there are three types of bail. The first is bail provided by police, also known as administrative bail. The second is bail provided by courts pending trial. The last is bail pending appeal. The conditions and terms for granting bail, the factors considered when granting bail and how this affect the possibility of receiving bail will be highlighted. A brief analysis of the Nigerian sentencing practices will also be discussed in other to illustrate how the practices impacts imprisonment rates. This is aimed at exposing the implication of the bail and sentencing together on over-incarceration of a particular group or class of people and how this leads injustice.

### **Constitutional Foundation for Bail in Nigeria**

To understand the functioning of bail and its impact on the pretrial detention population it is necessary to start with the constitutional and legal foundations of bail. In Nigeria the power of the court to grant bail has both constitutional and statutory foundations. The constitutional basis for granting bail is found in sections 38 (the right to freedom of movement), section 36.1 (right

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<sup>60</sup> Nigeria Prison Service, “Statistical Information” (31<sup>st</sup> October 2014), Nigeria Prison Service at 1, online: <<http://www.prisons.gov.ng/about/statistical-info.php>>.

to fair hearing) and its proviso such as the right to presumption of innocence and fair trial<sup>61</sup>. Also contained in section 35 of the *Constitution of the Federal Republic of Nigeria* is the right to liberty. Section 35 provides that

Every person shall be entitled to his personal liberty and no person shall be deprived of such liberty save in the following cases and in accordance with a procedure permitted by law.

- a) In execution of a sentence or order of a court in respect of a criminal offence of which he has been found guilty;
- b) By reason of his failure to comply with the order of a court or in order to secure the fulfilment of any court order to secure the fulfilment of any obligation imposed him by law;
- c) for the purpose of bringing him before the court in execution of the order of a court or upon reasonable suspicion of having committed a criminal offence or to such extent as may be reasonably necessary to prevent his committing a criminal offence;
- d) in the case of a person who has not attained the age of eighteen years, for the purpose of his education and welfare;
- e) in the case of persons suffering from infectious or contagious disease, persons of unsound mind, persons addicted to drugs or alcohol or vagrants, for the purpose of their care or treatment or the protection of the community; or
- f) for the purpose of preventing the unlawful entry of any person into Nigeria or of effecting the expulsion extradition or other lawful removal from Nigeria of any person or taking of proceeding relating there to;

**Provided**<sup>62</sup> that a person who is charged with an offence and who has been detained in lawful custody awaiting trial shall not continue to be kept in such a detention for a period longer than the maximum period of imprisonment prescribed for the offence.

Subsection 4 of this section provides that a person arrested or detained according to subsection 1c of the above section shall be brought before the court within reasonable time and if he is not tried within;

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<sup>61</sup> Constitution of the Federal Republic of Nigeria, supra note 13, s 36 (4 & 5).

<sup>62</sup> Emphasis added

- i. 2 months from the date of arrest where he is in custody or not entitled to bail;  
or
- ii. 3 months from the date of arrest or detention for persons released on bail, (without prejudice to any further proceeding that may be brought against him) be released either unconditionally or upon conditions necessary to ensure his appearance in court

Reasonable time is also prescribed in subsection 4 to mean:

- a) In case of arrest or detention in a place with a competent court of jurisdiction within forty kilometers a period of one day; and
- b) In any other case, a period of two days or such longer period as in the circumstances maybe considered by the court as reasonable time.

The Constitution does not set out a right to bail explicitly. However, bail as a constitutional right is borne out by the fact that the constitution provides for presumption of innocence in section 36 (5), section 35 also provides for liberty of the citizen.<sup>63</sup> This was reiterated in the case of *Obekpa v. State*.<sup>64</sup> Judge Ejembi Eko of the Court of Appeal in Port Harcourt Division has written a text, *The Law of Bail*, in which he describes the right to bail as follows:

The fair hearing or fair trial is insurance for the preservation and protection of the personal liberty guaranteed. The right of personal liberty loses its meaning and force unless fair trial is guaranteed, contained in the fair trial guaranteed is the presumption of innocence of the person accused of a criminal offence the two rights are so interwoven or interlocked that existence of none enhances the other. It is a right every person under the constitution is entitled to.<sup>65</sup>

In *Obekpa v. State* it was held that bail allows those who might be wrongly accused to escape punishment which any period of imprisonment would inflict while awaiting trial.<sup>66</sup> It facilitates easy access to counsel and witnesses, and the unhampered opportunity for the accused to prepare defense for trial. Unless the right to bail or freedom before conviction is preserved,

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<sup>63</sup> *Constitution of the Federal Republic of Nigeria* supra note 13, s 35, 36.5; J.A Agaba, supra note 18 ch 6 at 249-50.

<sup>64</sup> *Obekpa v. State*, 1980 INCLR 420

<sup>65</sup> Judge Ejembi Eko, *The Law of Bail*, 2<sup>nd</sup> Ed. (Ibadan: Life gate Press & Publishing Limited, 2005) at 1. See also Ernest Ojukwu et al, "Handbook on Prison Pre-trial Detainee Law Clinic" (2012) Network of University Legal Aid Institution 37

<sup>66</sup> *Obekpa*, supra note 64

protected and allowed, the presumption of innocence guaranteed to every individual accused of an offence would lose its meaning and force.<sup>67</sup>

The High Court in Nigeria has unlimited jurisdiction over criminal cases with the only exception being section 251 of the Constitution (matters exclusive to the Federal High Court). Section 252 provides that the Federal High Court exercises all the powers of the high court of the state. The matters exclusive to the Federal High Court are listed in section 251, subsections A to S with the exception of subsections D, P, Q and R. The Federal High court's power is only exclusive when it does not prevent a person from redress against the Federal government or its agencies with regards to management and control, operations and interpretation actions or injunctions relating to executive/administrative actions or decision of the Federal government.

251 (d) connected with or pertaining to banking, banks, other financial institutions, including any action between one bank and another, any action by or against the Central Bank of Nigeria arising from banking, foreign exchange, coinage, legal tender, bills of exchange, letters of credit, promissory notes and other fiscal measures:

Provided that this paragraph shall not apply to any dispute between an individual customer and his bank in respect of transactions between the individual customer and the bank;

(p) the administration or the management and control of the Federal Government or any of its agencies;

(q) subject to the provisions of this Constitution, the operation and interpretation of this Constitution in so far as it affects the Federal Government or any of its agencies;

(r) any action or proceeding for a declaration or injunction affecting the validity of any executive or administrative action or decision by the Federal Government or any of its agencies; and

Provided that nothing in the provisions of paragraphs (p), (q) and (r) of this subsection shall prevent a person from seeking redress against the Federal Government or any of its agencies in an action for damages, injunction or specific performance where the action is based on any enactment, law or equity.

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<sup>67</sup> J A Aguda, supra note 18 at 247

The High Court therefore has power to grant bail in all matters except those listed as exclusive to the Federal High Court in section 251 of the Constitution of the Federal Republic of Nigeria.

**272.** (1) Subject to the provisions of section 251 and other provisions of this Constitution, the High Court of a State shall have jurisdiction to hear and determine any civil proceedings in which the existence or extent of a legal right, power, duty, liability, privilege, interest, obligation or claim is in issue or to hear and determine any criminal proceedings involving or relating to any penalty, forfeiture, punishment or other liability in respect of an offence committed by any person.

(2) The reference to civil or criminal proceedings in this section includes a reference to the proceedings which originate in the High Court of a State and those which are brought before the High Court to be dealt with by the court in the exercise of its appellate or supervisory jurisdiction.

**252.** (a) For the purpose of exercising any jurisdiction conferred upon it by this Constitution or as may be conferred by an Act of the National Assembly, the Federal High Court shall have all the powers of the High Court of a state.

Agaba described bail as follows:

“A procedure by which a person arrested or detained in connection with a crime may be released upon security being taken for his appearance on day and place as may be determined by the person or authority effecting the release...”<sup>68</sup>

The three types of bail previously mentioned in this chapter are briefly discussed below.

### **Judicial Interim Release in Nigeria.**

In Nigeria bail granted by the police is described as administrative bail and it is usually granted upon the accused entering a recognizance with or without sureties for a reasonable amount to appear before the court at the time and place of recognizance. Such release may be on self-recognition or on condition that the accused enters into a bond with or without a surety.<sup>69</sup>

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<sup>68</sup> J A Aguda, *supra* note 18 at 249

<sup>69</sup> PA, *supra* note 16, s 27(b).

According to Section 27 of the *Police Act* the police may admit to bail any person that has been arrested without a warrant.

27) When a person is arrested without a warrant, he shall be taken before a magistrate who has jurisdiction with respect to the offence with which he is charged or is empowered to deal with him under section 484 of the criminal procedure act as soon as practicable.

Provided that any police officer for the time being in charge of a police station inquire into the case and;

- a) Except when the case appears to such office to be of a serious nature, may release such person upon entering into a recognizance, with or without sureties, for a reasonable amount to appear before a magistrate at the day, time and place mentioned in the recognizance, or
- b) If it appears to such officer that such inquiry cannot be completed forthwith, may release such person on his entering into recognizance, with or without sureties for a reasonable amount , to appear at such police station and at such times as are named in the recognizance, unless he previously receives notice in writing from the superior officer in charge of that police station that his attendance is not required, and any such bond maybe enforced as if it were a recognizance conditional for the appearance of the said person before a magistrate.

Section 18 states that the arrested person should appear at the police station in cases where further investigation cannot be completed.

18) If, on a person being so taken into custody as aforesaid, it appears to the officer aforesaid that the inquiry into the case cannot be completed forthwith, he may discharge the said person on his entering into a recognizance, with or without sureties for a reasonable amount, to appear at such police station and at such times as are named in the recognizance, unless he previously receives notice in writing from the officer of police in charge of that police station that his attendance is not required, and any such recognizance may be enforced as if it were a recognizance conditional for the appearance of the said person before a magistrate's court for the place in which the police station named in the recognizance is situate.”

Section 17 states that the arrested person should appear in the court usually in cases where the officer in charge of the station has further investigated the case.

17) When any person has been taken into custody without warrant for an offence other than an offence punishable with death ... but where such person is retained in custody, he shall be brought before a court or justice of the peace having jurisdiction with respect to the offence or empowered to deal with such a person

by section 484 of this Act as soon as practicable whether or not the police inquiries are completed.<sup>70</sup>

While section 17 of the *Criminal Procedure Act* deals with situation where police investigation has been concluded, section 18 of the *CPA* refers to situations where police investigation is still in progress.<sup>71</sup>

By using the phrase “as soon as practicable” these laws provide for a broader window giving the police the discretion to determine when the suspect would be brought to court or before a justice of the peace with discretion to hear his case. This discretionary power provided to the police officer to determine which offence is serious in nature as well as the practicable time in the above stated sections may be counter-productive to the purpose for which bail exist. There is also the vagueness of what is considered as “reasonable amount”. The law does not clarify if there a means of measuring what is reasonable or if this is determined by the socio-economic capacity of the accused person, or by the discretion of the officer in charge?

In *Eda v. Commissioner of Police*<sup>72</sup> the provision of section 17 *CPA* and section 27 *Police Act* were declared null and void due to the level of their inconsistency with the Constitution. Section 35 (4) of the Constitution provides that the police cannot detained a person for more than 24 hours or 48 hours except in capital or serious offences. Section 17 and 18 of the *Criminal Procedure Act* (“*CPA*”)<sup>73</sup>, section 129 *Criminal Procedure Code* (“*CPC*”)<sup>74</sup>, section 27 *Police Act* (“*PA*”)<sup>75</sup> and section 17 *Administration of Criminal Justice Law* (“*ACJL*”)<sup>76</sup> empower the police to grant bail pending further investigation.

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<sup>70</sup> *CPA*, supra note 14, s 17.

<sup>71</sup> *CPA* Ibid, s 18

<sup>72</sup> *Eda v. Commissioner of Police* (1982) 3 NCLR at 219.

<sup>73</sup> *CPA*, supra note 14, s 17, 18

<sup>74</sup> *CPC*, supra note 15, s 129

<sup>75</sup> *PA*, supra note 16, s 27

Unlike the *CPA*, the *CPC* adopts a different approach. Whenever it appears that an investigation cannot be completed within 24 hours of the arrest of the suspect, the police may release or send the suspect to a court of competent jurisdiction where the court may on application of the police officer detain such person in custody as “it deems fit” for a period of 15 days. This must be with reason and if police investigation is still not completed within those 15 days the court may if it considers detaining the suspect advisable, further remand the suspect for a successive 15 days. This provision therefore authorizes the detention of an accused for as long as it takes the police to build a case.<sup>77</sup>

Although there is no law that supports this practice in the southern parts of Nigeria, a practice known as “a holding charge” occurs in the south. Here the accused is brought before a court, usually the magistrate, with a charge that fits the known facts but is designed primarily as continuous detention of the suspect while the police complete their investigation.<sup>78</sup> In most cases the court does not have jurisdiction to grant bail for the offence charged. The court therefore proceeds to remand the accused pending arraignment before the proper court or legal advice from the Ministry of Justice.<sup>79</sup>

There is, however, no statutorily provided procedure to apply for bail. In practice it is usually done in writing by the suspect, his counsel or his surety when he is granted bail. It lasts for as long as the matter remains with the police. Administrative bail lapses once the suspect is charged and appears in court. Therefore, a new application has to be made.<sup>80</sup>

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<sup>76</sup> *ACJL*, supra note 17, s 17

<sup>77</sup> Isabella Okegbue, “Bail Reform in Nigeria” (1996) 6:6 Nigerian Institute of Advanced Legal Studies (NIALS) at 37 para 2. See also *Criminal Procedure Code*, 1990, Cap 30, s 129

<sup>78</sup> *Ibid* at 37

<sup>79</sup> *Ibid* at 37

<sup>80</sup> J A Aguda, supra note 18 at 254

Bail pending trial is used when a person is arrested with a warrant. There may be an endorsement by the court that issued the warrant that the suspect be release on bail after arrest upon satisfaction of some conditions specified in the warrant. In such a case the suspect need not appear before the court before proceeding on bail, but this is still a court bail. Where a person is arrested without a warrant or with a warrant, without these specifications for conditions of releases on bail the accused will need to apply for court bail after his arraignment before the court.<sup>81</sup> This is usually done before the trial at pretrial level.<sup>82</sup>

With bail of people accused of simple offences (imprisonment of less than 3 months), the CPA and CPC provide that the court shall admit a suspect to bail except in certain circumstances. These provisions however defer as to the circumstance that may influence court bail for such offences. While the CPC in section 340 specifically defines two circumstances which include:

- 1) Where the court considers that the proper investigation of the case will be prejudiced, and
- 2) Where there is serious risk that the accused will escape from justice (this provision also apply to granting police bail)<sup>83</sup>

Section 118(3) of the CPA only provides that the court must grant bail unless it sees good reason to the contrary. However, what would constitute good reason is left to the discretion of the court. This implies that if the court decides that the accused could not provide a surety or sufficient surety or any “good reason” the possibility of being granted bail is hampered.<sup>84</sup>

Where the offences are noncapital felonies (offences punishable by imprisonment of 3years or more) the *CPA* states “... the court **may** as it deems fit admit him to bail” and in the

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<sup>81</sup> *CPA*, supra note 14, s 30; *CPC*, supra note 15, s 57 and *ACJL* supra note 17, s 29 (1).

<sup>82</sup> J A Aguda, supra note 18 as 256; See also Professor J. Nnamdi Aduba & Emily I Alemika, “Bail and Criminal Justice Administration in Nigeria” (2009) Institute of Security Studies (ISS) 92

<sup>83</sup> Emphasis added; *Criminal Procedure Code, Northern Nigeria* 1990, s 340; Isabella Okegbue, supra note 77 at 40

<sup>84</sup> Isabella Okegbue, supra note 77 at 40

*CPC* used the term “persons accused of an offence punishable for a term more than 3 years **shall not** ordinarily be released on bail”<sup>85</sup>. Although the use of language used in both provisions are not similar, the effects of these provision are the same. The *CPC* once again provides for factors to be considered which include:

- 1) That the proper investigation of the case will not be prejudiced,
- 2) That no serious risk of the accused escaping from justice would be occasioned by his release, and
- 3) That no grounds exist for believing that the accused, if released, would commit an offence.<sup>86</sup>

Once again the *CPA* does not provide a guide. However, the southern states in Nigeria use English decisions for guidance. It has been established that bail is required to ensure appearance of the accused in court and not to serve as a punishment.<sup>87</sup> Certain aspects are considered to determine whether or not bail would be granted to an accused person. These include:

1. The nature and punishment attached to an offence,
2. Accused persons prescribed innocent until proven otherwise
3. Taking to record the character of the accused. Criminal record of the accused (if the accused is a repeat offender or not will greatly influence the court’s decision)
4. Likelihood that the accused will commit an offence if released on bail.<sup>88</sup>
5. The probability or tendency of the accused interfering with or obstructing the investigation of the case.<sup>89</sup>

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<sup>85</sup> Emphasis added; *CPA*, supra note 14, s118 and *CPC*, supra note 15, s341

<sup>86</sup> Emphasis added; Isabella Okegbue supra note 77 at 42

<sup>87</sup> Justice Okadigbo, in *Dogo v. Commissioner of Police* (1980) 1 NCR 14

<sup>88</sup> Chief Justice Butler Lloyd in *R v. Jamal* (1941) 16 NLR 54.

<sup>89</sup> African Human Security Initiative, “The Theory and Practice of Criminal Justice in Africa” (2009) Institute for Security Studies (ISS) 93-94; See also *Dantata v. Police* (1958) NRNLR 3.

Such broad discretion may be one of the reasons that the remand rate in Nigeria is so high. By giving the court such discretionary power these laws allow the court to determine what is good reason, which may range from suspects inability to pay fine to risk of accused committing another offence while on bail. This is particularly detrimental when the system is one that depends so much on punishment and retribution to do justice.<sup>90</sup>

Section 341(1) of the *CPC* states to the effect that when an accused is arrested for an offence punishable by death, the accused person **shall not**<sup>91</sup> be release on bail. However, subsection three (3) of the same section states that where it appears to the court that there are no reasonable grounds to believe that the accused committed the offence but there is sufficient ground for further inquiry the accused **may** be released on bail.<sup>92</sup> Section 118(1) of the *CPA* states to the effect that when an accused person is arrested for a capital offence the person **shall not**<sup>93</sup> be released on bail except by a judge of the high court.<sup>94</sup>

Use of the word “**may**” in section 341(3) of the *CPC* gives the court discretion to detain an accused person although there is sufficient ground for further inquiry is questionable. This provision raises the question of why the accused was arrested in the first instance if there is no reasonable ground to believe he or she committed the offence. Such discretion is very detrimental to an accused who cannot afford legal representation in a country that has a poor criminal justice system and tends to use imprisonment to solve it criminal just problems or at least make them go away.

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<sup>90</sup> Abdulkarim A. Kana, “Perspectives and Limits of Judicial Discretion in Nigerian Courts” (2014) 29 *Journal of Law, Policy and Globalization* 158-59. Online: [www.iiste.org](http://www.iiste.org).

<sup>91</sup> Emphasis added.

<sup>92</sup> Isabella Okegbue supra note 77 at 15

<sup>93</sup> Emphasis added.

<sup>94</sup> Ibid at 46

Bail pending appeal is another type of court bail. An appellant may seek bail at the appeal court pending trial before the trial court. This presupposes that the appellant has made application for bail at the trial court but was refused and the trial is still pending before the court.<sup>95</sup> In another instance the appellant may have been tried and convicted but has appealed against the decision. In such cases the application for bail will be pending the determination of the appeal.<sup>96</sup> In rare circumstances the appellant may apply for bail (not because of either of the two circumstances stated above but) because the appellant had requested that a charge against him be quashed for lack of a prima facie case and his application was refused. If an appeal is made against the ruling the appellant may make his application for bail for the first time before the appeal court in this instance.

### **Condition for Bail Release in Nigeria**

Section 210 of the *CPA* states:

“Every accused person shall, subject to the provisions of section 100 and of subsection (2) of section 223, be present in court during the whole of his trial unless he misconducts himself by so interrupting the proceedings or otherwise as to render their continuance in his presence impracticable.”<sup>97</sup>

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<sup>95</sup> *Ukatu v. Commissioner of Police* (2001) FWLR (Pt 66) 755.

<sup>96</sup> *Fawehinmi v. State* [1990] 1 NWLR (PT 127) 486.

<sup>97</sup> Under section 100 of the *CPA*, if a person is summoned to court in respect of an offence, the magistrate may on the application of such a person, where the offence is punishable by a penalty, not exceeding one hundred naira, dispense with the attendance of that person provided he pleads guilty in writing or a counsel appears and so pleads on his behalf in the court. Notwithstanding such a dispensation, the magistrate may, at any subsequent state of the proceedings order the accused person's personal attendance if it is required. The offences to which this exception applies are necessarily simple offences such as theft, not very serious ones.

The exception in section 223(2) of the *CPA*, deals with the investigation into the question of whether an accused person is of unsound mind, and, therefore unable to make his defense. Such an investigation may be held in the absence of the accused person if it is the opinion of the court that owing to his state of mind it would be in his interest or in the interest of other persons or of public decency that he should be absent. Thus, it is submitted this is not a real exception to the rule because the accused, in such a case is only absent from the proceedings in which his insanity is being investigated and not from the trial, as such, of the offence with which he is charged. The requirement that an accused person should be present during his trial is not only a rational one but is designed to ensure justice.

Section 118(2) of the *CPA* states that a person charged with a felony other than one punishable by death may be granted bail if the court deems it fit. However, section 341 *CPC* provides criteria for adjudicating bail applications. These criteria are as follows:

a. Persons accused of offence punishable by death shall not be released on bail;

b. Persons accused of offences punishable with imprisonment for a term exceeding 3 years shall not ordinarily be released on bail, the court may release such person if it considers:

- that the proper investigation of the case would not be jeopardized,
- there is no serious risk of the accused escaping from justice and;
- there are no grounds to believe that the accused would commit an offence

if released on bail.

c. Notwithstanding the above if it appears to the court that there are no reasonable grounds to believe that the accused committed the offence but there is sufficient grounds for further inquiry the court may release the accused person pending the inquiry.

These are only some of the factors to be considered in a bail application which have been recognized by the Supreme Court and other superior courts in Nigeria. However, courts have held that the most important test focuses on the probability that the accused will appear in court and whether or not release will endanger public safety.<sup>98</sup> These factors are:

- a. The nature of the offence and the prescribed punishment.
- b. The nature and character and quality of evidence against the accused.

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<sup>98</sup> *Dokubo Aari v. Federal Republic of Nigeria* (2007) All FWLR (pt. 375) 588.

- c. The possibility of the accused interfering with further investigation and /or prosecution of the case if granted bail.
- d. The prevalence of the offence.
- e. Detention for the protection of the accused person
- f. The possibility of the accused committing the same or similar offence while on bail.
- g. The criminal record of the accused.
- h. Ill- health.<sup>99</sup>

To apply for bail pending appeal the court must satisfy itself that the applicant has, in fact, lodged an appeal to the appellate court that is still pending, that the appellant must have complied with the conditions of appeal imposed which would show the seriousness of this application; and if he was granted bail during trial, that he did not attempt to jump bail.<sup>100</sup>

### **Terms of Bail in Nigeria**

These are condition(s) upon which bail can be granted, otherwise known as security for bail.<sup>101</sup> The usual goal of the conditions is to secure the attendance of the accused at his trial. Bail is rarely granted unconditionally in Nigeria.<sup>102</sup> In addition the terms or conditions upon which bail is granted must not be too onerous. Therefore, in fixing the amount of bail regards must be had to the circumstance of the case and the amount shall not be excessive.<sup>103</sup> Where the term

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<sup>99</sup> *Munir v. Federal Republic of Nigeria (2009) All FWLR (pt. 500) 775 at 785 -787.*

<sup>100</sup> *Jammel v. State (1996) 9 NWLR at 472.*

<sup>101</sup> *ACJL*, supra note 17, s 116.

<sup>102</sup> J A Aguda, supra note 18 at 301.

<sup>103</sup> *CPA*, supra note 14, s 120; *Criminal Procedure Code, Northern Nigeria 1990*, s 349 (1).

upon which bail granted by magistrate or police is excessive the high court has the power to review it.<sup>104</sup>

Typical conditions include:

Self-recognizance: Bail is granted on this condition only with respect to minor offences or when the accused person is a known personality whom the court is convinced will not flee jurisdiction. In such instances the accused need not enter a bond and no surety is required.<sup>105</sup>

Accused executing a bond: The accused may be granted bail on the condition that he executes a bond for a fixed sum. It is no more than an undertaking by the accused that he will be present whenever his presence is required by the court. Where he fails to appear on the day he is required to he may be made to pay the sum contained in the bond. This is also called a forfeiture of bond.<sup>106</sup>

Producing a surety or sureties who will enter a bond in a specific sum: The accused may be required to produce a surety or sureties. These sureties can enter a bond for a specific sum. The amount is usually the same as the accused would otherwise have required to put up. The surety undertakes to pay the bond if the accused fails to appear in court or a designated place on a day he is required, unless the surety can show cause why he should not be made to pay.<sup>107</sup>

Deposit in lieu of bond: This is usually resorted to by the accused or suspect where he finds it difficult to secure a surety. It is not for the court to request or demand deposit in lieu of bond.<sup>108</sup>

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<sup>104</sup> CPA, supra note 14, s 125; *Criminal Procedure Code, Northern Nigeria* 1990 s 344.

<sup>105</sup> J A Aguda, supra note 18 at 301.

<sup>106</sup> Ibid at 301

<sup>107</sup> CPA, supra note 14, s 17, s 18 & s 122; *Criminal Procedure Code, Northern Nigeria* 1990, c 80, s 345

<sup>108</sup> *Onuigbo v Police (1975)* Nigerian Monthly Law Report

The law concerning bail simply required the amount of every bond fixed with due regard to the facts of each case. It pays no regard to the position of the accused person. In other words most accused persons will be denied bail due to lack of money. This can either be seen as a serious case of negligence of duty by the law court or even more serious the deliberate effort by the court to deny defendant the right of bail. Of course the law itself is to blame for allowing such discretionary power of bail to law court.<sup>109</sup>

Now I would discuss the practice in Nigeria exposing the cause of Nigeria's over dependence on imprisonment in the process. The overdependence of the Nigerian criminal justice system on imprisonment such as its result on the prison condition and the general public lack of confidence in the justice system.<sup>110</sup> Then I would discuss the Canadian system and recent practices that have helped the Canadian justice system to gradually regain public confidence in it.<sup>111</sup> Finally in this chapter I would sample some of this practice and programs put in place to promote a restorative system in Canada that can be useful to the Nigerian justice system for the purpose of improvement.

### **Ensuring Attendance in Court**

In Canada there are four ways of ensuring accused attendance, they are; appearance notice, promise to appear, summons to appear and recognizance.

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<sup>109</sup> Sa'ad, Abdul-Mumin, "The Criminal Process in the law courts of Nigeria: The Case of former Gongola state" (1991) 8:9, *Annals of Borno* 52-65,

<sup>110</sup> Olaolu Olusina, Davidson Iriekpen & Chiemele Ezeobi, "Nigerian Prisons: Death Trap or Reform centers", *This Day* (13 May 2012) 1 Online: <http://allafrica.com/stories/201205140640.html>

<sup>111</sup> With the introduction of Restorative justice came the creation of initiatives that are centered around victim, community and the offender. See Canada, Department of Justice, "Re-think Access to Criminal Justice in Canada: A Critical Review of Needs, Response and Restorative Justice and Initiatives" 2015-01-07. Online [http://www.justice.gc.ca/eng/rp-pr/csj-sjc/jsp-sjp/rr03\\_2/p3b.html](http://www.justice.gc.ca/eng/rp-pr/csj-sjc/jsp-sjp/rr03_2/p3b.html)

An appearance notice informs the accused of the offence which he or she charged with and specifies that he or she is to appear in court on a certain day. He is also informed that failure to appear is a criminal offence.<sup>112</sup> If the offence is indictable or an hybrid offence, accused will be required to have his or her fingerprints taken and given specification on where and when this needs to be done and the notice will also notify the accused that failure to do so is a criminal offence<sup>113</sup>. The accused is required to sign this document. However, the refusal of a signature does not invalidate the notice.<sup>114</sup>

A promise to appear is similar to an appearance notice, the accused in this instance promises to attend court and where needed to appear at the police station for finger printing. This is also commonly used in Nigeria as an addendum to any condition granted by the releasing officer when granting administrative bail. Like a notice of appearance an accused is required to sign the promise but refusal does not invalidate the document.<sup>115</sup>

A summons to appear is also similar to an appearance notice. It is unique in that it is signed by the justice of the peace and is an order made in the name of the Queen. If fingerprints are required, it will state so in the summons. The time and place for fingerprinting will also be specified.<sup>116</sup> A recognizance is an acknowledgement to the crown that the accused will owe a certain amount of money if he or she fails to appear in court or at the police station for finger print if required.<sup>117</sup>

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<sup>112</sup> CCC supra note 27 s 145.5

<sup>113</sup> CCC supra note 27 s 145.5&6.

<sup>114</sup> Donald A Macintosh, *Fundamentals of The Criminal Justice System: Basic Overview of The Criminal Code* (Toronto: Carswell, 1989) at 68-69.

<sup>115</sup> Ibid at 69.

<sup>116</sup> Ibid at 69.

<sup>117</sup> Ibid at 69

Coupled with these are a number of fail safes implemented in Canada and North America that go a long way in ensuring accused persons do not escape into the abyss. The technological development, effective use of media and computerized record keeping and tracking has greatly impacted the efficiency of the justice system.<sup>118</sup> The willingness of the system to hold someone responsible for a crime is another driving force that has greatly influenced this; although the above listed may have negative implications on privacy and liberty they compel an accused to appear in court when he is needed.

Test of Detention: The tests for judicial interim release are set out in section 515(10) for whether or not an accused is to be detained. The primary ground for detention is whether detention is necessary to assure that the accused attends court in order to be dealt with according to law. The secondary ground for detention is whether detention is necessary in the public interest, or for the protection and safety of the public. The secondary ground only applies after it has been determined that his detention is not justified on primary ground previously stated. The secondary grounds give regards to all the relevant circumstances, including substantial likelihood that the accused will if release commit or influence the administration of justice.<sup>119</sup>

Bail Hearing: Section 469 is concerned with the most serious offences in the Canadian criminal offences, such offences as murder, treason, inciting mutiny, alarming her Majesty and other offences within this category. The principle in this section of the *Canadian Criminal Code* is that an accused person is to be released upon his unconditional undertaking to appear in court on the day of trial. However, this is only where there is no reason provided by the crown that something more is required to ensure the appearance of the accused.

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<sup>118</sup> Ibid at 69

<sup>119</sup> Macintosh, supra 114 at 74

If the Crown shows cause that the accused should not be released, he will be detained. Also, if the crown does not show cause that the accused should be detained but satisfies the judge or justice that the accused should not be released without condition, a judge or justice will release the accused subject to the condition or recognizance as he directs. If the Crown does show cause for an offence that falls within *Canadian criminal code* section 469<sup>120</sup> the onus shifts to the accused on balance of probability to show why he should be releases.

Section 515.10 (a-c) of the *Canadian Criminal Code* states grounds on which an accused may be detained until trial.

(10) For the purposes of this section, the detention of an accused in custody is justified only on one or more of the following grounds:

(a) where the detention is necessary to ensure his or her attendance in court in order to be dealt with according to law;

(b) where the detention is necessary for the protection or safety of the public, including any victim of or witness to the offence, or any person under the age of 18 years, having regard to all the circumstances including any substantial likelihood that the accused will, if released from custody, commit a criminal offence or interfere with the administration of justice; and

(c) if the detention is necessary to maintain confidence in the administration of justice, having regard to all the circumstances, including

(i) the apparent strength of the prosecution's case,

(ii) the gravity of the offence,

(iii) the circumstances surrounding the commission of the offence, including whether a firearm was used, and

(iv) the fact that the accused is liable, on conviction, for a potentially lengthy term of imprisonment or, in the case of an offence that involves, or whose subject-matter is, a firearm, a minimum punishment of imprisonment for a term of three years or more.

**Marginal note: Detention in custody for offence listed in section 469<sup>121</sup>**

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<sup>120</sup> CCC, supra note 27, s 469

<sup>121</sup> Emphasis added. CCC, supra note 27, s 515.10 (a-c); For further information on empirical research about Canadian pretrial detention analysis see Cheryl Marie Webster, Anthony N. Doob & Nicole M Myers, "The

## **Sentencing Practice in Nigeria**

Imprisonment is the second and most common sentence used in Nigeria; this may be imposed in almost every case. This sentencing means the accused would be required to change his residence address from the community where he ordinarily resides to an accommodation provided by the state called the prison until the expiration of the term of the imprisonment.<sup>122</sup> There an imprisonment sentence is silent as to whether it is with hard labor or not, it is deemed to be imprisonment with hard labor.<sup>123</sup> A sentence of imprisonment may be concurrent or consecutive.<sup>124</sup>

If an accused person is found guilty at trial or pleads guilty then the court will convict the accused person and pronounce his or her sentence as prescribed by the statute creating the offence. It is required that a sentence must be pronounced in the court in the presence of the accused.

Section 17(1) of the Interpretation Act states:

- (1) Where a punishment in respect of an offence is provided by an enactment, the enactment shall be construed as providing that an offender shall be liable in pursuance of the enactment to a punishment not exceeding the punishment so provided.<sup>125</sup>

Although the court with jurisdiction cannot impose a higher sentence than what is prescribed by law, the court can impose the maximum sentence prescribed by law for an offence.

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Parable of Ms. Baker Understanding Pre-Trial Detention in Canada” (2009) 21:1 Current Issues in Criminal Justice 79-102

<sup>122</sup> J A Aguda, supra note 18 at 831

<sup>123</sup> CPA, supra note 14, s 377 and ACJL supra note 17, s 316

<sup>124</sup> In a concurrent sentence the court upon sentencing the convict to more than one term of imprisonment for more than one offence, orders that the convict serves his or her punishments at the same time as another sentence at the trial proceedings or an earlier proceeding. Contrary to the above a consecutive sentence is where the court orders that a sentence begins after an earlier term has expired. In other words, the convict is to serve his sentence one after the other. Aguda used the example of Anuga Ogbole in his book supra note 18 at 832. According to section 380 CPA and 24 of the CPC, if a court sentences the convict of more than one offence but does not specify whether the sentence should run consecutively or concurrently then the sentence is to run consecutively.

<sup>125</sup> Interpretation Act of the Federal Republic of Nigeria LFN 2004 s 17

It may however choose to impose a lesser sentence than the prescribed sentence. The court has the discretion to do so and the judge or magistrate is not under any obligation to explain its reason for giving the maximum.<sup>126</sup>

Although the court has discretion when sentencing, this discretion is limited when the law creating an offence prescribes a mandatory sentence for the offence or where there is a minimum sentence for an offence. In such instances, the court cannot vary the mandatory sentence. Where a minimum sentence is prescribed for an offence the court cannot pronounce a sentence lower than the minimum. In Nigeria offences such as murder treason, armed robbery and instigating invasion of Nigeria carry a mandatory death sentence;<sup>127</sup> in such cases the judge has no discretionary power. Similarly where a minimum penalty for an offence is imprisonment, the option of fine cannot be imposed by the court.<sup>128</sup>

Sentences available as punishment in Nigeria vary from death sentence, incarceration, fine to caning. The death sentence is a mandatory punishment for capital offences; it is usually by hanging.<sup>129</sup> However, death sentence for offences created under the *Armed Robbery & Firearms Act* is often carried out by firing squad<sup>130</sup>. In Nigeria the following are capital offences:

- Murder culpable homicide punishable by death
- Treason
- Treachery
- Armed robbery

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<sup>126</sup> J A Agaba, supra note 18 at 822-23

<sup>127</sup> J A Agaba, supra note 18 at 824

<sup>128</sup> *Dada v Board of Customs & Excise* (1982) 2 NCR 79.

<sup>129</sup> CPA, supra note 14, s 367(1) & *Criminal Procedure Code, Northern Nigeria*, 1990 s 273.

<sup>130</sup> *Armed Robbery & Firearms Act (Special Provisions)*, LFN 1990, C398 LFN 2004, C-R11, s 1 (3)

- Directing or controlling or presiding at an unlawful trial by ordeal from which death results
- Giving or fabricating false evidence on account of which an innocent person suffers death.
- Instigating invasion of Nigeria
- Abatement of suicide of a child or an insane person

As stated previously, offences with mandatory death sentences cannot be varied. However there are exceptions to this, section 368 (2) Criminal Procedure Act *CPA* provides that a pregnant woman cannot be sentenced to death. Her sentence will be sentence to imprisonment for life in lieu of the death sentence. In practice life imprisonment means no more than 20 years unless the court decides otherwise,<sup>131</sup> this decision is of course with reason.

Also children and young person cannot be sentenced to death, section 368(3) of the Criminal Procedure Law (CPL) categories such persons as person who have not attained the age of seventeen at the time the offence was committed however, in section 306(3) Administration of Criminal Justice Law (ACJL) the age of a young person for the purpose of this section is 18 years.<sup>132</sup>

### **The Over Dependence of The Nigerian Criminal Justice On Imprisonment**

Patrick E Igbinoia states that before the arrival of Europeans, imprisonment was almost unknown to Africa.<sup>133</sup> Commonly used punishments included restitution, compensation, fine,

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<sup>131</sup> J A Aguda, supra note 18 at 826

<sup>132</sup> Ibid at 827-28

<sup>133</sup> Patrick Edobor Igbinoia, "The Chimera of Incarceration: Penal Institutionalization and its Alternatives in a Progressive Nigeria" (1984) *Int J Offender Ther Comp Criminol* 22,23. Online: [ijo.sagepub.com](http://ijo.sagepub.com)

extramural labor, and corporal punishment. At the time punishments ranged from death to amputation, flogging or whipping.<sup>134</sup>

Shajobi-Ibikunle D. Gloria<sup>135</sup> has a different view of incarceration in the place of Nigerian history. The author contends that the use of imprisonment was part of Nigeria practice before colonization. The author noted the differences between the pre-colonial methods or forms of imprisonment and those introduced to Nigeria during colonization. One of these forms of imprisonment (mostly practiced in the northern part of Nigeria pre-colonization) was keeping the offender in a stock; usually for theft. The offender is kept in stock often in an open place near the victim's house where he was shamed by passersby until a relative came and redeemed him for the crime committed. In the south east a person accused of murder was taken to the diviner (priest) to determine what cause him to commit such an offence and determine what his punishment was.<sup>136</sup>

In the south west offenders were kept in a place called "tubu - a form of cell so common that every chief had one". The offences could range from disobedience to witch craft to murder. In pre-colonial Islamic region confinement was not in a small dark room but in a house or the mosque and the detainer was required to feed the detainee. It was also a discretionary punishment. In Midwestern Nigeria the "ewedo" was used to hold a person until they were redeemed by their relatives or sold into slavery. Unlike modern day Nigeria the purpose of detaining the offenders was not to serve as punishment but to hold them until they could be investigated and tried.<sup>137</sup>

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<sup>134</sup> Patrick *ibid* at 23

<sup>135</sup> Shajobi-Ibikunle D. Gloria, *supra* note 1 at 94.

<sup>136</sup> *Ibid* at 95.

<sup>137</sup> *Ibid* at 95.

Commentators suggest that shaming in traditional Africa worked quite well because of the communal system of living in precolonial Nigeria.<sup>138</sup> The offence of one member of a family was a stigma to the entire family and the community as a whole. In order to avoid such shame the elders of the community were quick to correct and redirect the young ones in the community. A child was brought up by his or her community and not their parents alone. In other words if a child or young person in the community is seen to be involved in a wrong act by a neighbor, the neighbor is not to ignore such a child on the grounds that the child is not theirs but is expected to correct the child or young person and bring the action to the attention of the parents.

Another common practice in pre-colonial Nigeria was the use of folklore. I remember that as a child my sibling, cousins, 2<sup>nd</sup> cousins and I loved to visit our grandmother. At night before we went to bed she would gather us outside on a woven mat and tell us fictional stories that taught moral lessons like do not steal, do not lie, do not kill, do not envy others, obey and respect authority and countless other moral. These folklores lessons remained and guided me as a child in how to relate with children, elders, parent and community. Even when I was old enough to know right from wrong I still loved to sit and listen to them.

When I became an adult I realized the purpose of such gatherings in precolonial Nigeria included building family bonds and community bonds. It was a time of reflection and passing of community history and heritage. In precolonial time such gatherings were not limited to immediate families but extended families and even neighbors. At the time most neighbors shared common gathering spots. It is impossible to return to such a time. However, some of its practices can be revived.

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<sup>138</sup> Shajobi-Ibikunle D. Gloria, *supra* note 1 at 95

The point of the childhood experience was reiterated by an illustration given in a restorative justice class I attended. We were more inclined to help people or care about those that we felt a connection to than those we do not. On the other hand, we are less likely to deliberately do things that hurt those we have built relationships with and less likely to be bothered about how our actions affect a total stranger. This would be further discussed in chapter four.<sup>139</sup>

### **The Effect of Imprisonment as Punishment**

In Nigeria the administrative body responsible for convicted prisoners is called the Nigerian Prison Services (*NPS*) under the control of the Controller-General of Prisons. This body is responsible for taking in the prisoners, producing those in remand before the court when required, identifying the cause of anti-social behaviors, aid the retraining and rehabilitation of these offenders in order to prepare them for reentry into society and generate revenue through the use of prison farm and industries.<sup>140</sup>

Nigerian prisons are not private or state owned institutions. The management and maintenance of prisons is on the exclusive legislative list which relegates prisons to the federal government. However, donations are received from state government, private individuals and private organization. The Federal government appoints an Assistant Controller-General in various states to run the prisons. Like Canada, Nigeria has maximum security prisons and medium security prisons. Both prisons are referred to as convict prisons. The maximum security level prisons are for condemned convict while the medium security level prisons are for remand inmates and short term convicts. There are also remand homes and borstals for juveniles and two exclusively for women.

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<sup>139</sup> Amanda Nelunds, *supra* note 34

<sup>140</sup> Shajobi-Ibikunle D. Gloria, *supra* note 1 at 95

The Nigerian Prisons Service has a total of 240 holding facilities comprising the following:

- Maximum Security Prisons
- Medium Security Prisons
- Satellite Prisons
- Borstal Institutions for juveniles
- Farm Centers
- Open Prison Camp
- Female Prison

In 2012 the prison population was 51,560. By 2013 it was 53,841, and the most recent statistical information by the Nigerian Prison Services shows an increase to 57,121 as of October 2014.<sup>141</sup> Based on the estimate of the national population of 182.25 million people made in March 2016, the prison rate is 35 people per every 100,000 of the national population.<sup>142</sup> It is not surprising find to discover that the number of people in prison custody in Nigeria has steadily increased. In fact when the statistics are compared particularly from 2008 to 2014, it shows that the increase has been quite negatively progressive.<sup>143</sup>

The Nigerian Prisons Statistics as of **31st October, 2014** is presented below:

**Breakdown of the Nigerian Prison Population**

Table 1

	<b>Male</b>	<b>Female</b>	<b>Total</b>	<b>% of total inmate population</b>
Convicted Prisoners	17,280	264	<b>17,544</b>	32

<sup>141</sup> Nigerian Prison Services supra note 60 at 1

<sup>142</sup> World Prison Brief: Institute for Criminal Policy Research, Nigeria at 1. Online: <http://www.prisonstudies.org/country/nigeria>

<sup>143</sup> World Prison Brief ibid at 1; See also. Nigeria Prison Service, supra note 60

Unconvicted Prisoners	38,685	892	<b>39,577</b>	68
<b>Total</b>	<b>55,965</b>	<b>1,156</b>	<b>57,121</b>	<b>100</b>

Although its capacity is only for 50,153, the Nigerian prison services held 57,121 prisoners as of October 2014.<sup>144</sup> Beside the fact of overcrowding, perhaps the most disturbing factor is that more than half of these prisoners are awaiting trial, in other words they have not been convicted for an offence. It is commendable to see that there is a decrease in the percentage of awaiting trial prisoner since 2010 (72.9%), however there is still much work to be done. Among those that have been convicted about half of them are in prison for simple offences.

### **Breakdown of the Convicted Prisoners**

Table 2

	<b>Male</b>	<b>Female</b>	<b>Total</b>	<b>% of total convicted prisoners</b>
Short term (< 2 yrs)	7,900	92	<b>7,992</b>	48
Long term (> or = 2yrs)	7,279	134	<b>7,413</b>	41
Condemned convicts (death row)	1,559	29	<b>1,588</b>	8
Lifers	542	9	<b>551</b>	3

<sup>144</sup> World Prison Brief supra note 142 at 1; see also Nigeria Prison Service, supra note 60 at 1,

<b>Total</b>	<b>17,280</b>	<b>264</b>	<b>17,544</b>	<b>100</b>
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Further studies shows that a good percentage of the convicted were first time offenders or offenders who committed non-violent crimes. One of the responsibilities of *NPS* is to identify the cause of anti-social behavior<sup>145</sup> and it is expected that this information would be available to the public. However, it is not made available and there is doubt as to whether this inquiry is even carried out at all.<sup>146</sup>

Some effects of the imprisonment were described by Yahaya Abdulkarim<sup>147</sup>. He stated that there are social-economic impacts of imprisonment and other costs of imprisonment which are not limited to physical costs. He emphasized how imprisonment can lead to recidivism. It may be due to such factors that convict that have completed their term of imprisonment keep ending right back in prison.<sup>148</sup>

Good populations of the prisoners are adults between ages 20 – 50.<sup>149</sup> This age bracket is the active and most effective group needed in the Nigerian work force. If they were not in prison, they could be actively impacting the country's economy. Imprisonment was therefore described as a waste of human force by Stephen. One can infer that it is a waste when the percentage of a population in countries that ought to be its (economic income percentage) occupies the countries prison (percentage economic loss).<sup>150</sup> Economic effects of imprisonment include the loss of human resources, high cost of support and maintenance, cost of prison construction, reduction of

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<sup>145</sup> NPS, supra note 60 at 1.

<sup>146</sup> World Prison Service, supra note 142 at 1

<sup>147</sup> Yahaya Abdulkarim, "An Analysis of Social-Economic Impact of Imprisonment in Nigeria" (2012) 2:9 IISTE at 150 (www.iiste.org)

<sup>148</sup> Ibid at 150-52

<sup>149</sup> Ibid at 150

<sup>150</sup> Ibid at 150

per capital income, job discontinuity, increase of unemployment, family financial poverty which in turn affects the country's returns.

An increase in the number of prison facilities means an increase in the prison budget may be without economic returns. This is costly for the government and costly for tax payers.<sup>151</sup> As earlier stated imprisonment is costly. However, this is not only costly to the individual and family but also to the government. The economic effect of imprisonment is one that goes on in a vicious cycle which has a ripple effect not only directly on the offender but directly on the government and the indirectly on taxpayers. Economic losses like loss of human resources occur due to the fact that prison population is largely of people between ages 20 to 50. The cost of feeding inmates alone is above 5 billion naira per year. Building and maintenance is at an average of two billion yearly. All this does not take into account other factors like healthcare, social or economic costs<sup>152</sup>

Although Abudulkarim mentioned that imprisonment could have its advantages because it increases the security level of the country, the disadvantages outweigh the advantages since it is possible to achieve security with an alternative system while minimizing cost and putting the imprisoned workforce to economically productive use.<sup>153</sup>

In addition to economic impact some of the social effects of imprisonment are:

- homelessness,
- unemployment poor health,
- stigmatization which leads to social isolation.

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<sup>151</sup> Ibid at 150

<sup>152</sup> Ibid at 151

<sup>153</sup> Ibid at 150

- Poverty due to social isolation which increases the likelihood of reoffending
- Weaken personal identity and motivation which usually leads to mental health issues such as depression.<sup>154</sup>

Overcrowding is another major problem facing Nigerian prisons. This is first due to the amount of persons awaiting trial in the prison which is over 60 percent of the prison population. A third of the convicted prisoners are convicted of non-violent crimes, 80 percent of whom are sentenced to imprisonment for less than two years.<sup>155</sup> Finally, more than 55 percent are first-time offenders.<sup>156</sup> Because the system is taking in more than it is letting out and taking in more than its capacity, its facilities are excessively strained. This also causes staff stress. The Nigerian prisons are under-staffed and their staffs are under-paid, undertrained and overworked.<sup>157</sup> Due to these conditions, the level of corruption among staff is high as staffs indulge in collecting bribes, trading in illegal substances and stealing from inmates' food rations.<sup>158</sup>

### **The Problem of Discretionary Power of the Court**

One may argue that the real problem is not that Nigerian law does not provide alternatives to imprisonment but that the discretion given to the court in sentencing has a net-widening effect. In other words, instead of relieving the criminal justice system the discretion is giving the court more leverage to widen its grasp. It is pertinent that every system should have a

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<sup>154</sup> Ibid at 150

<sup>155</sup> Shajobi-Ibikunle D. Gloria, supra note 1 at 97.

<sup>156</sup> Evolution of Imprisonment in Nigeria: Literature review of chapter two – criminal law –Martins Library- <http://martinslibrary.blogspot.ca/2014/05/evolution-of-imprisonment-in-nigeria.html>.

<sup>157</sup> Ibid at 98

<sup>158</sup> Shajobi-Ibikunle D. Gloria, supra note 1 at 94.

penal policy. Nigeria does not have any clearly identifiable penal policy as to different penal legislative instruments applying to the northern and southern parts of the country<sup>159</sup>.

Shajobi-Ibikunle. D. Gloria stated that the variety of sentences legally pronounced by various courts with the same jurisdiction and inconsistency amongst the sentences is a major problem in the criminal sector. Alemika and Alemika<sup>160</sup> state that the reason for this is the absence of sentencing policy and because Nigeria criminal justice system is predominantly a retributive one; “the different approach becomes a problem when it presents the criminal justice system as irrational, inconsistent and unjust.”<sup>161</sup>

There is limited research on the effect of imprisonment on mental and physical health of inmates after release. However, with the inhumane treatment that is inevitable because of the state of the prison system (overcrowding, understaffing, limited facilities, little or no standard minimum rule for treatment of offenders) and the use of solitary confinement (which research has shown causes delusion, depression and dissatisfaction with life, panic and sometimes madness)<sup>162</sup> it is too safe to say arguments can be made that the experience would adversely affect physical or mental health or both.<sup>163</sup>

Certainly there is research that shows that policies exist to exempt ex-offenders from gaining employment in some occupation, voting (until recently in 2014 when a case against the

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<sup>159</sup> Ibid at 100

<sup>160</sup> As cited by Shajobi-Ibikunle. D. Gloria, Alemika, E.E.O, & Alemika, E.I, “Penal Crisis and Prison Management in Nigeria” (1994) 94

<sup>161</sup> Fatayi-Williams A, *Sentencing Process, Practice and Attitude: As seen by an Appeal Court Judge in The Nigerian Magistrate and the Offender* ed. T.O Elias. (Benin: Ethiope Publishing Corporation, 1970) at 152.

<sup>162</sup> Debra Parkes, “Ending the Isolation: An Introduction to the Special Volume of Human Rights and Solitary Confinement” (2015) 4:1 Can J Hum Rts vii, with reference to a psychiatric research by Diane Kelsall.

<sup>163</sup> Yahaya Abdulkarim, *supra* note 147 at 150

election body of Nigeria was won in Benin city<sup>164</sup>) or holding offices.<sup>165</sup> Other research shows the adverse effect of imprisonment on families and social relationships.<sup>166</sup> All these factors increase the possibility and likelihood of recidivism. The fact that the increase in use imprisonment has not resulted in an equal or at least notable reduction in recidivism is sufficient to beg the question whether imprisonment is a productive response to crime in Nigeria, encouraging rehabilitation and transformation of offenders into law abiding citizens or just a structure developed by the criminal justice system to provide an easy fix.

### **How Bail Conditions Are Set to Fail in the Circumstances of the Poor and Uneducated**

**Poverty:** The ripple effect of poverty is ignorance. A good amount of the Nigerian population lives off less the one dollar each day. In other words they can barely afford 3 meals a day, many in this category do not have education in the list of their priority, after considering the cost and finally the rate of unemployment in the country even for the educated, many are frustrated and some soon result to other illegal means of survival.<sup>167</sup>

Unlike in Canada where the Criminal Code provides that particular attention to the circumstances of the offender or accused be considered,<sup>168</sup> in Nigeria the law only provides for the circumstances of the case and leaves the discretion to the court to determine the rest. Although the law does say that bail must not be excessive, the absence of any requirement to consider the accused circumstances may defeat the aim of receiving bail. Finance or societal

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<sup>164</sup> Gabriel Enogholase, Vanguard “Prisoners in Nigeria have the Right to Vote in all Elections, Court Rule.” December 19<sup>th</sup> 2014 (Newspaper). Online: <http://www.vanguardngr.com/2014/12/prisoners-nigeria-right-vote-elections-court-rules/>. The ruling was made by Justice Mohammed Lima.

<sup>165</sup> These are called collateral consequences of criminal conviction also described by Tosh. J as referred to by Yahaya Abdulkarim, supra note 147 at 152-53.

<sup>166</sup> Yahaya Abdulkarim, supra note 147 at 152 while referring to Stephen J, State Prison Expenditure (Washington, DC: USA Department of Justice in Criminal Delinquency

<sup>167</sup> BBC News, “Nigerians Living in Poverty rise to nearly 61%” (13<sup>th</sup> February 2012), Online: <http://www.bbc.com/news/world-africa-17015873>

<sup>168</sup> CCC, supra note 27, s. 718.2 (e)

status are closely tied to all term for granting bail in Nigeria and because of the rate of poverty in the country many accused person are unable to make bail.

The poor defendant is seriously disadvantaged in the quest for pretrial release. A defendant that can barely afford 3 meals a day may not be able to continue through education which means he may not beware of his rights and the law. If a defendant can barely afford to eat how would he afford legal representation? All these circumstances surrounding an accused person ensure that the road to pretrial release for an accused is arduous and ill-defined and is usually trod successfully only by the well-off, the well-informed, and the well connected.<sup>169</sup>

**Corruption:** Second to this is the high rate of corruption in the country<sup>170</sup> particularly imbedded in the justice system at its grassroots. Because of the gap in the cost living to the income of the people working in prisons, particularly at the lower levels, bribery is a common practice in the justice system and the country as a whole.<sup>171</sup> Desperation and frustration has set in. The ethics and morals once upheld by the justice system are now forgotten or simply ignored and only a few have enough will to uphold justice. Slightly related is the rampant use of bond by the police as the condition for administrative bail.<sup>172</sup>

Corruption plays a large role in the denial of bail by the police<sup>173</sup>, although it is conspicuously displayed in most police stations that bail is not for sale, it is a right. But due to the high average illiteracy rate in the country, many accused persons cannot read the notice and

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<sup>169</sup> Yahaya Abdulkarim, *supra* 147 at 73

<sup>170</sup> Uzochukuwu Mike, "Corruption in Nigeria: Review, Cause Effect and Solution." Updated Aug 31<sup>st</sup> 2016 Online: <https://soapboxie.com/world-politics/Corruption-in-Nigeria>; see also Trading Economics, "Nigeria Corruption Rank" Online: <http://www.tradingeconomics.com/nigeria/corruption-rank>

<sup>171</sup> Onike Rahaman, "Imperative of Prison Reform" (11th May 2010). Online: <http://focusnigeria.com/prison-reform.htm>; See also Salihu Isiaka Onimajesim, *Criminal Justice System in Nigeria: An Appraisal* (2009) [unpublished, archived at University of Ilorin and <https://www.unilorin.edu.ng/> at 200.

<sup>172</sup> Onike Rahaman, *Ibid* at 1

<sup>173</sup> *Ibid* at 1

often they are told that the sum of money they are asked to pay is required by law. However, if the topic of corruption is to be addressed we may need to address systemic problems.

Enuku states that the educational deficit of the prison population appears to be even greater than in the general public.<sup>174</sup> Confinement makes it impossible for prisoners to gain access to formal or informal education. He proposes that educational programs be made available to prisoners and I agree with the initiative.<sup>175</sup> However, I would encourage that this be made available outside confinement in order to give the prisoners the opportunity to socialize and interact with their community, assisting with reintegration.

Theoretically speaking the more educated or aware of their rights people are, the less likely they are arbitrarily detained pre-trial. In some cases police are unaware or just ignore the rights of the accused. Iyizoba recapped his friend's ordeal with the police. He was arrested and detained with some other boys because he was out at 8pm. Fortunately he called a relative who got the police commissioner involved and he was released. The arresting officer's excuse was that usually boys apprehended at such hours are robbers. Such arrests are common practice by the Nigerian police.<sup>176</sup>

With these two disadvantages stated above, the poor and uneducated tend to be the most commonly accused and arrested. They are also the most likely detained for longer without bail or unable to meet conditions for their bail.<sup>177</sup> Some are arrested and kept in custody with no awareness of their charge, no access to a lawyer (due to prohibitive cost and no publicly funded

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<sup>174</sup> Usiwoma Evawoma Enuku, "Humanizing the Nigerian Prison Through Literacy Education: Echoes from Afar" (2001) 52:1 JCE at 18

<sup>175</sup> Ibid at 18

<sup>176</sup> Chiwuba Iyizioba, "Injustice in Nigeria's Prison System: Nigeria's citadel of injustice" (1th August 2009), Mercatornet, Online: [http://www.mercatornet.com/articles/view/nigerias\\_citadel\\_of\\_injustice/](http://www.mercatornet.com/articles/view/nigerias_citadel_of_injustice/)

<sup>177</sup> Ibid at 1

legal aid), no one qualified to stand as surety and nothing to use as bribe to get out of jail. Some are in jail with no idea of what they did or what their rights are. This is unjust.<sup>178</sup>

According to Salihu Isiaka Onimajesin, the institution of criminal justice in Nigeria is a political entity that has lost its autonomy.<sup>179</sup> Its decisions are now known to be interfered with by members of the upper class. It protects the interest of those in power who own and control the forces of production while pretending to guarantee equal justice for the powerful and relatively powerless.<sup>180</sup>

## **Conclusion**

In conclusion it is clear that the Nigerian criminal justice system has a long way to go to achieve real justice. Also, the common problems of overcrowding and bad maintenance of prisons in Nigeria are connected to the practices of its criminal justice system. There is a need for alternative measures to ensure attendance of accused in court alongside the need for deliberate attempt by the system to use alternatives to correctional mechanisms for nonviolent offenders. Finally, creative and productive ways need to be developed to promote recidivism and achieve justice. Such measures may require structural changes as well.

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<sup>178</sup> Usiwoma Evawoma Enuke, *supra* note 174 at 18. See also Chiwuba Iyizioba, *supra* note 176.

<sup>179</sup> Salihu Isiaka Onimajesim, *supra* note 171 at 203

<sup>180</sup> *Ibid* at 203

## **CHAPTER THREE-RESTORATIVE JUSTICE THEORY CRITIQUES AND PRACTICES**

Although the use of pretrial detention or remand is common in many countries, it may not be the best option for any criminal justice system. The use of punishment as a deterrent is also questionable, if we assume that the imprisonment is some form of deterrence to others.

This chapter aims at identifying principles and practices that can influence the Nigerian criminal justice system. To do so it is important to understand the meaning of restorative justice. This chapter will discuss restorative justice principles, ideas, practices and styles, its debates and criticisms. The use of restorative justice to reduce incarceration and effectively respond to crime will also be highlighted.

The purpose of this chapter is to give an understanding of how restorative justice works and how it could influence criminal justice or gradually provide better results for a criminal justice system. The aim is to provide a better understanding of how restorative justice can be used to reduce incarceration and encourage rehabilitation and reintegration.

### **What Is Restorative Justice?**

We begin with a description of restorative justice. However, we cannot define restorative justice without considering the meaning of justice. It can be drawn from previous chapters that punishment is used in sentencing offenders of the law and its purpose is to contribute to respect of the law, crime prevention and maintenance of just and peaceful society. The use of punishment for the purpose of correction is not a new concept to most countries. However, we pay particularly attention to Nigeria or Canada in this thesis.

However, the actualization of the above objectives through the instrumentality of punishment is questionable. If punishment contributes to respect of the law should its

administration not influence recidivism rate positively? Crime rates should also reduce steadily if punishment achieves its goal of deterrence for the purpose of crime prevention. Finally the question of peaceful society can be targeted through crime prevention because if crime can be prevented then we can have a peaceful society.

However, the most worrisome question here is that of justice. Is it just to use an offender as a scape goat or an example to others or the society in order to prove a point (deterrence factor)? Also, high remand populations are a major problem in both Canada and Nigeria. Whether the detention of persons awaiting trial or sentencing is just because it ensures attendance of the accused in court is questionable. Other grounds for detention in Nigeria were discussed in chapter two of this thesis. Questions concerning the protection of the rights of such individual may arise. If not found guilty do the individuals have any recourse? Also, for consideration is the time wasted, the possible psychological damage caused by incarceration experience, stigmatization and rights of the individual?

There are other grounds for detention of an accused such as the nature of the offence and punishment prescribed. The nature, character and quality of evidence against the accused, the possibility of the accused interfering with the investigation of the case, the prevalence of the offence, and the possibility of the accused committing the same or similar offence if released on bail are also important factors. Sometimes detention is for the protection of the accused, and in many cases the criminal record of the accused may also influence his probability of being granted bail or otherwise. In Canada the *Canadian Criminal Code* states 3 grounds for detention in section 151.10 (a-c) as discussed in chapters two of this thesis.

The different theories of justice were discussed in chapter one of this thesis. To reiterate there are 3 major theories. Substantive theories which focus on moral values framework and

substance of what is just. The procedural theories say that substance cannot be given to justice and only a framework and procedure of achieving fair and just result can be used. The liberal theories such as utilitarianism say whatever is of most utility to most people is just and anything in violation of it is unjust.

Just as there is no precise definition of justice there is no precise definition of restorative justice. Most definitions of restorative justice take descriptive form. They seek to define restorative justice in opposition to retributive justice. Bazemore's theory of restorative justice pinpoints three core principles of restorative justice.

Three "big ideas" provide the basics for a normative theory of restorative justice. This core principles- repair, stakeholder involvement, and the transformation of community and government roles in the response to crime ...- most clearly distinguish restorative justice from other orientation and define the core outcomes, processes, practices, and structural relationship that characterize restorative approaches.<sup>181</sup>

### **Restorative Justice Practices**

There are three major ways restorative justice is practiced:

- Victim offender mediation
- Conferencing
- Circles

Restorative justice can also be used in instances of mass violence against humanity and genocides (example South Africa and Canada) by Truth commissions.<sup>182</sup> Truth commissions as restorative justice have encouraged cathartic storytelling, the presence of sympathetic witness,

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<sup>181</sup> Bazemore Gordon, "Young People, trouble, and Crime: Restorative Justice as a Normative Theory of Informal Social Control and Support." (2001) 33:2 Youth & Society at 206

<sup>182</sup> Amanda Nelund, supra note 34

reparation and healing, and acknowledgement of victims' truth. Reconciliation and forgiveness and healing a nation are still questionable but were amongst the aims of Truth commissions<sup>183</sup>

Unlike academics such as Theo Gavrielides<sup>184</sup> who try to explain restorative justice in a narrow lens "an alternative criminal justice system", Howard Zehr suggests that restorative justice is a set of values for how to live together peacefully. This lack of clarity as to what restorative justice is has opened the idea of restorative justice to manipulation.<sup>185</sup> Restorative is intended as a practice of its own, not a part of the criminal justice system. By restricting restorative justice to the confines of a program we will be limited to the desire to be consonant with existing retributive practices.<sup>186</sup> By doing this restorative justice is perceived as an add-on to existing retributive practices which in turn has a net widening effect. If restorative justice has the status of a program within the criminal justice system it is constrained by the expectation of the criminal justice system instead of getting its recognition as a different way of doing justice.<sup>187</sup> As we progress in this chapter a description of restorative justice practices will be analyzed.

Restorative justice's ability to widen the range of issues that need to be addressed is one of its strength. However, this strength can be detrimental if applied within the criminal justice system's retributive justice context. It amounts to criminalization of social problems when primary responsibilities for issues like mental health, poverty, education and so on are placed

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<sup>183</sup> Amanda Nelund, *supra* note 34

<sup>184</sup> Gavrielide Theo "Some Meta-Theoretical Questions for Restorative Justice" (2005) 18: 1 *Ratio Juris* at 87

<sup>185</sup> Sandra Walklate "Researching Restorative Justice: Politics, Policy and Process." (2005) 13:2 *Critical Criminology* at 167

<sup>186</sup> Elizabeth M. Elliot, *supra* note 33 at 71

<sup>187</sup> *Ibid* at 72-3

on the realm of criminal justice system which is not structurally or conceptually set up to address such issues.<sup>188</sup>

It is important to understand that there are three major stakeholders in restorative justice. They include the victim, the offender and the community. Government processes do not always prioritize these major stakeholders and this makes it difficult to achieve restorative justice goals. If restorative justice is identified as a program it would prioritize government processes over restorative justice goals of healing the three major stakeholders.<sup>189</sup>

Amongst substantive theories of justice, restorative justice has been defined by some as relational justice.<sup>190</sup> Relational justice is, justice that concerns itself with relationships, equal dignity, concern and respect. By ignoring social context, we ignore the fact that we are inherently relational. This kind of justice therefore concerns itself with creating equality, restoring the relationship to a place of concern and dignity and transforming the relationship. This does not mean the same as restoring the relationship to the status quo because the status quo may never have been that of right relationship, equality, dignity, concern and respect. Where this is the case returning to the status quo would amount injustice.<sup>191</sup> This theory therefore asserts that restorative justice and the use of punishment are fundamentally opposed.

Howard Zehr took a spiritual route to describe restorative justice.<sup>192</sup> In his book he defines restorative justice as what retributive justice is not, as a binary opposite to retributive

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<sup>188</sup> Kent Roach, "Changing Punishment at the turn of the Century: Restorative Justice on the Rise" (2000) 3:42 Canadian Journal of Criminology at 274

<sup>189</sup> Elisabeth Elliot, *supra* note 33 at 73

<sup>190</sup> Llewellyn, Jennifer & Howse, Robert, *supra* note 35 at 1-112; For further information on relational theory the article refers largely to relational theory of justice Van Ness Daniel, "New Wine and Old Wineskins: Four challenges of Restorative Justice" (1993) 4:2 Criminal Law Reform at 251

<sup>191</sup> Llewellyn, J & Howse R, *ibid* at 46-51

<sup>192</sup> Howard Zehr, *Changing The Lenses: A New Focus for Crime and Justice* (Waterloo, ON: Herald Press, 1990)

justice. His major concerns were that retributive justice did not meet the needs of victims or empower them, and did not lead to real accountability of offenders because they did not understand the harm they had caused or take responsibility for it. Consequently, there is a need for a new way of seeing and understanding justice, a new justice paradigm<sup>193</sup>

Woolford's description of restorative justice is in the form of a restorative justice ethos. This means that all the different ways of looking at restorative justice share a common value or ethos. These common values are:

- Conflict is knowable.
- We know conflict through communication
- Conditions for unproblematic communication can be established,
- Human behavior can be changed
- We (humans) can creatively solve problems because of the ability to communicate
- Good communication would lead to peace in society<sup>194</sup>

Some important traits are used to identify the restorative-ness of a process.<sup>195</sup> Restorative justice is open to active participation of interested parties. It gives participants active roles in determining the process and its outcome. However, it does not mandate participation because participation must be voluntary. By allowing active participation of the interested parties it empowers participants and gives a significant degree of ownership which requires a degree of investment in the resolution by the participants. Restorative justice derives its legitimacy from the satisfaction of its participants not from state support or achieving state

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<sup>193</sup> Ibid

<sup>194</sup> Andrew Woolford, *supra* note 39 at 54

<sup>195</sup> Ibid at 14

designed outcome. Its aim is to give participant the opportunity to fashion something positive from a negative event.<sup>196</sup>

Restorative justice has some properties that make it malleable. Woolford calls these properties morphological properties. These properties include:

- Restorative justice is contextually specific. In other words there is no definitive or prescribed process and outcome to be achieved because of different range of event.
- Restorative justice is a process through which the parties have an opportunity create new positive meaning out of a negative event. “It” does not follow a set course.
- Restorative justice is negotiated and can be the subject of heated debate and disagreement.
- Finally restorative justice is a living model. It is a continually evolving body of ideas built from stakeholder active participation.<sup>197</sup>

Conflict is described as property which its stake-holders own. However, conflict is usually given away or stolen when stake-holders refuse or simply do not take ownership of the conflict. Nils Christie argues that conflict has value.<sup>198</sup> According to him the major stakeholders to a conflict are the victim, offender and the society or community. He argues that conflict is often stolen by professionals, mostly lawyers, social workers, teachers, psychologist and others. While lawyers steal conflicts and make it their own by determining what is

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<sup>196</sup> Ibid

<sup>197</sup> Ibid at 16

<sup>198</sup> Amanda Nelund, supra note 34; Nil Christie “Conflict as Property” (1977) 17:1The British Journal of Criminology at 3-8

important or not important to a case, social workers, psychologist, teachers and criminologist define conflict away in such a way that it is no longer a conflict.<sup>199</sup>

Conflict is lost when the conflict is stolen by professionals as described above or due to structural theft resulting from segmentation. We give away some of our conflict because we do not understand their values. We lose some conflicts, particularly those pertaining to honor and respect. We make some type of conflict invisible such as crimes against elderly, children and women in their homes by privatizing them. By doing so they become invisible.<sup>200</sup>

According to Christie, segmentation occurs due to change in social context. Such segmentation could be by space or by caste (group) rather than the whole person.<sup>201</sup> Segmentation by space means we interact with each other by our roles in society. Examples are teacher-student relationships and parent children relationships. Caste segmentation include biological attributes, sex, physical, race, age and so on.<sup>202</sup> In the end segmentation leads to depersonalization of conflict, destruction of conflict before it begins or just it is simply made invisible.<sup>203</sup>

Restorative justice has also been described as an alternative justice process. Pelvic notes that restorative justice is portrayed in practice as a process rather than an alternative justice to the criminal justice system.<sup>204</sup> He illustrates restorative justice as different way of doing justice or just a refinement of the existing criminal justice system. Although restorative justice uses different values, morals and norms. It is founded on the criminal justice system's definition of

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<sup>199</sup> Ibid at 3-8

<sup>200</sup> Ibid

<sup>201</sup> Ibid at 3&4

<sup>202</sup> Ibid at 5&6

<sup>203</sup> Ibid at 6

<sup>204</sup> Amanda Nelund, *supra* note 34; see also reading material George Pelvic, "Governing Paradox of Restorative Justice: Tracing Auspices of Restorative Justice" 2005 at 14-24

crime. He also argues that restorative justice is so focused on the aftermath of crime it neglects to question the law of what crime is.<sup>205</sup>

The danger of seeing restorative justice as an alternative process is that it allows restorative justice to be easily absorbed by the criminal justice system. It also allows restorative justice to appeal to various political interests. In addition, as long as restorative justice depends on criminal justice system definition restorative justice will be limited and so cannot replace what it is based on.<sup>206</sup>

John Braithwaite tries to work through criminological theories in describing restorative justice.<sup>207</sup> He ties restorative justice to re-integrative shaming. Re-integrative shaming is where the act is shamed but the actor is forgiven and allowed back into the community. Braithwaite contrasts this with disintegrative shaming used by the system. This notion creates the possibility of condemning the act (crime) but being able to accept the actor. For it to be most effective the victim must be confronted and the offender must have support<sup>208</sup>

Braithwaite identifies values and goals of restorative justice. Some of these values include:

- To meets the need of participants.
- Focus on healing harm.
- Always reflect and embody values of community.<sup>209</sup>

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<sup>205</sup> George Pavlic, Ibid

<sup>206</sup> Ibid at 14

<sup>207</sup> John Braithwaite, "Restorative Justice Theories and Worries" series 63 (paper delivered at 123rd International Senior seminar) 47. Online:

[http://www.unafei.or.jp/english/pdf/RS\\_No63/No63\\_10VE\\_Braithwaite2.pdf](http://www.unafei.or.jp/english/pdf/RS_No63/No63_10VE_Braithwaite2.pdf)

<sup>208</sup> John Braithwaite, *Crime, Shame and Reintegration*, (Cambridge, UK: Cambridge University Press, 1989)

<sup>209</sup> Ibid

In other words, restorative justice must go beyond the criminal justice system, and facilitate a way of living well together in every sphere.<sup>210</sup> A common factor at the core of in many of restorative justice theories and definitions is relationships. “Restorative justice focuses on what relationships can do.” Without relationships, restorative justice cannot heal victims, change offenders or prevent harm.<sup>211</sup> Restorative justice focuses on two levels of relationships They include:

1. A discrete relationship which is relationship between people involved in the harm. This type of relationship is possible to restore in some cases (minor offences). They are sometimes impossible to restore (murder). And in most cases getting back parties back to status quo before the harm occurred would mean ignoring the conflict.
2. Social relationships are relationships of equal concern, respect and dignity. This concerns itself with the broader relationships and is not just limited to relationship between one individual and the other. It aims to reestablish social equality in relationships. Thinking about the discrete relationship can hopefully help heal the social relationship as well.<sup>212</sup>

Hal Pepinsky suggested that empathy is an important tool for building healthy relationships.<sup>213</sup> Obedience to the law is described as inherently unfair and its effectiveness in encouraging truly peaceful behavior is challenged.<sup>214</sup> Obedience has three possible outcomes: blind obedience, calculation of risk, and revolt. None of these outcomes amount to positive

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<sup>210</sup> Elizabeth M. Elliot, *supra* note 33 at 137

<sup>211</sup> Amanda Nelund, *supra* note 34.

<sup>212</sup> *Ibid*; see also Elizabeth M. Elliot, *supra* note 18 at 115, 137, 199.

<sup>213</sup> Hal Pepinsky, “Empathy Works, Obedience Doesn’t” (2000) 9:2/98 *Criminal Justice* at 141-167

<sup>214</sup> *Ibid*

behaviors in the long run.<sup>215</sup> Without dwelling too long on empathy, a quick scenario can be used to illustrate the effect relation can have in different circumstances. If you were asked to sit in an unofficial panel where your colleague (just an acquaintance) was accused of a crime, would you be more open to hearing what happened from the colleague and trying to reach a reasonably good resolution? On the other hand, if an unknown person was accused of the same crime in the same circumstance, would you consider your decision with more or less care? This brings us to the significance of community, not just a community of people we know but a community of care which could be built upon by using empathy as a tool.

### **The Canadian Practices and Programs in Place That Aid Restorative Justice**

Within the past decade or more research has shown the traditional criminal justice process has aided very little in the reduction of recidivism in North America. Also victim groups who have felt neglected or ignored have criticized the traditional criminal justice process and this is because crime is viewed as a criminal behavior done primarily against the state. These have led to the development of restorative justice practices, a way of settling disputes which requires the voluntary involvement of the victim and the offender and the community.<sup>216</sup>

Restorative justice has therefore manifested into the creation of different programs. Some research identifies restorative justice programs to include programs like restitution, victim-offender reconciliation and community mediation, all of which have underlying value systems. In other word the more restorative justice is developed and modified for better results the more these programs will flourish.<sup>217</sup>

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<sup>215</sup> Amanda Nelund, supra note 34

<sup>216</sup> Bonta J, Suzanne Wallace- Capretta & Jenifer Rooney, Restorative justice: An Evaluation of the Restorative Resolution Project. Solicitor General Canada, 1998-05 Catalogue No. JS42-84/1998e. at 1

<sup>217</sup> Restorative Justice, John Howard Society of Alberta 1997 at 1. Online: <http://docplayer.net/13706646-Restorative-justice-john-howard-society-of-alberta.html>

Restitution is an offender oriented sanction. It derives its orientation from ancient practices which have developed in six stages: Victim revenge (the harmed retaliated), collective revenge (family and kin retaliated causing blood feuds), negotiation (negotiations between families), adoption of code (with preset compensation of each different crime), and mediation (rulers became involved and took some of the compensation), adversarial (offences became crime against the state). These six stages resulted in the creation of a criminal justice system.<sup>218</sup>

It is important to note that restorative justice programs can be initiated at any stage of the criminal justice system. It could be pre-charge which is at the police stage or post-charge with the crown at trial. It could be presentencing before the court, post-sentencing which is after court during correction and pre-revocation also described as parole.<sup>219</sup> Although most restorative justice programs have common elements and most programs require the offenders voluntary participation and acceptance of responsibility for their actions; not all programs apply all restorative justice principles.<sup>220</sup> Other research state Restorative justice programs include circle of support and accountability, conferencing and victim offender mediation.<sup>221</sup>

According to the Canadian Inventory of Restorative Justice Programs and Services (*CIRJPS*) a number of programs are available for parties at national, provincial and regional levels. Further information on programs at the regional and provincial levels can be acquired at <http://www.csc-ccc.gc.ca/restorative-justice/003005-4001-eng.shtml>. According to the *CIRJPS* as of July 27<sup>th</sup> 2012 there were 12 programs available at the national level. These include:

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<sup>218</sup> Gerry Johnson, supra note 280 at 7.

<sup>219</sup> Jeff Latimer, Craig Dowden & Danielle Muise, "The Effectiveness of Restorative Justice Practices: A Meta- Analysis" (2005) 5:2 *The Prison Journal* at 129; See also The Canadian Resource Center for Victim of crimes article on restorative justice in Canada revised in March 2011 divides the stages into pre-sentencing and post-sentencing stages.

<sup>220</sup> Canada, *Restorative Justice in Canada: What Victims Should Know* prepared by the Canadian Resource Center for Victims of Crime Revised March 2011

<sup>221</sup> *Ibid* at 1-30

- Aboriginal Justice Directorate
- Canadian Families and Corrections Network
- “The F Word”
- Heartspeak Productions
- Peace of the Circle
- Quakers Fostering Justice of Canadian Friends Service Committee
- Restorative Justice Division
- Restorative Opportunities – Victim Offender Mediation Services
- The Sawbonna Project
- Shannon Moroney, Restorative Justice Advocate, Author, Artist, Speaker
- “The Story of Bob”
- Youth Canada Association (YOUCAN) <sup>222</sup>

### **Measuring Restorative Justice Success in Canada**

Like any new practice restorative justice success has limited resources because of its limited availability of well-designed studies. However, methodologies are being developed to evaluate its success when compared with traditional criminal justice system.<sup>223</sup> Two forms of analysis have arisen from the attempt to measure restorative justice success. They are traditional narrative review and meta- analytic techniques.<sup>224</sup>

Traditional narrative or qualitative review uses comprehensive literature to summarize research. This method may not be the best option since it may lack objectivity for the purpose of

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<sup>222</sup> Canada, Correctional Services Canada. “Canada Inventory of Restorative Justice Programs And Services” (Ottawa: CSC, 27 July 2012) Online: <http://www.csc-scc.gc.ca/restorative-justice/003005-4001-eng.shtml>

<sup>223</sup> Jeff Latimer et al, supra note at 219 or Bonta J et al, supra note 281; See also McCold Paul. Restorative Justice: An Annotated bibliography (Monsey, NY: Criminal Justice Press 1997)

<sup>224</sup> Jeff Latimer, Craig Dowden & Danielle Muise, supra note 219 at 129 to 130;

drawing a conclusion from the data analysis. It is rare to find consistency and systemic criteria in the selection of literature when using a narrative review. This could be disadvantageous when considering the big picture for the purpose of measuring restorative justice successes.<sup>225</sup>

Quantitative studies use statistical measures known as phi coefficients. It requires comparing a study group, those who have gone through a restorative justice program, to a control group, those who have not gone through a restorative justice program, to measure whether the restorative justice program has resulted in reduced recidivism.<sup>226</sup> A meta-analysis is a statistical analysis of a collection of several quantitative studies to aggregate the level of relationship between two or more variables (independent and dependent variables)<sup>227</sup>. Several quantitative studies have provided more objectivity which is lacking in the narrative review method. They are a more explicit, systemic, exhaustive and quantitative and therefore regarded as a superior method.<sup>228</sup>

Meta-analysis has three basic steps which include literature review, data collection and data analysis. Literature review is aimed at identifying and gathering relevant studies. The second step is data collection used to extracting data through predetermined coding procedure. Finally, data analysis is the process of analyzing the aggregated data using statistical techniques. We would not dwell on these steps for the further study. Jeff Latimer's meta-analysis study on restorative justice has more details.<sup>229</sup>

Umbreit noted that meta-analytic method has some shortcomings because it gives room to a wide range of variation and can be greatly influenced by the group participating in the

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<sup>225</sup> Jeff Latimer et al, Ibid at 130

<sup>226</sup> Donald Macintosh supra note 114 at 5

<sup>227</sup> Gene V Glass, Barry McGaw & Mary Lee Smith, "Meta-Analysis in Social Research." (1981) 124 Sage Library of social research (CA: Newbury Park 2008).

<sup>228</sup> Jeff Latimer, supra note 219 at 130

<sup>229</sup> Ibid at 129

restorative justice process.<sup>230</sup> Others argue that the meta-analytic sampling procedure is already biased. In that it favors predominantly published studies. Also the effect of size may be overestimated when calculation is based on predominantly published studies rather than representation of the entire body of research whether published or unpublished.<sup>231</sup>

One of the restorative justice principles is working with the offender within the community among others. The purpose of this is to prevent recidivism. However, there are other goals such as providing alternatives to incarceration, reducing recidivism, repairing harm to relationship, victim assistance or aid healing among others.<sup>232</sup>

### **Examples of Restorative Justice Successes**

Conferences and circles are the major examples of restorative justice styles that have recorded success in Canada. Each of these may fall under one of these categories or use one of these approaches. The program may be categorized as an alternative or diversion program, a healing or therapeutic program or a transitional program. The goals of each style determines what category or model a program takes.<sup>233</sup> The models will be described below.

#### **Alternative or Diversion Programs:**

These programs usually aim at diverting cases from court in order to provide an alternative to parts of the criminal justice process and sentencing. In such cases the prosecutor may make a referral to differ prosecution to allow an alternative and the case may be drop if a satisfactory settlement is reached. A judge may also refer a case to restorative conferences or

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<sup>230</sup> Umbreit as referred to in Andrew Woolford, *The Politics of Restorative Justice: A Critical Introduction* (Halifax and Winnipeg: Fernwood 2009) at

<sup>231</sup> Supra note at 132-35

<sup>232</sup> Howard Zehr, *The Little Book On Restorative Justice*, (New York: GoodBooks 2015) at 5

<sup>233</sup> Ibid at 47-52

circles to sort out some elements of the sentencing in order to involve the community victim and offender in structuring a sentence that best suits the needs of the parties.<sup>234</sup>

#### Healing and Therapeutic programs:

In these programs the goal is not to prevent the offender from prison sentencing. Often in this program the crimes are severe ones and the offender is already in prison. These are often conferences but they are not aimed at impacting the case of the offender or influencing their parole or clemency appeal. Of course there is need for well-structured preparation of the parties in such a program in order to avoid victimization. Also not all programs under this category involve one-on-one encounters of the victim and offender. Since the program is often set up as a treatment process, it may be initiated by either party.<sup>235</sup>

#### Transitional programs:

This type of program is relatively new. It is often used for the purpose of ensuring successful reintegration of the offender or transitioning after prison. These programs are aimed at helping both victim and offender return into the community such programs are centered on addressing victims' harm and offenders' accountability. They often take the form of circles of support and accountability. These circles are often a gathering of ex-offenders, community members and even victims of similar offenses as a means to support and hold the ex-offenders accountable. One can safely say that one of the aims of such programs is to prevent recidivism.<sup>236</sup>

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<sup>234</sup> Howard Zehr supra note 232 at 52

<sup>235</sup> Ibid at 53

<sup>236</sup> Ibid at 54

Howard Zehr indicated that it is important to view restorative justice models as a continuum in which the degree of the restorative justice practice can be measured.<sup>237</sup> It is therefore possible to have a criminal justice process that is partly restorative and partly not. In instances where either the offender is unwilling to accept responsibility or victim refuses to participate there are other options which may not be fully restorative but play essential roles in the overall system of justice<sup>238</sup>

In conclusion the effectiveness of restorative justice can be analyzed with six key questions. If we could answer these questions positively they may help us to determine the level of restorative effectiveness of any programs:

1. Does the model address harm, needs and causes?
2. Is it adequately victim oriented?
3. Are offenders encouraged to take responsibility?
4. Are all relevant stakeholders involved?
5. Is there an opportunity for dialogue and participatory decision making?
6. Is the program respectful to all parties?<sup>239</sup>

### **Significance of Community**

Although restorative justice has a hard time defining community, McCold defines community by identifying types of community.<sup>240</sup> A simple definition of community can be derived from the meaning of the word itself. The word community is derived from two words

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<sup>237</sup> Ibid at 55

<sup>238</sup> Ibid at 56

<sup>239</sup> Ibid at 55

<sup>240</sup> Mc Cold. Paul, "What is the Role off Community in Restorative Justice Theory and Practice?" in Howard Zehr & Barb Toews, *Critical issues in Restorative Justice*, eds, (Monsey, NY: Criminal justice press 2004); see also Elisabeth Elliot, supra note 33 at 192

“common” and “unity”, which mean shared oneness.<sup>241</sup> These two elements however depict a state of social exclusion, such that those with shared oneness have the identity of a community as opposed to those who are not within that shared oneness.<sup>242</sup> The two types of communities as identified by McCold include:

- Micro community and
- Macro community.

Micro community is the individual community of care which include those you have close relations with such as friends and families. When crime is committed within a micro community, every relationship damaged needs to be restored for conflict to be resolved. This is a more victim focused community.

Macro community is defined by neighborhood or membership such as churches, city schools, professional associations, and others with similar capacities.<sup>243</sup> In a macro community the concern is not focused on restoring relationship but on the cause of the crime and how the community can be protected. This community is more offenders focused as opposed to micro community.<sup>244</sup> While some have defined restorative justice is a tool used by communities to resolve conflict, others have argued that restorative justice can be used to build communities and create networks through the notion of “social capital.”<sup>245</sup> Johnson argues that community is defined by communities themselves. It is an active process of people identifying with each other

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<sup>241</sup> Ibid

<sup>242</sup> Mc Cold. Paul, “What is the Role off Community in Restorative Justice Theory and Practice?” in Howard Zehr, & Barb Toews, *Critical issues in Restorative Justice*, eds, (Monsey, NY: Criminal justice press 2004) 155-171; see also Elizabeth M. Elliot, supra note 33 at 192

<sup>243</sup> Amanda Nelund, supra note 34; see also Mc Cold supra note 218

<sup>244</sup> Paul McCold & Ted Wachtel, “Community Is Not a Place: A New look at Community Justice Initiatives” 1998 1:1 Contemporary Justice Review 71-85

<sup>245</sup> Robert Putnam, *Bowling Alone: The Collapse and Revival of American Community*. (New York: Touchstone 2000)

because of their common traits, but also because they identify themselves as part of their communities.<sup>246</sup>

### **The Debates around Restorative Justice Effectiveness.**

Despite popular support,<sup>247</sup> restorative justice has received criticisms over the years. There are technical criticisms and substantive criticisms of restorative justice. The technical criticisms are those that are correctable, such critiques may include errors and oversights. These errors and oversights can easily be corrected through minor revisions. However, substantive criticisms are much deeper and affect the fundamental premises of restorative justice. These criticisms go to the very root of restorative justice and expose contradictions. In order to address such criticisms there is a need for an intensive reevaluation and reinvention of restorative justice.<sup>248</sup> We will briefly explore these criticisms individually.

#### **Technical and Substantive Criticism**

Some restorative justice advocates define restorative justice as what the criminal justice system is not. It is due to this strict binary opposite definition that restorative justice has received technical and substantive criticisms. Writers like Daly<sup>249</sup>, Walgrave<sup>250</sup> and Roche<sup>251</sup> state that the portrayal of the criminal justice system against an overly idealized version of restorative justice has in the long run done a disservice to restorative justice. This is so because restorative justice

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<sup>246</sup> Gerry Johnson, "How and in what terms should Restorative Justice be conceived?" in H. Zehr and B. Toew, *Critical Issues In Restorative Justice*, eds (Cullompton, UK: William Publishing 2004).

<sup>247</sup> Andrew Woolford, supra note 39 at 134

<sup>248</sup> Andrew Woolford, supra note 39 at 134.

<sup>249</sup> Daly Kathleen, "Restorative Justice: The Real Story" In Gerry Johnstone, *A Justice Reader: Text Sources, Context ed* (Cullompton, UK: Willan Publishing, 2003) as referred to by Andrew Woolford, supra note 39 at 134.

<sup>250</sup> Walgrave Lode, "Has Restorative Justice Theory Appropriately Responded to Retribution Theory and Impulses" In H. Zehr and B. Toews eds *Critical Issues in Restorative Justice* (Cullompton, UK: Willan Publishing, 2004) as referred to by Andrew Woolford, *ibid*.

<sup>251</sup> Roche Declan, "Restitution and Restorative Justice" In G. Johnstone and D.W. Van Ness eds *Handbook of Restorative Justice* (Cullompton, UK: Willan Publishing, 2007) as referred to by Andrew Woolford, supra note 39 at 134.

practices in reality are the result of combined work of restorative justice and criminal justice system. By not owning up to this overlap with the criminal justice system, the merits of restorative justice are difficult to access.<sup>252</sup>

Another disservice occurs when proponents claim restorative justice is non-punitive. This claim hinges on what is meant by punishment or what will amount to it. In the criminal justice system punishment or penalty are imposed by the state as opposed to restorative justice where offender has to admit to wrong doing which causes discomfort, and experience humiliation and embarrassment. The offender is given a say in the shape the sanctions will take.

The difference between restorative justice and criminal justice system in this case is the form each system punishment takes. Restorative justice is not devoid of punishment as some are lead to believe. Daly and Duff encourage people to present an honest reflection of restorative justice in order to avoid depicting restorative justice as “soft on crime” because in reality it is not.<sup>253</sup> Their advice has been taken by many practitioners and restorative justice proponents. In an effort to facilitate restorative justice, advocates have made arguments that have led to restorative justice myths that are being perpetrated as truth.<sup>254</sup> This distinction can be addressed by providing greater understanding of the intersection between restorative justice and criminal justice system and redefining what is meant by “punishment”.

Other criticisms are less concerned with the overlap of restorative justice and retributive justice and more with the likelihood of jettisoning due process; particularly the concern of “presumption of innocence until proven guilty”. This issue arises because restorative justice

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<sup>252</sup> Andrew Woldford, *supra* note 39 at 137

<sup>253</sup> *Ibid*

<sup>254</sup> Kathleen Daly, “Restorative Justice and Punishment: The View of Young People” Paper Presented to The American Society of Criminology Annual Meeting, Toronto: November 1999 at 17-2

practice requires that the wrongdoer admits the act and take responsibility for the wrong before the process can begin.<sup>255</sup> However the issue of due process and offenders' rights can be addressed by requiring that the offender speaks to a defense lawyer first.<sup>256</sup>

Net widening is another concern. Some proponents such as Van Ness and Strong<sup>257g</sup> Umbeit and Zehr<sup>258</sup> writers have argued that restorative justice programs can lead to net widening when harms that would not usually amount to crime are ramped up for a criminal justice response. They fear that restorative justice has presented the danger of net widening when in used as a less resource dependent alternative for dealing with low level crime that would usually not be in the criminal justice system. It thereby widens the net for social control for such harm as capturing graffiti scribbling, petty shoplifting and even snowball throwing which would usually be resolved. Instead they are accounted for by restorative justice as a success.<sup>259</sup>

Some worry that this may lead to the wrongdoer being stigmatized, embracing a criminal identity, or simply putting them at greater risk to be caught again because they are under greater surveillance.<sup>260</sup> Net-widening can be addressed by restorative justice programs restricting their clientele to those that would receive prison time in some cases, and distancing restorative justice programs from the state in other cases so it would not be seen as doing state work.<sup>261</sup>

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<sup>255</sup> Woolford supra note 39 at 138

<sup>256</sup> Ibid at 139

<sup>257</sup> Van Ness Daniel & Karen H. Strong, *Restorative Justice* (Cincinnati: Anderson, 2002) as referred to by Andrew Woolford supra note 39 at 138

<sup>258</sup> Umbreit Mark & Howard Zehr "Restorative Family Group Conferences: Differing Models and Guidelines for Practices" (1996) *Federal Probation* 60, 3: 24-9 as referred to by Andrew Woolford note 39 at 138

<sup>259</sup> Andrew Woolford, supra note 39 at 137-38

<sup>260</sup> Ibid at 138-39

<sup>261</sup> Ibid at 140

Ashworth's concern is that restorative justice can still lead to disproportionate sentences.<sup>262</sup> The classical school of criminology's principle that "the punishment should fit the crime" has led to an expectation that there would be a relationship between seriousness of the crime and the sentence. Unlike retributive justice where the above is the case or if there is a difference in sentence for offences with the same fact, a rationale is given as to why the difference in sentence. Restorative justice does not limit itself to sentencing guidelines or past precedent. Restorative justice's focus is on the stakeholders efforts to creatively resolve the harm. However, with creativity consistency is not guaranteed.<sup>263</sup> These criticisms can easily be resolved by having a judge to review the restorative justice sentences or sanction.

The above criticisms focus on the theoretical criticism and the responses to them show the receptive-ness or openness of restorative justice to adapt to guidance for the purpose of achieving justice and improve its practice. Substantive criticisms go to the root of restorative justice content and substance.

Expanding on net-widening, some scholars have wondered if restorative justice is not leading to the expansion of state control. This is because it is so entrenched in the criminal justice system and its dependence on the system for funds, referral and even terms. Some argue that the state seeks new ways to govern without relying solely on its machineries such as courts or prison.<sup>264</sup> In other words the state exercises social control without bearing the cost. According

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<sup>262</sup> Ashworth Andrew, "Responsibilities, Rights and Restorative Justice" In G. Johnstone ed, *A Restorative Justice Reader: Text, Sources, Context* (Cullompton, UK: Willan Publishing, 2003) as referred to by Andrew Woolford, *supra* note 39 at 141.

<sup>263</sup> Sharpe Susan, "The Idea of Reparation" In G. Johnstone & D.W. Van Ness, *Handbook of Restorative Justice*, eds (Cullompton, UK: Willan Publishing 2007) at 30 [http://samples.sainsburysebooks.co.uk/9781134015191\\_sample\\_648297.pdf](http://samples.sainsburysebooks.co.uk/9781134015191_sample_648297.pdf); Wright Martins & Guy Masters, "Justified Criticism, Misunderstanding or Important steps on the Road to Acceptance" in E. Weitekamp & H. Kerner, *Restorative Justice Theoretical Foundations*, ed (Cullompton, UK: Willan Publishing 2002) at 50.

<sup>264</sup> Andrew Woolford, *supra* note 39 at 15-16

to these arguments restorative justice is complacent in the aim of governance for social control.<sup>265</sup>

Pavlic illustrates how restorative justice participates in several governmentalities.<sup>266</sup> He states that restorative justice has a goal of individual self-governance which affects immediate and future behavior of stakeholders. By doing so, the state is relieved of such responsibilities that are taken up by stakeholders due to their defined roles in restorative justice process. According to him, in restorative justice process the offenders are asked to take responsibility for their action, victims are asked to express how the offence has affected them and give reasonable demands for repair and the community is to participate in reintegration of the offender and healing the victim. This role lessens the cost and responsibilities and duties of the state.<sup>267</sup>

Also the quasi-market condition where a rolled-back welfare state provides less funding for non-profit services providing agencies increases the strain on the agencies. The agencies then risk a compromise of restorative justice idealism and programing. Therefore, low funding may lead to restorative justice core principles drifting toward corruption or partial or complete cooption by the state agents.<sup>268</sup>

Governmentality is how restorative justice provides a way of understanding the world. In order to govern behavior restorative justice must first change how we think of justice and it does this by redefining core components of criminal justice. The problem with this is that these

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<sup>265</sup> Rose Nikolas, "Government, Authority and Expertise in Advanced Liberalism" (1993) 22:3 *Economy and Society* 283-99. These critics are influences by French philosopher and social historian Michel Foucault

<sup>266</sup> George Pavlic, *supra* note 204 at 17

<sup>267</sup> George Pavlic, *supra* note 204 at 17-18

<sup>268</sup> Andrew Woolford, *supra* note 39 at 140-141; Levrant S, F.T Cullen, B. Fulton & J.F Wozniak "Reconsidering Restorative Justice: The Corruption of Benevolence Revisited?" (1999) 43:3 *Crime and Delinquency* 3-27; see also Mika, Harry, & Howard Zehr, "A Restorative Framework for Community Justice Practice." In K. McEvoy and T. Newburn, *Criminology, Conflict Resolution and Restorative Justice*, (Houndsmills, Basingstoke, Hampshire: Palgrave Macmillian 2003) 135-45. Online: [https://he.palgrave.com/resources/sample-chapters/9780333761458\\_sample.pdf](https://he.palgrave.com/resources/sample-chapters/9780333761458_sample.pdf)

governmentalities do not recognize restorative justice as a true alternative to criminal justice system. Instead they portray restorative justice as dependent on the conceptual and practical tendencies of criminal justice system.<sup>269</sup>

Woolford<sup>270</sup> used the Alberta Tar Sands as an example to illustrate how restorative justice could be restricted when it constrained by structural limitation that result from its dependence of the criminal justice concepts.<sup>271</sup> The Alberta Tar Sands issue is one of the most troubling cases of environmental damages. It has had a staggering effect on the Alberta and Canadian economy.<sup>272</sup> Fort Chipewyan, a village that rest on the shores of lake Athabasca, 260 kilometers north of Fort McMurray, has been found to contain unsafe levels of arsenic, mercury and polycyclic aromatic hydrocarbon due to contamination and doctors have confirmed that the Aboriginal population suffers from higher than expected rate of cancer in the village. The process of conversion of tar sand bitumen into crude oil is said to produce large amounts of contaminated water which may not have been properly contained.<sup>273</sup>

Although the case is an environmental issue it is evidently endangering lives. This example illustrates how dependence on the standard criminal justice system prosecuting and punishing the individual or corporations responsible can affect restorative justice's ability to address disastrous injustices that cause harm. However, restorative justice could not address the incident because it has not been defined by or specified within the *Criminal Code*.<sup>274</sup> If

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<sup>269</sup> George Pavlic, supra note 204 at 17-18

<sup>270</sup> Andrew Woolford, supra note 39 at 143 p.2

<sup>271</sup> Ibid

<sup>272</sup> Ibid 143; see also you tube documentary Thomas Seal: The Ooze: A Documentary on Alberta Tar Sand 5<sup>th</sup> October 2015 <https://www.youtube.com/watch?v=-07sfg0m9io> and <https://www.youtube.com/watch?v=-07sfg0m9io>.

<sup>273</sup> Andrew Woolford, supra note 39 at 143

<sup>274</sup> Ibid at 143

restorative justice was to function as a true alternative it would need to be able to address such potential injustices even if the law has not yet criminalize them<sup>275</sup>

Another form of harm that restorative justice fails to address is structural inequalities that cause social harm. Pavlich addresses the social harm caused by structural inequalities and the ideology of community and justice.<sup>276</sup> He states that the use of community has the potential to exclude those not within the community. According to him this could lead to an “us against them” type of thinking and those that are not within the community are excluded from the “community of care.”<sup>277</sup> He suggest an alternative of hospitality rather than community. His argument is that there is a shift to a host type of relationship which is welcoming whether or not the other belongs to the community of care.<sup>278</sup>

He argues for a deconstruction of restorative justice terms from criminal justice concepts so as to get rid of the limitations of the standard criminal justice system and open discussion towards other possibilities. He argues that this dependence will cause restorative justice to compromise its foundation as an alternative. Such compromises may defeat the very essence which restorative justice seeks to repair <sup>279</sup>

We see some of these substantive criticisms flow from technical criticisms. The way they are addressed show the possibility of different views of restorative justice. While net widening can be reasonably addressed in technical criticisms, substantive criticisms present problems of cooption which cannot be resolved by technical solutions. Technical critiques can be addressed

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<sup>275</sup> Ibid at 143

<sup>276</sup> George Pavlic, *supra* note 204

<sup>277</sup> Ibid

<sup>278</sup> George Pavlic, “The Force of Community” in H. Strang and J, Braithwaite, *Restorative Justice and civil Societies*, eds (Cambridge: Cambridge University Press 2001) at 62-4; see also Andrew Woolford, *supra* note 39 at 143-44

<sup>279</sup> Ibid at 20

by recommending and ensuring that restorative justice advocates provide an understanding of the integration of restorative justice and the criminal justice system. But the substantive criticism argues that for restorative justice to truly be an alternative it needs to be deconstructed from the standard criminal justice system.<sup>280</sup>

All these criticisms are essential for the development of restorative justice practiced. We will now highlight the major restorative justice practices in Canada. Also the pro and cons of restorative justice will be itemized.

### Pros

If carried out effectively restorative justice can achieve the following:

- Active participation of stakeholders which can facilitate relationship building
- Facilitate victim satisfaction
- Aid reintegration of offender while reducing stigma
- Aid rehabilitation due to community involvement
- Address the root cause of the harmful act
- Expose root problems in the community that the criminal justice system cannot address, and
- Aids repair of relationships.

### Cons

If not properly or carefully facilitated, the purposes of restorative justice could be defeated and the following may result:

- Re-victimization may occur
- People lie so this can hinder progress of restorative justice process

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<sup>280</sup> Amanda Nelund, supra note at 34; See Woolford Andrew note 39 at 134-44

- Because most people do not understand restorative justice it is often viewed as soft on crime, and
- The absence of one concrete definition opens restorative justice to manipulation.

It is notable that restorative justice produces positive result when properly implemented. However, if not carefully manage practices that are meant to be restorative can have a much worse impact than a criminal justice system. Proposals will now be discussed to suggest solutions to the possible challenges that may occur from the application of restorative justice.

### **What Does Restorative Justice Have To Offer?**

It is important to consider whether and how restorative justice is effective in achieving its goals. Most government-funded restorative justice programs consist of evaluative components. The challenge is by what parameters are the progress of restorative justice measured? Since restorative justice objectives are rehabilitation of offenders, healing of victims and restoring communities, restorative justice success may be measure based on whether or not offender had reoffended, whether or not victims are satisfied, and whether or not community members are involved in the process. However, when these objectives are influenced by political interests the parameters for measurement of restorative justice success could change. Instead of questions like: Did restorative justice address the harm done, Did restorative uncover the cause of the harm, Did restorative justice provide a lasting solution or suggestion to prevent reoccurrence? Emphasis is placed on questions as to whether restorative justice reduces recidivism, if it is less costly for the government, and if it increases victim satisfaction. Such questions, however, have

the tendency to shift the priority of restorative justice programs to government interest rather than actual restorative effect of restorative justice.<sup>281</sup>

Another difficulty arises when demands are made for quantitative results of restorative justice success. This is because much of what restorative justice aims to achieve cannot be measured by quantity. Restorative justice aims like healing and restoration are mainly amount to individual definitions which are difficult to measure by survey and thus lend themselves to qualitative descriptions of success rather than quantitative measures of success. Also challenging is the existence of selection bias since offenders are often directed towards restorative justice because they are “promising” candidate since they are willing to admit and have a willing support and network system to help them reintegrate into society.<sup>282</sup> It is therefore possible that people who may be in greater need of rehabilitation may be cut off because they do not meet the requirements or fall within the above category.

However, restorative justice appears to be making a positive impact. Several studies have shown that restorative justice has helped victim of crimes get satisfaction.<sup>283</sup> Certainly this is not without some hitches on the way. Although some programs show high level of victim participation and satisfaction some restorative justice programs have experienced difficulty with

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<sup>281</sup> Andrew Woolford, *supra* note 39 at 77

<sup>282</sup> *Ibid* at 78

<sup>283</sup> Andrew Woolford, *supra* note 39 at 78 referred to McCold Paul & Benjamin Wachtel, “Restorative Policing Experiment: The Bethlehem Pennsylvania Police Family Group Conferencing Project” Piperville, Pennsylvania: Community Service Foundation 1998, and Heather Strang, *Victim Participation in Restorative Justice Process* (Oxford: Oxford University Press 2001).

victim participation<sup>284</sup>. In some cases it was found that victims were the most dissatisfied amongst the participants by the process<sup>285</sup>

Offenders usually have a high level of satisfaction.<sup>286</sup> Although the reports on reduction of recidivism rate are mixed, there are programs that have positive results.<sup>287</sup> According to some, elements like active participation, consensual decision-making, lack of stigmatizing shaming, and visible offender remorse are keys to the success of restorative justice.<sup>288</sup> Finally, the level to which restorative justice has benefited communities is still open to debate and there is yet to be more research on how restorative justice contribute to formation of social capital and strengthening community relationship.<sup>289</sup>

In conclusion, one can argue that restorative justice has the potential to assist the criminal justice better if it is not confined within criminal justice systems' ideas and goals. For restorative justice to be truly restorative it must set its own goals and not compromise its core values. Certainly this does not mean that restorative justice must be rigid because that may have the opposite effect. Restorative justice should be allowed to function where the criminal justice may not reach while making sure its values are not jeopardized.

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<sup>284</sup> John Braithwaite, "Restorative Justice and A Better Future" In G. Johnstone, *A Restorative Justice Reader: Texts, Sources, Context*, ed (Cullomton UK: Willan Publishing 2003) ch. 3; see also John Braithwaite, "Restorative Justice and A Better Future" (1996) 76 *Dalhousie Review* at 9-32.

<sup>285</sup> Gabrielle Maxwell and Allison Morris, *Family, Victims and Culture: Youth Justice in New Zealand* (Wellington: Special Policy Agency and Institute of Criminology, Victoria University of Wellington, 1993).

<sup>286</sup> Bonta James, Suzanne Wallace-Capretta & Jennifer Rooney, "A Quasi-experimental Evaluation of an Intensive Rehabilitation Supervision Program" (200) 27 *Criminal Justice and Behaviour* at 312-29

<sup>287</sup> *Ibid*

<sup>288</sup> Maxwell, Gabrielle, Allison Morris & Hennesey Hayes, "Conferencing and Restorative Justice" in D. Sullivan and L. Tiff eds, *Handbook of Restorative Justice: A Global Perspective*. (London and New York: Routledge. 2006) at 103

<sup>289</sup> Woolford *supra* note 39 at 79-81

## CHAPTER FOUR-RESTORATIVE JUSTICE PRACTICES IN CANADA

Although Canada is still going through a level of development and application of restorative justice practice, the Canadian criminal justice system has been able to provide success stories that the Nigerian criminal justice system can learn from. This is not to insinuate that things are rosy for the Canadian justice system. Canada still struggles with high remand population and some new laws put more pressure on the system to use incarceration,<sup>290</sup> but the Canadian justice system has taken steps towards restorative justice adoption in its laws and practices.

A big part of the introduction of restorative justice to the Canadian criminal justice is the introduction of section 718.2(e)<sup>291</sup> to the Canadian Criminal Code. It was this section that allowed for the implementation of restorative principle to the case of *Gladue*<sup>292</sup> (a case now renowned in Canada as precedence). Although *Gladue* is not truly restorative justice, it implements the restorative element imbedded in the Canadian criminal code in section 718.2(e). Subsection (e) of this section was put in place in order to address the disproportionate representation of Aboriginal people in the Canadian criminal justice system. It should be noted that this is not truly restorative justice as described in the previous chapter. It is more of a sentencing regime within the criminal justice system with a restorative focus.

*Gladue* was decided by the Supreme Court in 1999, describing the principles applicable to sentencing Aboriginal offenders in conjunction with Section 718.2(e). The following is some guidance provided by the Supreme Court of Canada in its decision in *Gladue*. The court referred

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<sup>290</sup> CCC, supra note 27 SSC, c.1

<sup>291</sup> CCC ibid s 718.2(e)

<sup>292</sup> *R v Gladue (1999)*, Carswell BC 778 [*Gladue*] para 61

to findings of some public inquiries and concluded that “widespread racism has translated into systemic discrimination in the criminal justice system”.<sup>293</sup>

Section 12<sup>294</sup> of the Interpretation Act describes the purpose of section 718.2 (e)<sup>295</sup> to have remedial purpose. This sub-section when taken together with sub-section (1) provides a codification for the guidance of sentencing judge in an effort to simplify and add structure to trial level and sentencing decision. The Supreme court added that<sup>296</sup> “this section alters the method of analysis which each sentencing judge must use in determining the nature of a fit sentence for an Aboriginal offender”<sup>297</sup>

The Supreme Court also instructed sentencing judges to put into consider other factor like “poor social and economic conditions” and a legacy of dislocation” faced by Aboriginal people.<sup>298</sup> It directed sentencing judges to undertake the process of sentencing Aboriginal offenders differently in order to attain a truly fit and proper sentence in the particular case.<sup>299</sup>

The court stated that the provision of 718.2(e) apply to all Aboriginal offenders who come within the scope of Section 25 of the Charter and Section 35 of the Constitution Act 1982, notwithstanding their status.<sup>300</sup> This therefore includes urban-Aboriginal persons.<sup>301</sup> In *Gladue*, the Supreme Court reinforced that although section 718.2(e) should apply when sentencing Aboriginal offenders, other principle of sentencing outlined in the criminal code should be taken

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<sup>293</sup> *Gladue* supra note 292 para 61.

<sup>294</sup> Interpretation Act s 12

<sup>295</sup> *CCC* supra note 27 s. 718.2(e)

<sup>296</sup> *Gladue*, supra note 292 at 706 para 32

<sup>297</sup> *Ibid* para 33

<sup>298</sup> *Ibid* at para 68

<sup>299</sup> *Gladue*, supra note 292 at para 33

<sup>300</sup> First nation /Indian status

<sup>301</sup> *Gladue*, supra note 292 at para 90-1

into account, section 718.2(e) should be considered in context of the whole of section 718 and scheme of Part XXIII of the Criminal Code.<sup>302</sup>

This could also be read to say that the sentencing judge must look to the circumstances of the Aboriginal offender even in violent and serious offences because it may impact the sentencing of the Aboriginal offender. This was noted in the Supreme Court of Canada's interpretation of the sentencing provision.

“it appears that the unbalanced ratio of Aboriginal offenders came from an unfortunate institutional approach that is more inclined to refused bail and impose more and longer prison terms for Aboriginal offenders”<sup>303</sup> The impact of *Gladue* and its results are discussed further in this chapter.

The Canadian justice system is similar to the Nigerian justice system with regards to interim release. A judicial interim release hearing is held by a justice of the peace or a provincial court judge. A defense counsel and Crown attorney may agree that an accused be released before a bail hearing is held. The crown attorney can then notify the judge that he is not opposed to the release and the accused can be released without the necessity of going through a bail hearing if the judge agrees.<sup>304</sup> In conclusion, this chapter introduces readers to how some restorative justice practices are integrated into the criminal justice system such as *Gladue*. It will also provide the difference between restorative justice and *Gladue*.

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<sup>302</sup> Ibid at para 88

<sup>303</sup> Ibid para 64

<sup>304</sup> Gerry Johnson, “How and in what terms should Restorative Justice be conceived?” in H. Zehr and B.Toew, *Critical Issues in Restorative Justice*, eds (Cullompton, UK: William Publishing 2004) at 72.

*Gladue* case, principles and the Canadian bail law together provide an insight on improving bail in Nigeria. We will now explore Canadian implementations of restorative justice that may provide insight for Nigeria. This will serve as a guide for lessons to be learnt.

This brings us to the discussion on *Gladue*. Now although *Gladue* arose as a result of the use of restorative justice principle, it can be argued that it is not fully restorative justice program at least not in the sense as described by Howard Zehr in his “Little Book on Restorative Justice” *Gladue* can simply be described as a criminal justice that is partially restorative.

### **Gladue Principles**

1. The Supreme Court stated that when a judge is sentencing an Aboriginal offender, it is essential to consider the unique background and systemic factors which may have played a part in bringing the particular offender before the court.
2. If those factors were significant, the judge will need to consider them in order to determine if imprisonment would actually serve to deter, or to denounce the crime in a sense that would be meaningful to the community of which the offender is a member.
3. The sentencing judge must take into account the different circumstances surrounding the offence, the accused, the victim and the community. The judge must understand the difficulty Aboriginal people have faced.
4. The sentencing judge must still impose a sentence that is fit for the offence and the offender. Section 718, 718.1 and 718.2 must be read and interpreted as a whole and therefore, the sentencing should not be automatically reduced simply because of the Aboriginal origins of the offender.
5. The *Gladue* principle applies to Aboriginals residing on or off reserve. It also applies to Aboriginals who come in the scope of section 20 of the *Canadian Charter of Right and Freedom (CCRF)*<sup>305</sup> and section 35 of the *Constitution Act 1982*.<sup>306</sup>

Although there are certain criticisms that arose from the practice the Canadian criminal justice system has succeeded in using this principles in a number of cases. A few of these cases will now be discussed.

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<sup>305</sup> *Canadian Charter of Right and Freedom* s 20 entrenched in *Constitution Act 1982*. 80 s 35

<sup>306</sup> Michelle Obonsawin, “Introduction to Legal Foundation” in Reghuvaran Kunjukrishnan, Michelle Obonsawin & A G Ahmed, “Gladue Principle and Their Application in Criminal Justice and Mental Health Systems” Online:  
<http://www.hsicc.on.ca/Resource%20Library/Mental%20Health%20and%20Justice/Gladue%20Principles%20and%20Their%20Applications%20In%20Criminal%20Justice%20and%20Mental%20Health%20Systems%20-%202013.pdf>

## Gladue Application

Kent Roach stated<sup>307</sup> that the Toronto *Gladue* court from its onset payed particular attention to the circumstance of Aboriginal offender from their first appearance to courts. In a number of cases the principle in *Gladue* have been given consideration in bail cases, Dallas Mark in a bulletin co-authored by Louise Tansey analyzed some of this cases. I will now provide an overview of some particularly illustrative cases.

*R v. Trodd*,<sup>308</sup> a 31 year old (with an exclusive criminal record which include youth entry for an offence in which a police officer was died) was charged by the Anishinabek Police Services with 15 counts information alleging two counts of breaking an entry, one count of assault, one count of aggravated assault, one count of threatening death, two counts of unlawful confinement, four counts of breaching a recognizance and four counts of breaching probation and concurrently charged by Ontario Provincial Police with two counts of mischief ,two counts of breaching his probation and one count of breaching recognizance.<sup>309</sup>

Justice Koke in his review stated that the Justice of the peace did not err in her application of *Gladue* and that she stated that she considered *Gladue* in paragraph 16. Secondly although the Justice of the peace did not specifically articulate steps in *Gladue* it was not always necessary to do so as indicated in section 718.2(e)and thirdly *Gladue* requires the court to take judicial notice of systemic or background factors and attempt to have some evidence adduced which will assist the court and the Justice of the peace in Trodd's case met these duty by ensuring that there was sufficient evidence before her with respect to the offender and her reason

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<sup>307</sup> Kent Roach, Henry S. Brown, Martha Schaffer & Gilles Renaud, "Time for Justice: One Approach to R v Gladue" (2009) 54 Crim LQ at 431.

<sup>308</sup> *R v. Trodd*, 2014 ONSC 3848

<sup>309</sup> Dallas Mark, "Bail: Gladue Considerations" (2014) 21 MarkCrimLB at 2,3&6

in paragraphs 26 and 29<sup>310</sup> (accused refers to himself as a Cop killer, his convictions, repeat breach of recognizance and the fact that his community was seeking protection from him.)

Finally from this case we know that the *Gladue* principle is not limited to sentencing only but extends to judicial interim release. The court must however take into consideration *Gladue* factors as they relate to the offender before the court and the proposed plan. *Trodd's* case is a reminder of the fundamental principle in *Gladue* that as with sentencing, bail application particularly for violent and serious offences will result in the same outcome of imprisonment for both Aboriginal offenders and Non-Aboriginal offenders and so detention is the most likely result where the offence is serious and the offender (Aboriginal or not) has a criminal record and a poor history of compliance with conditions.<sup>311</sup>

In *R v Pierce*<sup>312</sup> an Aboriginal woman was charged with aggravated assault arising from an incident where she allegedly beat two of her former friends with a baseball bat and a golf club she was also charged with assaulting a police officer and breach of an earlier release.<sup>313</sup> In order to have her detention order reviewed she argued the bail hearing judge erred in law in her reasoning on secondary grounds. She also argued that there were new material changes in circumstances which would mitigate in her favor for the purpose of interim release. One of these was her good faith promises to abide by conditions and commit to a rehabilitation program that will assist her with dealing with loss and addiction. She has lost a near full pregnancy and her offending behavior and consumption of drugs and alcohol coincided with the loss. Initially *Pierce* resisted counselling and this initially disqualified her from release.<sup>314</sup>

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<sup>310</sup> *Regina v Jeremy Trodd* 2014 ONSC 3648[2014]O.J No 2902,114 W.C.B (2ND) 80

<sup>311</sup> Dallas Mark, supra note 307 at 3,6.

<sup>312</sup> *R v Pierce*, 2010 SCJ CarswellOnt 8702

<sup>313</sup> Ibid, at para 5.

<sup>314</sup> Ibid, at para 5.

On appeal Justice LeRoy stated that the Justice of the peace did not err in detaining Pierce and explained that the public perception and confidence in the administration of justice is heavily influenced by the Aboriginal status of Pierce. Furthermore, where natives are involved the *Gladue* principles prevail all aspect of the criminal process and the potential for a lengthy term of incarceration, these were the tertiary grounds on which the court released her [para 45].

The court also added that when detention is merely convenient or advantageous it is not justified. Finally, the court accepted that the applicant is not likely to reoffend if released pending trial [para 31-32]. In this case the change in circumstance influenced the decision of the court and Pierce was released on bail. There are similarities with the Todd case, the efficacy of the proposed plan of release factors in the offender's community support with consideration of the public's confidence in the administration of justice.<sup>315</sup>

Section 719(3) permits the judge determining a sentence to takes into account the time spent by the accused in pre-trial detention as a result of the offence. Therefore, unless section 718.2(e) is considered at the bail hearing a sentence for imprisonment for an Aboriginal person can occur by the time the Judge begins to pay particular attention to the circumstances of the Aboriginal offender which in turn precludes a reasonable sanction other than imprisonment.<sup>316</sup>

In some instance it will be impossible for the court to pay particular attention to the circumstances of an Aboriginal offender unless bail is granted.<sup>317</sup> Such instances where the offence is committed due to:

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<sup>315</sup> Ibid, at 5-6.

<sup>316</sup> Dallas Mark, supra note 307 at 3; see also *R v. Fice* (2005)1 S.C.R 742, 196 C.C.C (3d) 97,28 C.R (6<sup>th</sup>) 201 Para 64]; see also Debra Parkes, David Milward, Steven Keesic & Janine Seymour, *Gladue Handbook: A Resource for Justice System Participants in Manitoba*, (University of Manitoba, September 2012) 18.

<sup>317</sup> *R v Fice* (2005) SCC 32 Para 69

“...an undiagnosed fatal alcohol disorder, the court may only need to address the disorder but because there can be no assessment of this condition while the offender is in custody there would be no evidence or possible way of giving attention to that unique background and systemic factor which played a role in bringing the offender before the court.”<sup>318</sup>

In conclusion, the *Gladue* bail cases offer insights on whether there are more constructive avenues of handling bail if applied to persons that fall within the bracket of poor and uneducated in Nigeria, and can offer insight on whether there are more constructive avenues of handling bail to avoid accused spending much time in interim detention while mitigating concerns of skipping bail. Although it is true that many of the issues arising from pretrial release discuss are systemic ones which may imply the need for a drastic shift in the countries entire system.

### **Differences between Restorative Justice and Gladue**

As stated before restorative justice does not have an exact definition. However, an operational definition can be reached to make it easier to identify what restorative justice is not. Restorative justice is defined as a voluntary, community based response to criminal behavior that attempts to bring together the victim, the offender and the community, in an effort to address the harm caused by the criminal behavior. Form this definition any program that contains restorative elements but does not attempt to bring victim and offender together is not considered restorative justice in its true form.<sup>319</sup> Below is a breakdown between restorative justice and *Gladue*:

Table 3

Restorative Justice	Gladue
Voluntary participation of all stakeholders or	Gladue is offender centered because it is

<sup>318</sup> Howard Zehr, supra note 232 at 3

<sup>319</sup> Jeff Latimer, Craig Dowden & Danielle Muise, supra note 219

at least an attempt is made to get all stake holder involved.	rooted in section 718.2 of the criminal code which has restorative intention but doesn't attempt to involve the victim.
Its use is not limited to crime as stated by law because it can include harm done	Gladue practice is limited to crimes as provided by law
It has various styles, practices and programs	Gladue only concerns itself with one of the aims of restorative justice
It is not limited to criminal justice or the criminal justice system alone.	This is purely practiced within the criminal justice system and still greatly influenced by punitive justice.
It has multiple principles for the purpose of focused on restoration of relationships.	It adopts certain restorative justice principle into its practice. Therefore applying only a small part of restorative justice principles.
It is often practiced as a non-adversarial process where parties of the process attempt to resolve their dispute	Used in adversarial process often without involving the victim
It requires that the offender accepts responsibility for action	Offender is not required to accept responsibility. The concern is the circumstances surrounding offenders

	appearance in the criminal justice system
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**Conclusion**

A criminal justice program needs to adopt certain elements to be categorized as fully restorative. We must however note that it is possible to be relatively restorative with having all the elements required. The Canadian criminal justice system has taken its own steps in the right direction. These steps may seem little but in time, with continuity and discipline to ensure good practice, Canada can become one of the leading authorities amongst its counterparts in restorative justice. I am certain that Nigeria can learn a few lessons from restorative justice practitioners, researchers and advocates to avoid mistakes made by restorative justice pioneers.

## **CHAPTER FIVE- RESTORATIVE JUSTICE IN NIGERIA**

The Nigerian criminal justice system is presently experiencing great levels of backlog cases, high remand rates, and low rehabilitation which in turn leads to high recidivism, dehumanized prisons conditions and a near catastrophic justice system. This is due to the systems financial incapacitation, the level of corruption within the system, high level of public distrust for the system, and the high social and economic costs of incarceration. In order to begin to repair damages done it is important that the system regains the confidence of the people it was created to govern and protect. The best way to do this is to produce results.

In this chapter the challenges that are faced by the Nigerian criminal justice system will be diagnosed. Possible solutions will be discussed and lessons that can be learnt from the Canadian criminal justice systems mistakes or errors will be noted. This chapter will allow us to suggest attributes or ideas that can be useful with the aim of positively impacting the Nigerian criminal justice system. This chapter analyzes practices that can apply in the Nigerian criminal justice system. It introduces the readers to what can be learnt from the Canadian courts for the purpose of improving the Nigerian justice system.

This chapter provides us with lessons that can be learned from the Canadian experience which could be used in the Nigerian context while avoiding the same mistakes. There are specific Canadian experiences and mistake that can be useful to the Nigerian criminal justice system for the purpose of learning better ways of carrying out justice. Models of correction can be adjusted to suit the Nigerian context and people as well as its justice system in its pursuit of its purposes.

## **Arguments for Restorative Justice within the Nigerian Context**

Some Nigerian writers have described pre-colonial indigenous practices as restorative in nature. Like most African countries, Nigeria has multiple cultures. Yet these different tribes have one thing in common when addressing the issue of crime. Their indigenous justice systems focuses on relationships which in turn brings about the development of restitution, rehabilitation and reconciliation. In precolonial Nigeria taboos (crimes and deviances) were resolved among the parties.<sup>320</sup>

Although there were different systems or formats for handling crime in different tribes these formats were mainly focused on restoring social harmony and reconciling the parties.<sup>321</sup> Social pressure therefore played a major role in achieving compliance, because enforcement of justice, law and order lies within the complex relationships in the communities.<sup>322</sup> However the presence of a multicultural society implies that what works for one community may not work for the other.

Some communities in Nigeria still live in settlements small groups and villages. Many of these villages are diverse in culture. However, their common goal is to maintain civility and order to attain preferred societal goals. Though most of these precolonial laws and practices are unwritten, they are still practiced in the hinterland of many African countries. Coupled with this

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<sup>320</sup> J A Aguda, *supra* note 18

<sup>321</sup> Sally Merry, "The Social Organization of Mediation in Non-Industrialized Societies: Implication for Informal Community Justice in America" In Richard L. Abel. (ed.) *The Politics of Informal Justice* (NY: Academic press 1982) 17-45

<sup>322</sup> Robert .S, "Traditions and Change at Mochudi: Competing Jurisdictions in Botswana" (1979) 17 African Law Studies at 37-51. See also Igbokwe V.C, "Social Cultural Dimensions Of Dispute Resolution: Informal justice process among the Ibo- speaking people of Eastern Nigeria and their implications for community/neighborhood justice system in North America" (1998) 10 African Journal of International and comparative law at 446-71

is the fact that state criminal justice systems in many African countries have limited infrastructure, hence they do not have resources to deal with minor in settlements or villages.<sup>323</sup>

### **Implementation of Restorative Justice: State Structure Vs Grassroots Communal Level**

In 1999 when Nigeria finally transitioned from the era of military government to a democratic one, the Human Right Violation Investigation Commission (HRVIC) was established. The HRVIC report listed some expectations. They include:

- Restoring the dignity of victims;
- Creating opportunity for perpetrators to “expiate their guilty”
- Facilitating National catharsis and development of a prevailing culture of impunity
- The Naming of perpetrators and disclosure of the truth about their atrocities are punishment “through public stigma, shaming and humiliation” this can reduce the urge of retribution.<sup>324</sup>

From this report it is clear that even with the experience of colonialism, adoption of the colonial system, and the 15 year of military regime; at Nigeria’s first breath of freedom she reverted to a restorative emphasis to her justice system.<sup>325</sup> In an effort to adopt responsive laws

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<sup>323</sup> Maiwa’azi Dandaura Samu, “Nigerian Indigenous Justice Examined through the Lens of Restorative Justice” (2013) Academia, 5; see also Don John O Omole, “Justice in History: An Examination of African Restorative Traditions’ and The Emerging ‘Restorative Justice’ Paradigm.” (2006)2:2 African Journal of Criminology and Justice Studies (AJCJS) at 45.

<sup>324</sup> Human Right Violation Investigation Commission (HRVIC) 2002f, 2:8 12-8.14

<sup>325</sup> Don John Omole, *Restorative Justice and Victimology: Euro Africa Perspective*, (Netherland Wolf legal Publisher (WLP) 2010) at 125-145. Provide details chart of empirical Research showing the Acceptability of Restorative Justice in Nigeria. The charts compare victim to professionals, variance in level of acceptability to variance in level of education, gender, duration of victimization, difference in culture ages and religion and their variances in acceptability of restorative justice

that recognize the unique circumstances of the country as a transitional country, this body was designed to raise fundamental issues and questions about Nigeria past, present and future.<sup>326</sup>

R. Olusesan buttresses the point that a responsive law put concept, doctrine and principle into consideration. By doing so, such laws provide the understanding that responsive laws are not just about procedural fairness. They must include social awareness, active public discuss via definition and actualization of substantive justice that is relational in nature.<sup>327</sup>

Another restorative justice intervention attempt was the Nigerian Criminal Justice Reform of 2005. This bill introduced community service (section 477), plea bargaining (Sec 247), compensation to victims of crime (section 292), restitution (section 440:3), and juvenile justice (part 46) in pursuant to the *Child Rights Act* of 2003. However, some of these are still yet to be fully implemented in all states of the Federation in Nigeria.<sup>328</sup>

In analyzing the grass-root practices, of restorative justice, the Ibo culture will be used to represent Nigeria. This is not to imply that this culture represents accurately all the different tribes and culture but for the purpose of this thesis they will be used as a focal point. Ibo is one of the three major tribes in Nigeria and like most cultures in Nigeria the socio-political institutions include communalism, democracy and religion. However, this drastically changed with the colonization of Nigeria which introduced western education, culture, religion and capitalism.<sup>329</sup>

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<sup>326</sup>Raymond Olusesan Aina, "Nigeria's Human Right Violation Investigation Commission (HRVIC) and Restorative Justice: The Promise, Tension and Inspirations for Transitional Societies" (2010)4:1 African Journal of Criminology & Justice Studies (AJCJS) 57-8

<sup>327</sup> Ibid at 63

<sup>328</sup> Don John Omole, "Towards Implementing RJ in Nigeria: The Nigerian Criminal Justice Reform Bill" (2005), Restorative Justice Consortium: Resolution 23. 7; See also Comfort Chinyere Ani, "Reform in the Nigerian Criminal Procedure Laws" (2011) 1 NIALS Journal on Criminal Law and Justice

<sup>329</sup> Maiwa'azi Dandaura Samu supra note 323

Pre-colonization, Nigerians had their own way of making laws, governing themselves and settling their conflict. To date many villages and settlements still use this method to govern themselves. For example many Ibo settlements, villages and towns still use the “Oha” and “Izuzu” as their legislative body. The “Oha” is a general assembly of the adult male where a legislative bill can be tabled or moved by adult male for discussion. The “Izuzu” is a consultative session of the heads of each lineage after the “Oha” as occurs. This session is a closed session. After deliberation on the bill a ceremony called the “Ofo” is done to validate the bill and to commit it to the goddess of the earth “Ala” as law. The validation of a bill only occurs when the bill is able to persuade not only the mind of the “Izuzu” but also their heart to the functionality of the laws to maintain order in the community.<sup>330</sup>In other words the laws are made by the people for the people, and not just for the benefit of a group within the community.

Similar to this is the system of the Yoruba peoples legislative process, except that the Yoruba’s have their king presides over such legislative bodies and he is supported by the Priest of the deity worshiped in the tribe or group. Also common is the promulgation of any law created. Contrary to western culture of putting a law in the gazette, indigenous Nigerian culture a law is either promulgated by a town crier or by the lineage head (member of the Izuzu).The same group that formed the legislative body also form the judiciary(court system) when a crime occurs. It should be noted that in both Cultures, as is consistent with other cultures in Nigeria, the laws that governs the people are in a hierarchy. The divine law is above all else before the

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<sup>330</sup> Ikenga .K.E Oraegbunam, “Crime and Punishment in Igbo Customary Law: The Challenge of Nigeria Criminal Jurisprudence” (2010) at 10-15. <http://www.ajol.info/index.php/og/article/viewFile/57917/46285>

positive state law. It is the divine law that governs offences like murder and offences that are classified as too grievous for state law to punish.<sup>331</sup>

It is not the intention of this paper to conclude that the precolonial system should be reinstated but the purpose of this past practice should be considered when venturing into the criminal justice reform. This would mean that the Nigerian criminal justice system will need to move its focus when assessing crime from “mere disobedience of a law(s)” to the complexity of the harm done to the relationship of the parties, and to the community affected by the wrongdoing. And if restorative justice seeks to take advantage of the dynamics of the context of the traditions within which it operates, as suggested by Maiwa’azi Dandaura Samu, the relational friendly values and common good principle of the traditional system can easily be adopted and streamlined to restorative justice principles and practices of equality and fairness.<sup>332</sup>

### Strengths and Weaknesses

Like the situation of restorative justice in Canada, Nigeria has had some critiques on the feasibility of restorative justice within the Nigerian criminal justice. Some doubt its possibility or effectiveness. Others view it as soft on crime. While others argue that it could lead to the offender facing consequences too great for the crime committed. Other problems with the indigenous traditional practice of restorative justice include being seen as arbitrary, paternalistic or unjust because decisions were often based on gender, tribal or political lines. It therefore allowed for discrimination, particularly against females.<sup>333</sup>

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<sup>331</sup> Ibid at 7&8; For detailed information on the precolonial justice process see O. Oko Elechi, *Doing Justice Without the State: The Afikpo (Ehugbo) Nigeria Model*, (NY: Routledge 2006) at 129

<sup>332</sup> Maiwa’azi Dandaura Samu supra note 323 at 9.

<sup>333</sup> Don John O Omole, supra note 323 at 45

Critiques of restorative justice have been reviewed in chapter three of this paper. However, it would be necessary to make the traditional restorative adaptation of restorative justice in Nigeria gender sensitive so women and youths could also have a voice. Also, punishment where necessary should be set to fit the crime and not be excessive as is often the case in Nigerian indigenous criminal justice practice.<sup>334</sup>

Admittedly the indigenous traditional Nigerian criminal justice system often gives a lot of leniency to the victim (which is good) but could also lead to injustice to the offender because the offender may not be given the opportunity to participate in the process. Also false accusation that were allowed in the indigenous traditional Nigerian justice system in the name of spirituality may not always be accurate. Therefore, the use of facts and truth (true facts) and not just popular belief should be the encouraged<sup>335</sup>

### **How Restorative Justice Practice in Canada Particularly Gladue is Significant to this Paper**

There are similarities in circumstances between Canada and Nigeria because both countries still suffer from consequences of colonial rule till date (In Nigeria the poor and uneducated and in Canada the Aboriginal people). Both countries have colonial affiliations with Britain and have adopted their criminal laws mainly from British common law. Canada's modification to its *Criminal Code* allowing a restorative approach within a retributive criminal justice system is a model that could be adopted.

It is therefore possible to identify some common ground with which one can help the other. Nigeria can learn from Canada's efforts to integrate restorative principles into its criminal law process. Canada could identify other restorative practices already in place at grass root levels

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<sup>334</sup> Maiwa'azi Dandaura Samu, supra note 322 at 10-11

<sup>335</sup> Ibid at 11

that may be beneficial to its criminal justice system. Both countries could collaborate resources for the purpose of research towards developing a workable justice system for their people separately or together.

*Gladue* application is an indication of the possibility of the application of restorative principle in a retributive system. The Canadian criminal code had enacted in its laws restorative intentions for offenders, particularly Aboriginal offenders in section 718.2(e)<sup>336</sup> This enactment gave the judiciary the power to be creative with its sentencing in 1996, but it was not until 1999 that a judicial decision was made at the supreme court level in the case of *R. v Gladue*<sup>337</sup>.

The overrepresentation of Aboriginal people within the criminal justice system was the trigger for the enactment of section 718.2(e). In the case of *Gladue* a 19year old urban aboriginal woman plead guilty to manslaughter for killing her common law husband. Section 718.2(e) was not invoked because it was argued that she did not fall within the Aboriginal community. She was sentenced to 3 years imprisonment. The Supreme Court thereby laid out some guidelines for judges to follow when applying section 718.2(e). The Supreme Court instructs sentencing judges to put into consideration factors like “poor social and economic conditions and legacy of dislocation” faced by Aboriginal people, “systemic and background factors” and it should apply to all class of Aboriginal offenders.<sup>338</sup>

In Nigeria the issue is not one of a race or ethnic group of people, rather it is of a class of people. The over representation of the poor and uneducated in the Nigerian criminal justice system is disheartening. More disturbing is the reason for their incarceration. Not only are most of the detainees awaiting trial but many of them may be awaiting trial for years. Some are kept in

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<sup>336</sup> CCC supra note 27 s 718.2(e)

<sup>337</sup> *R v Gladue* (1999), Carswell BC 778 [Gladue]

<sup>338</sup> Ibid [Gladue]; see also *R v Wells* [2000]1 S.C.R 207 187 D.L.R (4<sup>TH</sup>) 257 [Wells]

detention because they could not meet the requirement for their bail (which usually requires a sum of money or owning a landed property).

Like Canada, the Nigerian criminal justice system has a long standing legacy of relying on incarceration to solve its problems. Deterrence is a key element of the Nigerian criminal law and so the criminal justice system uses specific and general deterrence as its solution. Unfortunately there is no scientific evidence to support the efficacy of deterrence theory. In fact there are certain factors that can serve as obstacle to effective deterrence.<sup>339</sup>

While using the rate of recidivism to support his arguments, Peter Anyebe states:

“The fact of recidivism, which is known to be quite high amongst some classes of offenders and in some contexts, suggest that there are equal, if not more, important factors than treats of punishment that go into decision making concerning offering . The deterrent effect no-doubt becomes weaker with each subsequent conviction.”<sup>340</sup>

### **How Does Restorative Justice During Bail Help the Nigerian Situation?**

Although bail was not originally devised created to keep accused people until it is convenient to carry on with their trial; the Nigerian law and practices reflect a contrary position. The obsolete incoherent and inconsistent legislature helps to perpetuate these negative practices of keeping an accused in jail until their trial. In some cases the case is still under investigation but the accused is held in custody pending investigation.<sup>341</sup>

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<sup>339</sup> Kelvin C. Kennedy, “A Critical Appraisal of Criminal Deterrence theory.” (1983)88 Dick. L. Rev 1(1983-1984) 7; see also David Milward, *Aboriginal Justice and The Charter: Realizing A Culturally Sensitive Interpretation of Legal Rights*, (Vancouver: UBC Press 2102) at 8, 9,11&12

<sup>340</sup> Peter A Anyebe, “Sentencing in Criminal Cases in Nigeria and the Case for Paradigmatic Shift” (2011)1 NIALSJ Crim L & Just at 151-96 while referring to M. Foucault and D. Farrington and G. Tucker, “Reconviction rate of Adult Male after Different Sentences” (1981) 21 British J .Crim at 357-59

<sup>341</sup> Isabella Okegbue, *supra* note 77 at 37

Even though the purpose of pretrial detention is not punishment, the absence of carefully regulated substantive and procedural due process in bail hearings has effectively amounted to the violation of constitutional right of presumption of innocence. It also restricts the accused's liberty so that they are cut off from their support system such as their family and friends, and are unable to work or make are living, and consequently unable to afford their defense counsel. This detention also limits the accessibility of the accused to resources of their choice that would enable them prepare their defense.<sup>342</sup>

Resulting from the overuse of detention/incarceration is the overcrowding of the Nigerian prison, low maintenance of the facilities, straining of the staff and facilities of the prison, increased economic costs to the country's finances among other things. All of this in turn affects the daily running and development of the criminal justice system and the confidence of the Nigerian people in its justice system. As noted in chapter two, 68 percent of the Nigerian prison population consists of accused awaiting trial. One way to reduce the prison intake is to introduce restorative justice at the bail stage.

The introduction of restorative justice could be the scissors that snips a good amount off the burgeoning prison population in Nigeria. As illustrated under the indigenous tradition in Nigeria, most cases handled by village councils do not make it to the state criminal justice system because they are addressed amongst the parties and within the community. Where the case has become a state matter, restorative justice can be introduced during bail for the determination of the terms and conditions of the bail.

It is the sad truth that a large percentage of incarcerated people are either the poor or the uneducated or those that can be categorized under both. Many of whom are only detained

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<sup>342</sup> Ibid at 182

because they cannot afford their bail money or money to bribe the police, and do not know their rights or cannot meet other terms or conditions of their bail. The introduction of restorative justice to bail conditions could be a practical way of avoiding the use of imprisonment as a means of ensuring attendance of the accused.

## **Recommendations**

Like many western countries, Canada has experienced its share of high imprisonment and remand rate.<sup>343</sup> However Canada has taken practical steps to better manage these issues for the purpose of making the country a better place. One of its notable steps taken to achieve this improvement is that of the introduction of restorative justice to its criminal justice practices. Research carried out in the course of this work shows that restorative justice's impact on pre-trial and post-trial imprisonment rates of Canada is a noticeable one.<sup>344</sup>

Although each province runs independently of the other, federal laws such as the constitution and the *Canadian Criminal Code* have imbedded in them clauses that encourage practical application of restorative justice principles. Such provisions in turn affect imprisonment rate and thus positively impact the criminal justice system. Additionally, considerably more judges, lawyers and prosecutors now consider restorative justice in the practice of law in Canada.<sup>345</sup> Finally, researchers have now broken more ground by providing more substantial

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<sup>343</sup> James Bonta, Rebecca Jesseman, Tanya Ruggie and Robert Cormier, "Restorative Justice and Recidivism: Promises Made, Promises Kept" at 108-10

<sup>344</sup> Ibid at 108-17; see also *Canadian Criminal Code*, RSC 1985, c C46, s 178,2(e)

<sup>345</sup> See the decision of Justice Shaun Nakatsuru a judge the Toronto Gladue court in *R v Jesse Armitage 2015 ONCJ 64*; -Justice Murray Sinclair (2015) - "Everything we do going forward should be based on the question of how we achieve reconciliation, every action by every government, at every level, including municipalities"; For further information see also Johnatan Rudlin, "Aboriginal Over-representation and *R. v. Gladue*: Where We Were, Where We Are and Where We Might Be Going" (2008) 40 *The Supreme Court Law review* at 687-713 Online: <http://sclr.journals.yorku.ca/index.php/sclr/article/view/34898/31687>

research to support restorative justice, by bringing light the benefits and successes that restorative justice can bring about.<sup>346</sup>

Presently Lagos state (the commercial center of Nigeria) has a court program known as the court annexed ADR (Alternative Dispute Resolution). It can be argued that the concept of court annexed ADR could not be further apart from restorative justice. In its practices lawyers aim at reducing the conflict to only legal issues and then minimize the sentences for their clients without dealing with the broader issues behind the conflicts<sup>347</sup> However, from our discussion of restorative justice so far, restorative justice seeks to expand the issue and address not just legal Issues, but also address the harm caused which may not necessarily be a crime by law.<sup>348</sup>

Restorative justice is particularly concerned with the repair of relationships which will require the parties to work out their differences with the guidance of an unbiased third party or group.<sup>349</sup> As opposed to court-annex ADR, restorative justice key values are reconciliation, restitution, reintegration and restoration. Court annexed ADR still seeks to determine who is wrong or at fault; what law they broke and what punishment they deserve.<sup>350</sup> It can be described as an informal or less technical form of the court system.

The challenge that Nigeria faces with integration of restorative justice into the criminal justice system has many aspects. In Nigeria, restorative justice practices are often used in civil matters. In fact, many civil matters never get within the court. Most people in Nigerian communities, including neighbors, church members, family friends, and family friends, prefer to settle out of court instead of proceeding to court litigation. Most civil matters that do end up in

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<sup>346</sup> Prepared by the Canadian Resource Center for Victims of Crime, "Restorative Justice in Canada: What Victim Should Know" revised March 2011. Online: <https://crevc.ca/docs/restjust.pdf>

<sup>347</sup> J. A Aguda, *supra* note 18 at 858

<sup>348</sup> *Ibid* at 858

<sup>349</sup> *Ibid* at 858

<sup>350</sup> *Ibid* at 857

court are instructed to try the alternatives first and then return to court if the dispute is not resolved.<sup>351</sup>

For criminal matters however the problem is not necessarily that the parties are not willing to resolve the conflict but that the state (acting for the Attorney-general, the police or any other person authorized by law to enforce public right to commence criminal proceedings) insists on the courts' involvement, and the defense attorneys advise their clients to plead not guilty even when aware that they are guilty. Unfortunately, the courts already have more cases than they can handle so processes may take weeks or months before hearings begin. And if the defendant is underprivileged or uneducated or both he may be unable to afford his bail or unable to understand the implication of court process.<sup>352</sup>

This is not to conclude that restorative justice is not practiced in state criminal cases. It is but usually only where the case has not gotten to the criminal justice system. In most cases, once a matter is reported to the police and it is taken up then restorative justice is no longer an option. This is because there are no laws that specify or adopt restorative principles in Nigerian criminal law. The attempt by Lagos state to create diversion programs such as court –annexed ADR failed in achieving restorative results.<sup>353</sup>

Canada has incorporated in its laws the use of alternatives. It has also put these laws into practice. This is revealed by the increasing use of mediation, circle, and conferences for more

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<sup>351</sup> Adeoti Dorcas Abimbola, "The Application of Alternative dispute resolution to Nigerian Criminal law" Academia, Accessed on the 11<sup>th</sup> of July 2016, 7

<sup>352</sup> J A Aguda supra note 18 at 858-59

<sup>353</sup> Ibid at 858

cases restorative justice principles are being imbedded into criminal justice system in Canada. Examples of these include the well-known *Gladue* case.<sup>354</sup>

Although the Canadian criminal justice is not perfect and may not be totally restorative, the use of restorative justice diversion programs is a start in the right direction. Amongst the challenges to be faced by restorative justice in the Nigerian criminal justice system is the current legal framework of the criminal justice system. The present construction of criminal law in Nigeria is retributive. It does not accommodate restorative justice principles. In addition, the cumbersome procedure and stages a bill needs to pass through makes it makes even more difficult to integrate new practices into the law.<sup>355</sup>

Also detrimental to restorative justice progress in Nigerian criminal justice system is the fact that supporters of restorative justice theories may very well be in the minority in Nigeria.<sup>356</sup> Here a lot of work needs to be done to educate the general public of restorative justice, its principles, what it seeks to achieve and how it works. Although restorative justice has similar principles with many Nigerian traditional practice, it needs to be given its own separate identity and the Nigerian public needs to be informed. Some people may never see the four walls of a school because Nigeria is a very religious country so most people belong to one religious community or the other. A deliberate effort to inform the public of what restorative justice is and how it works will go a long way in increasing restorative justice supporters.

Continuity or the absence thereof is a terrible plague that most programs in Nigeria suffer from. Sometimes leaders and pioneers forget or simply omit to pass on the baton of their training, knowledge and leadership. This adversely affects the program once the leader or

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<sup>354</sup> *Gladue*, supra note 337

<sup>355</sup> J A Aguda, supra note 18 at 858

<sup>356</sup> J A Aguda, supra note 18 at 858

pioneer is no longer present or capable to continue the work. If restorative justice is to succeed in the Nigerian criminal justice system, a frame work must be put in place for the recognition of what restorative justice is on an ongoing basis. This way it not only the leaders that know the workings of restorative justice, but also the communities and the parties who may wish to adopt it in their case.<sup>357</sup>

This brings us to the need for record keeping of restorative justice practices. This is not necessarily to create judicial precedence because as we now know in restorative justice every case is handled uniquely with consideration of its circumstances and stakeholders. This is a step that the Canadian criminal justice has already taken, and it has allowed researchers to point out restorative justice success stories and failures.<sup>358</sup> Record keeping will aid the development and continuity of restorative justice by providing the following:

1. it provides document for research purposes,
2. It allows the government, the communities and the public as a whole to successfully follow the success or mistakes of the program in other to help avoid further mistakes.<sup>359</sup>

An underlying challenge of the Nigerian criminal justice system is the perception of restorative justice as soft on crime. Many view restorative justice as soft on crime or as a way for offenders to escape prison punishment, especially where a restorative justice program is used before the criminal justice process of punishment (e.g. diversion). Restorative justice proponents in Canada discussed re-integrative shaming and how it can be used as a tool for correction,

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<sup>357</sup> J A Aguda, supra note 18 at 858

<sup>358</sup> Canada, Department of Justice, “Effect of restorative programming: A Review of the Empherical” 2015. Online: [http://www.justice.gc.ca/eng/rp-pr/csj-sjc/jsp-sjp/rr00\\_16/p3.html](http://www.justice.gc.ca/eng/rp-pr/csj-sjc/jsp-sjp/rr00_16/p3.html) accessed 10th of July 2016. 3.2&3.3

<sup>359</sup> J A Aguda, supra note 18 at 858

rehabilitation and reintegration of offenders. Although shaming is not necessarily a common practice in Canada, many Nigerian communities still use shaming as their main tool for correction. The shaming culture has been used pre-colonization in many of the different tribes in Nigeria. It is still being used to date in many rural areas, villages and small towns and is therefore not a new practice.<sup>360</sup> The method may not be re-integrative as John Braithwaite's<sup>361</sup> described re-integrative shaming to be but the idea of shaming is not novice to the country's inhabitants.

Although restorative justice has sound principles another argument that could be made is that restorative justice is not necessarily the best approach for every case. Victims of violent crimes may not feel that forgiveness, remorse or repentance is possible. Also in some cases not all victims are willing to participate; in other words not all offenders are remorseful for their actions.<sup>362</sup> A key element of successful restorative justice is willing participation of the parties and offenders acceptance of their responsibility for the offence or crime committed. And for many victims punishment and decapitation may be the necessary components in a criminal justice process. These challenges are also faced in Canada because some victim's concept of justice is according, to just desert theory that the offender should get what he deserves as an equivalent punishment for the crime committed.<sup>363</sup>

Although restorative justice principles are aimed at achieving voluntary participation of the stakeholders, this may be to the disadvantage of the offenders. The offender may feel

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<sup>360</sup> J A Aguda, supra note 18 at 859

<sup>361</sup> John Braithwaite, *Crime, Shame and Reintegration* (Cambridge, UK: Cambridge University press 2005)

<sup>362</sup> J A Aguda, supra note 18 at 859; Annalise Acorn, *Compulsory Compassion: A Critique of Restorative Justice*, (Vancouver: UBC Press 2005)

<sup>363</sup> Amanda Nelund, supra note 34; See also Ives Dale E, "Inequality, Crime and Sentencing: Border, Hamilton and Relevance of Social Disadvantage in Canadian Sentencing law" (2005)30:1 Queen's LJ 114-55 at 137.

pressured to take part in the program and as a result may choose not to seek legal advice or feel they have to admit guilt even if they believe they are innocent. Sometimes restorative justice processes might lead to tougher consequences than court imposed consequences.<sup>364</sup> In other words, effective restorative justice must respond to public safety concerns while still respecting the rights of procedural fairness for the offender.

One other challenge in the Nigerian general culture is training and upholding standards, or lack thereof. Training is not a common feature of Nigeria's public life. However, for restorative justice to work effectively in the Nigerian society it must be facilitated by trained facilitators. This facilitator should be required to upgrade their knowledge, keep proper records of the process' successes and challenges, develop their mediation skills and apply restorative justice principles with great care in the course of their practice. This is because where restorative justice process is not properly handled it can be abused. The delicate nature of restorative justice process makes it vulnerable to manipulation. This could result to re-victimization or dissatisfaction of the victim when the offender refuses to take full responsibility for the offender, or is not truly remorseful for the crime. It could also result to the violation of the offender's rights to procedural fairness when the offender feels pressured to take responsibility for an offence he may not have committed.<sup>365</sup>

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<sup>364</sup> J A Aguda, *supra* note 18,

<sup>365</sup> J A Aguda, *supra* note 18 at 859-60

## CHAPTER SIX-CONCLUSION

From the issues that were fairly discussed in the thesis concerning the Canadian and Nigerian criminal justice system, it is possible to draw the conclusion that the Canadian criminal justice is not without flaws. However, it has taken tangible steps towards advancing the growth of its justice system by adopting restorative justice practices within and without its formal criminal justice system. The steps have led to notable advantages or successes and a few disadvantages that the Nigerian criminal justice system could learn from.

By pointing out the similarities in the two criminal justice systems, pertaining to disproportionate representation of a particular group. I am able to highlight how the Nigerian criminal justice system could learn from the actions of the Canadian justice system to address the issue of disproportionate representation of the disadvantaged class in the Nigerian justice system. Although there is more focus is on bail, the practice can just as easily be applied to sentencing process as long as it does not lose sight of its restorative aim.

I argue that restorative justice is not new to Nigeria's justice system. Yet it is new or almost nonexistent development within the Nigerian formal criminal justice system. The paper portrays Nigeria population predisposition to practice restorative principles due to the country's different cultural practices. Although many of these practices were displaced by the colonialization of Nigeria many of the practices still exist in rural area and some semi urban communities.

Although this paper does not intend to misconstrue the message of reverting back to precolonial justice system (which were not all restorative or without their own short comings); it can be argued that a collaboration of history and lessons learnt from Canada's present restorative practices can be reviewed to help develop a workable restorative criminal justice system for

Nigeria. This in turn could aid the recognition of the possibilities and advantages that could be beneficial to the country's justice system, economic and financial wellbeing and her international reputation. However I am advocating for a mixture of village restorative councils and utilizing restorative principles during the bail phase.

The importance of record keeping for the purpose of development in Nigerian laws, practices and academic excellence is also emphasized in this paper. A country with a history of colonization and military rule, multiculturalism and legal pluralism needs detailed and accessible records. Such record will serve as research resources that may help in the development of an adaptable criminal justice system that will be stable enough to ensure fairness and justice, but flexible enough to accommodate the special circumstances and needs of a country like Nigeria.

Finally the aim of the thesis is not to portray restorative justice as an all-inclusive solution to the criminal justice problems in Nigeria but step in the right direction. The intention is to encourage her to create her own positive, productive and workable system as opposed to simply following a status-quo that has clearly not worked for Nigeria for over fifty years.

In conclusion, the diversity in culture within Nigeria needs to be considered before Nigeria can adopt any laws or practices. And although Canada is a multi-cultural society, what works for Canada may not necessarily work in Nigeria. Thus it is in the interest of the Nigerian criminal justice system and Nigeria as a country that willing researchers and restorative justice proponents should consider such factors as the religious, cultural and legal differences when proposing a workable restorative justice framework. As stated by Maiwa'azi Dandaura, to propose a workable model, proponents of restorative justice must first examine existing alternative resolution mechanisms and consider the interaction of their model with the local power dynamics that shape the strengths and weaknesses of their models.

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as referred to by Andrew Woolford supra note 39 at 138

## **ONLINE RESOURCES**

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