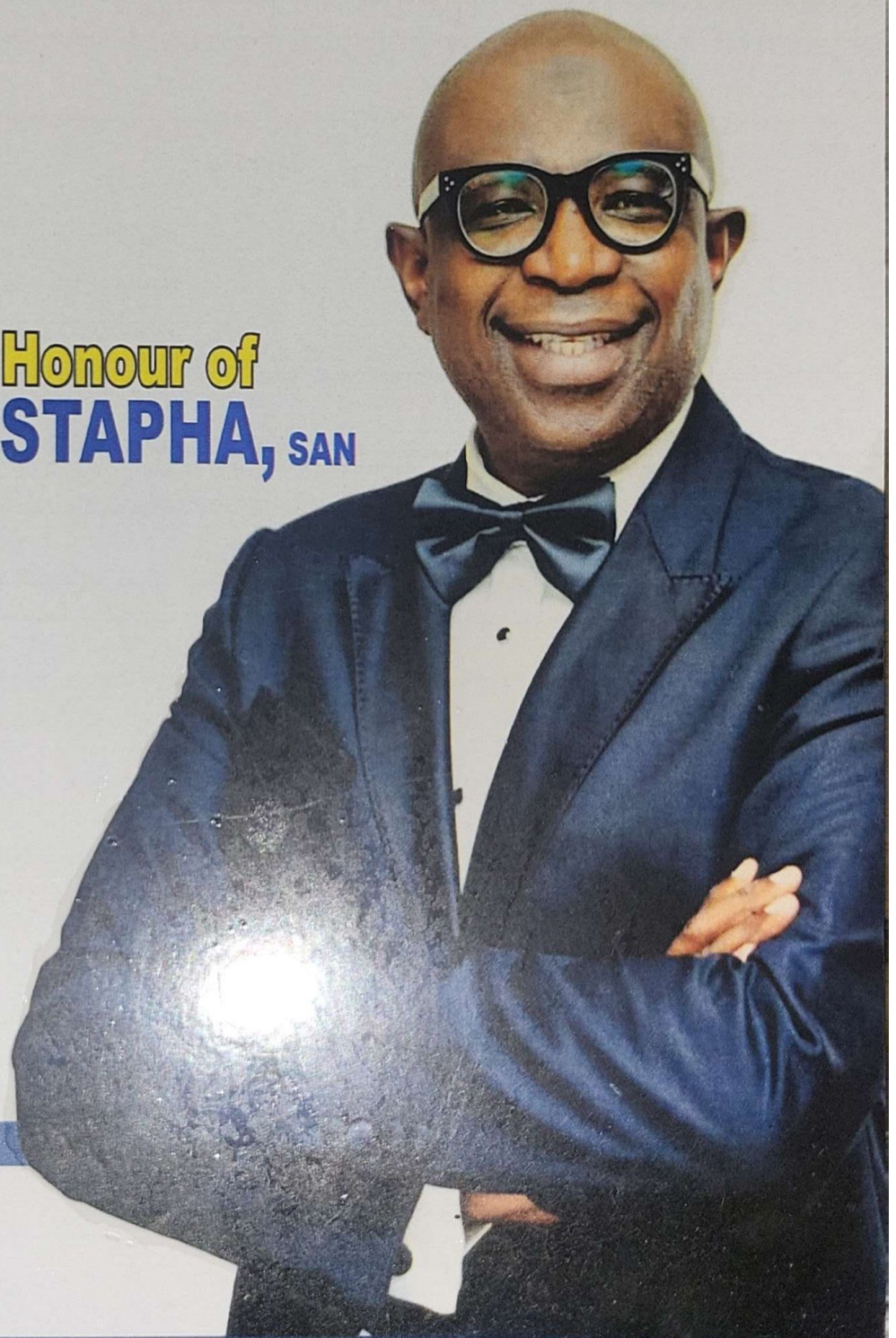


Trends

in Law, Practice and
the Shari'ah in Nigeria

Essays in Honour of
A. U. MUSTAPHA, SAN



Editors:

Prof. A. I. Abikan

Prof. A. O. Sambo

Dr. A. S. Ishola

CHAPTER SEVEN

ADMINISTRATION OF CRIMINAL JUSTICE ACT, 2015 AND ACCESS TO JUSTICE APPROACH IN NIGERIA

Kafilat O. Mohammed-Lawal & Khairat O. Akanbi*

7.1 INTRODUCTION

Improving access to criminal justice has been one of the challenges Governments face the world over. However, a lot of efforts are often expended on improving the efficiency of the judicial system while neglecting the quality of justice dispensed. This has resulted in great imbalance in the criminal justice system and has led to calls for the re-direction of government policies on access to justice from efficiency towards effective and quality justice.¹The Access to Justice Approach has been suggested as a more effective model for improving access to justice, and for reforming the criminal justice system itself. The adoption of this model has helped to re-shape the criminal justice system in some jurisdictions.²The focus of this chapter therefore is to examine the extent to which this approach is reflected in the criminal justice policy in Nigeria and ability of the Administration of Criminal Justice Act to facilitate its introduction.

7.2 Access to Justice

The word "access" can be explained from two main perspectives, its usage as a noun and its usage as a verb. As a noun, access is defined as "a way of entering

Dept of Public and International Law, Faculty of Law, Al-Hikmah University,
Ilorin, Nigeria kmohammedlawal@gmail.com

Dept of Business Law, Faculty of Law, University of Ilorin, Nigeria
khairatakanbi@rocketmail.com

¹Ab Currie, *Riding the Third Wave: Rethinking Criminal Legal Aid within an Access to Justice Framework*(Research and Statistics Div. Dept of Justice, Canada) p.11 He had asserted that "it is a fair statement that as a field of scholarship and praxis, access to justice has focussed too much on access and too little on the quality of justice itself".

²Restorative justice is one of the mechanisms through which the access to justice approach can be realised. In Canada, New Zealand and Australia, it has been used to provide alternative systems of justice for aboriginal and indigenous communities, whose members were often disproportionately represented in the criminal justice system.

or reaching a place" and as a verb, as the "opportunity or the right to use."³In the Black's Law Dictionary, it is defined as "an opportunity and ability to enter, approach, pass to and from or communicate with".⁴The definition of access in the Black's Law Dictionary shows a preference for its verbal usage. This is further demonstrated in its usage concerning justice. Access to justice is therefore defined in the *Blacks' Law Dictionary* as the ability of citizens to make use of the courts and other legal institutions for the resolution of their disputes.⁵

One of the oldest challenges of the administration of criminal justice is the problem of access and accessibility. From time immemorial Governments have sought to make justice as accessible as possible to their citizens.⁶ However, the focus has been more on making the judicial institutions accessible to the people and improving the ability of the people to make use of these institutions.⁷ The conceptualization of access to justice has therefore traditionally focused on reflecting this objective.

Due to the central role played by the courts in the administration of justice generally and in particular criminal justice, access to justice has sometimes been explained in its simplest form as access to the courts. In *Global Excellence Communications Ltd. vs. Duke*,⁸ Niki Tobi JSC, while reiterating the importance of access to the courts said:

Access to court is a constitutional right that can only be taken away by a clear provision in the constitution. It cannot be taken away by implication or speculation by the courts.

The correlation of access to court with access to justice is also reflected in the conceptualisation of access to justice in some international legal instruments.⁹ This connection has been alluded to by Francioni,¹⁰ and in his conceptualisation, he asserted that in its ordinary usage, access to justice can be said to be synonymous with judicial protection and the right of individual citizens to seek remedies before

³A.S. Hornby (ed) *Oxfords Advanced Learners Dictionary* (8th ed. Oxford University Press, London) 8-9

⁴ B.A. Garner, *Blacks Law Dictionary* 9th ed. (Thompson Reuters West, Texas) 14

⁵ Garner op. cit. p.16

⁶ One of fundamental provisions of the *Magna Carta* is contained in Clause 40 , which provides thus: "To no one will we sell, to no one will we deny or delay right or justice" *Magna Carta*, available www.salisburycathedral.org.uk accessed 13th June 2023

⁷ The provision of justice is one of the hall marks of good governance.

⁸ (2007) 16 NWLR (pt. 1059) 22 at 48.

⁹ Access to Justice: Practice Note (2004 UNDP).

¹⁰ F. Francioni, "The Right of Access to Justice under customary International Law" in F. Francion (ed) *i Access to Justice as a Human Right*, (Oxford University Press, Oxford 2007).p.6

properly constituted courts whose impartiality and independence in the application of the law is guaranteed.

Mosher,¹¹ on the other hand, focused on the challenges arising from the traditional conceptualisation suggesting that there are challenges in evolving effective systems for enhancing access to justice due to its conflation with access to the court. While critiquing this approach, she said:

...not only is justice conflated with access to law, but even within the realm of law, the focus is narrowed to the formal process of institutionalized dispute resolution and more particularly the courts.

The pervasiveness of this narrow conceptualization of access to justice necessitates a natural and consequential question of whether that conflation is justified. The answer to this can be seen from the way that justice itself is, and has been conceived.

7.2.1 Conceptualization of Justice

The conceptualization of justice has been one of the oldest philosophical and spiritual questions that philosophers have been trying to unravel. Allen,¹² while reiterating the antiquity of the problem noted that ever since men have begun to reflect on their relationship with each other and upon the vicissitudes of the human lot, they have been pre-occupied by the meaning of justice. Ladan¹³ equally recognized the philosophical challenges that the problem of conceptualizing justice has evoked and he observed as follows:

"What is justice is the question which philosophers have been debating since the Fifth Century B.C. It is said that justice is the chief concern of man but what it is, remains a matter of dispute, not only in philosophy but also in ethics and jurisprudence".

As a result of these philosophical endeavors, there are divergent opinions which have resulted in a diversity of perspectives on the conceptualization of justice. Despite the diverse ways in which justice has been conceived, the most important conceptualization of justice, particularly about the judicial process is legal justice.¹⁴ This is because it determines the way that the adjudication of disputes is

¹¹ Janet Mosher, "Lessons in Access to Justice: Racialised Youths in Ontario's Safe Schools" [2008] (46)(4) *Osgoode Hall Law Journal*, p.816.

¹² C. K. Allen, *Aspects of Justice*, (Indian Reprint Universal Law Publishing, Delhi 2009) p.1

¹³ M. T. Ladan, *Introduction to Jurisprudence: Classical or Islamic* (Malthouse Law Books, Lagos, 2006), 80.

¹⁴ Also known as formal justice.

conducted and also because it is the standard by which the decision of the courts is measured. It has also helped to shape the way that access to justice is conceived. Legal justice has been defined in the Blacks' Law Dictionary as the fair and proper administration of law.¹⁵ This conceptualization of justice makes law the ultimate standard for measuring what is just or unjust. The use of the law has been justified on the basis that the wisdom of the law is wiser than the wisdom of any individual.¹⁶ This may be because the law represents the collective wisdom of the society which has evolved in tandem with the needs of the society and it is regarded as the best reflection and determinant of what the society accepts as fair and equitable. Due to the pivotal role of the courts as interpreters and administrators of the law, they are equally seen as the administrators of justice. Despite the over-arching importance of legal justice, it has its limitations. Apart from the conceptual challenges that legal justice creates for justice generally, it has also limited the framework upon which access to justice is conceived and assessed.

7.3 Legal Justice and the Evolution of Access to Justice Reforms

Although justice according to law is regarded as the best standard of justice, it also has its limitations. The most important standard that legal justice is subjected to is the requirement of fair hearing and procedural fairness. The outcome of a judicial process will, therefore, be adjudged fair if all the principles of fair hearing are adhered to.

This use of procedural fairness as the benchmark for determining the fairness of legal justice is not without its limitations. Rhodes for example has suggested that the ability of a litigant to enjoy all the procedural guarantees provided by the law is dependent on their ability to get the needed legal resources to present their case effectively; Where they do not have access to such resources, access to court becomes meaningless and for indigent litigants even when they receive their day in court, "they do not always feel that justice has been done"¹⁷ The technical nature of the judicial procedure in common law countries has therefore meant that the attainment of fair hearing is dependent not only on providing access to court but also on guaranteeing to litigants the ability to effectively navigate the judicial process.

The realisation of the fundamental nature of access to legal representation to effective access to court has also shaped government responses to the challenge of access to justice. In *Solomon Ogboland Anor vs. FRN*,¹⁸ the Supreme Court of Nigeria also reiterated the connection between access to court and access to

¹⁵ Garner op. cit. p.287

¹⁶ Coke, cited in V. D. Mahajan, Jurisprudence and Legal Theory (Eastern Book Company, Delhi, 2014) p.119.

¹⁷ Deborah Rhodes, *Access to Justice* (Oxford University Press, London 2004) p.6

¹⁸ (2000) 8 MJSC, 69.

justice. It had observed that "the right to counsel is at the root of fair hearing and its necessary foundation."

In most societies, poverty has been identified as one of the biggest limitations to access to counsel, access to justice policy has therefore been predicated on overcoming this challenge. The mechanisms that have evolved for improving access to justice have therefore largely been directed towards improving the ability of indigent litigants to access legal services through the provision of free or subsidised legal services.¹⁹ This approach is essentially based on the need to ensure procedural fairness and in acknowledgement of the role that access to legal representation plays in ensuring this fairness.

Another limitation of legal justice in promoting access to justice is predicated on the extent to which legal justice is perceived by litigants as constituting a fair result. This is determined by the extent to which it is capable of meeting the needs of the parties, and also the extent to which it correlates with popular standards of justice.²⁰ The perception that legal justice does not always meet the needs of litigants and that it also falls short of meeting the expectation of citizens on what form justice should take has resulted in calls for alternative models of justice that would better reflect the needs and expectations of litigants.²¹

Whilst legal justice is the acceptable and universal value of justice, making the court the primary focus of justice will not adequately serve the ultimate goal of justice as reflected in the highlighted limitations. This has naturally influenced law reform discourse towards moving justice beyond legal justice. The evolving nature of the discourse on access to justice will therefore be examined.

7.3.1` Evolution of Access to Justice Reforms

The quest to improve access to justice has given rise to various reforms leading to strategies aimed at improving access to justice. It is however generally acknowledged that the first-wave of access to justice reforms revolved around the provision of legal aid to indigent litigants. Initially, this service was provided by legal practitioners who took on legal representation without compensation. The

¹⁹ The earliest model of such law was the Poor Law of England, otherwise known as the *Infirma Pauperis Act*, II Henry 7, C12 [England], subsequently the first legal aid Act was enacted in England in 1948, Legal Aid and Advice Act, 1949; in Nigeria, it is currently provided for under the Legal Aid Act, 2011

²⁰ It has been generally observed that in most societies there exists elements of disconnection between legal justice or community perception/expectation of justice (popular justice). the implication is that the way the courts decides cases is not how people expect such cases to be decided. See P.H, Robinson, "Democratising Criminal Law: Feasibility, Utility and the Challenge of Social Change" *North Western University Law Review*, [2017](111)(6) p.1568

²¹

State sometimes guarantees the provision of this service by mandating lawyers to provide free legal services to indigent litigants.²² In order to further encourage lawyers to take up cases for indigent counsel, governments later introduced the payment of token amounts to lawyers representing indigent litigants. This practice eventually evolved into the legal aid scheme, which was initially introduced in England in 1949²³ and has since spread to different jurisdictions across the world.

The pivotal role played by legal aid in providing access to justice is reflected in the fact that virtually all countries now have formal schemes for the provision of legal aid to their citizens. The association of legal aid with access to justice has been so fundamental that it has been described as epitomising the first wave of access to justice reforms.²⁴ Although the importance of legal aid remains indisputable, however, society is dynamic and the problem of access to justice is also evolving. In its more recent manifestations, the challenge has been associated more with the quality of justice than access to court. While highlighting this challenge, Currie said:

*"It is a fair statement that as a field of scholarship and praxis, access to justice has focused too much on access to justice and too little on the quality of justice itself."*²⁵

It has been deemed necessary to move beyond legal aid in resolving the challenges of access to justice. Consequently, while legal aid can be said to constitute the earliest and most comprehensive response to the problem of access to justice of the modern era; other strategies for resolving the problem of access to justice have subsequently emerged.

In their seminal study on access to justice, *Garth and Cappelletti*²⁶ had adopted the metaphor, "waves" to describe the emergence of successive strategies that have been evolved to resolve the problem of access to justice. This metaphor has

²² The earliest form of such legislation was the Inform Pauper Act 1495, 11 Hen. 7, C. 12. This extended the pre-existing right of indigents to sue free of charge that already existed in ecclesiastical courts.

²³ Wikipedia, *Legal Aid*, available at <https://www.en.m.wikipedia.org> accessed 13th August 2023

²⁴

²⁵ Ab Currie, *Riding the Third Wave: Rethinking Criminal Legal Aid within an Access to Justice Framework* (Research and Statistics Div. Dept of Justice, Canada) p.11; An engaging and expensive definition of access to justice has been suggested by Roberge. He suggested that it ought to be conceived as access to a form of justice that should be seen as a form of justice for the person for whom it is intended and that meets his needs and expectations of justice. See Jean-Francois Roberge, "Emerging Trends in Access to Justice and Dispute Resolution in Canada" *Journal of Arbitration and Mediation* [2014] p. 75

²⁶ *ibid*

also been adopted by other authors²⁷ and it is from this perspective that the formal strategies for improving access to justice will be examined.

7.3.2 First and Second Wave of Access to Justice Reforms

As stated, legal aid is usually regarded as constituting the first wave of access to justice reforms.²⁸ The justification of the use of legal aid can be attributed to the fact that the primary concern had been the actualization of justice for the individual. However, when it was also realized that collective rights were equally as important as individual rights, mechanisms for the introduction of collective rights were introduced and this marked the emergence of the second wave of access to justice reforms, which was therefore predicated on Public Interest Litigation and Class Actions.²⁹

The second wave of access to justice reforms has been said to be characterized by efforts aimed at protecting "group and collective-diffuse-interests other than those of the poor".³⁰ The emergence of this trend has been ascribed to the period between 1965 – 70 when significant amendments to civil procedural rules; moved the precincts of civil litigation from individual protection of rights towards an era when private entities and non-governmental organisation could institute actions to protect diverse interests.³¹

For example, in the United States of America, the most significant effect of the second-wave of reforms was the introduction of class action litigation. These were largely undertaken by private legal practitioners for the protection of group and diffuse interests and rights. In other parts of the world however, governments were reluctant to delegate this important role to private legal practitioners, thus the protection of diffuse interests was undertaken by government officials such as the Minister of Public in Civil Law jurisdictions, the German *Staatsanwalt* and the Soviet *Prokuratura*.³² There was also an attempt in the United States to introduce a system of public advocates, who would be a class of government paid lawyers specially entrusted with the protection of the rights

²⁷ Macdonald while writing on access to justice had also adopted the adjective. Unlike Garth and Cappelletti, he came up with five waves rather than three. See Roderick Macdonald, "Whose Access? Which Justice" [1992] (7)(1) pp.175-184 *Canadian Journal of Law and Society*

²⁸ This is because it was the main strategy that was used to improve access to justice from the immediate period after the second world war till the 1970s

²⁹ The change from legal aid is also a demonstration of the change from the protection of individual rights to the protection of diffuse interest and collective rights.

³⁰ Garth and Cappelletti, op. cit. 210.

³¹ The whittling down of the over bearing influence of the principles of *locus standi* had made this possible.

³² Garth and Cappelletti, op. cit. p.211.

of special classes of people in society. While making arguments to justify this model in Wisconsin, it was asserted as follows:

*There is an imbalance in advocacy which in many cases, can only be corrected by government-paid lawyers representing the unrepresented interests of consumers, the environment, the elderly, and other similarly unrecognized interests. A "public advocate" must speak for those interests if they are to be heard at all.*³³

In addition to the public advocacy model, attempts were also made for the protection of diffuse interests and rights through the establishment of administrative/regulatory bodies such as the Consumer Ombudsman in Sweden which was created to represent the "collective" fragmented interests of consumers, by negotiating contract clauses with the business community on behalf of consumers as a whole.³⁴

Although the second wave of access to justice reforms had a significant effect on access to justice in other parts of the world, concerning the protection of group rights, it is a less developed aspect of the access to justice policy in Nigeria. While significant milestones have been achieved in other parts of the world through the use of class-actions, public interest litigation has remained an under-developed and under-explored mechanism for the provision of access to justice in Nigeria. One reason, to which this can be attributed, is the fact that for a long time after the rule on *locus standi* had been liberalized in other common law countries, it remained a sacrosanct aspect of the judicial system in Nigeria.³⁵ However, there have been subsequent efforts to liberalize the rule of *locus standi* through amendments to the procedural rules for the enforcement of fundamental rights;³⁶ these amendments are yet to result in significant improvement in the protection of fundamental rights that can be comparable to what has been achieved in other countries, such as India.³⁷

³³ Centre for Public Representation, *Toward Fairer and more Responsive Administration* (Madison, Wisconsin, 1975).

³⁴ Garth and Cappelletti, p. 213.

³⁵ Federal Republic of Nigeria 1999, (as amended) *Adesanya .v. The President of the Federal Republic of Nigeria* (1981) 1 All NLR (pt. 1) 1.

³⁶ *Fawehinmi .v. Akilu* (1987) 4 NWLR, (pt. 67) 797. Fundamental Rights Enforcement Procedure Rules, 2009.

³⁷ Z. Holladay, "Public Interest Litigation in India as a Paradigm for Developing Nations" *Indiana Journal of Global Legal Studies* [2012] (19)(2) p.555 and R.K. Salman and O.O. Ayankogbe, "Denial of Access to Justice in Public Interest Litigation in Nigeria: Need to Learn from Indian Judiciary" *Journal of Indian Law Institute*, pp594-625

It is also significant that whereas public interest litigation has resulted in considerable improvement in access to civil justice, its effect on criminal justice has been less significant. It can therefore be asserted that the second-wave access to justice reforms has not been well-developed in Nigeria.

7.3.3 Third-Wave of Access to Justice Reforms

Although the reforms introduced in the criminal justice system under the first and second waves of access to justice reforms have remained integral parts of the criminal justice system, the quest to further enhance access to justice resulted in what has been described as the third wave of access to justice reforms. The totality of reforms introduced under the third-wave has been described as "the access to justice approach".³⁸

This third wave of reforms has three main strategies viz:

- a. General reforms to procedural rules of courts and process of litigation.³⁹
- b. Devising alternative models to deciding legal claims.⁴⁰
- c. Introduction of special institutions and procedures for certain types of claims of particular social importance.⁴¹

However, attention will be given to reforms that seek to devise alternative models for deciding legal claims as this is the focus of this article.

7.4 Alternative Models for Deciding Legal Claims

a. Arbitration and Conciliation

Arbitration can be said to be among the earliest systems adopted by societies to resolve disputes,⁴² it was displaced by judicial adjudication in the common law legal tradition in the medieval era.⁴³ It however made a

³⁸ Garth and Cappelletti, p. 223.

³⁹ Garth and Cappelletti, p. 228.

⁴⁰ *ibid*, 232.

⁴¹ The three main strategies were identified by Cappelletti and Garth as what could be used to actualize the third wave of reforms, only the second strategy will be considered in this article.

⁴² The system for the administration of justice in primitive legal systems was described by Zehr as Community Justice due to the fundamental role that the community played in the process, but more importantly he opined that the administration of justice was primarily a mediatory and negotiating process rather than been dependent on adherence to strict rules and the imposition of decisions by the judge. See Howard Zehr, *Changing Lenses: A New Focus for Crime and Justice* (Herald Press, Waterloo, 1990) p.100

⁴³ Anthony Mason, "Restorative Justice: Courts and Civil Society" in Heather Strang and John Braithwaite (eds) *Restorative Justice: Philosophy to Practice* (Ashgate, London 2004) p.1

successful re-emergence in the 1970s, as a viable means of formal dispute resolution. Its usage since its re-introduction has largely been restricted to civil litigation. One of the distinctive features of arbitration is that the dispute is resolved through an informal process presided over by an arbitrator(s) appointed or approved by the parties. The arbitrator could be a legal expert or a person with other forms of technical expertise.

Although conciliation is similar to arbitration in the sense that it adopts mediation rather than adjudication, the most important point of distinction lies in the fact that the process is not merely aimed at resolving legal disputes between the parties but actual conflict resolution. The process of conciliation therefore goes beyond legal disputes but probes further into the root causes of the disputes to mend the relationships that have been disrupted.⁴⁴

b. Encouraging Fair Settlement by Manipulating the Economic Incentives of the Parties

This aspect of the access to justice strategy involves the prevention of litigation by selective use of financial incentives for litigants who decide to settle their disputes out of court. The most prevalent method through which this strategy has been practiced in jurisdictions like England, Australia, and Canada is through a penalty system for litigants who refuse reasonable offers of settlement made by the other party. Where the court eventually finds for the other party, (usually the defendant) the plaintiff would have to bear the cost incurred by such a defendant.⁴⁵

Despite the well-intentioned reasons behind the use of economic incentives, it has been suggested that it may not promote fairness, particularly in a contest between parties that are unfairly matched economically. A plaintiff without adequate resources that would facilitate an effective presentation of his case would still suffer the distressing consequences of having to foot the bill of the defendant.⁴⁶ Thus, it has been suggested that the strict use of financial incentives may not be a fair solution to the problem of access to justice.⁴⁷

7.4.1 Third-Wave of Reforms Concerning Criminal Justice

The earliest studies on access to justice were primarily focused on studying the concept from the perspective of civil litigation.⁴⁸ While this perspective helped to

⁴⁴Garth and Cappelletti, 233. It should be noted that conciliation is not a common approach to conflict resolution in European countries and countries whose legal systems are based on that of western European countries.

⁴⁵*ibid*

⁴⁶See Michael Zander, "Is the Payment-into-Court Rule Worth Copying" *Rabels Zeitschrift* [1976] 750 cited in Garth and Cappelletti *op. cit.* 237

⁴⁷Garth and Cappelletti, *op. cit.* p.

⁴⁸Garth and Cappelletti *op. cit.*

facilitate a better understanding of the challenges of access to justice in the conduct of civil litigation, it had a lesser impact on the administration of criminal justice. Since the emergence of the third wave of access to justice reforms, civil litigation has begun to move beyond legal justice towards a conceptualisation of justice that is not dependent on provisions of the law alone but also determined by the agreement of the parties on how their conflict should be resolved. As stated, this has been achieved through the introduction of alternative dispute resolution mechanisms such as arbitration, mediation, and conciliation, Criminal justice on the other hand has remained fixed on the narrow framework of legal justice, which usually translates to punishment.

With the growing realization that criminal justice is not effective⁴⁹ and acceptable to the most important class of people that are affected by crimes, the victims, there emerged various social movements that have tried to bring about the redefinition of criminal justice.⁵⁰ These movements were founded on the simple mantra of providing victims with the kind of justice they need and want. The simple questions that galvanized the movement were how sufficient punishment was in meeting the needs of victims and whether victims would be better satisfied with a different form of justice. Some of the opinions were from the perspective that criminal justice had not been very beneficial to victims. It has been asserted⁵¹ that punishment only serves the interest of the State because it is a means through which the State asserts its power and authority which does little or nothing for victims. However, the general perception is that the need of victims concerning criminal justice is vengeance⁵²; which the State exacts on their behalf

⁴⁹ The ineffectiveness of punishment is attributed to the fact that it does not stop offenders from re-offending. The government spends money to punish offenders, the goal been to promote security of the society, but the usual case is that once incarcerated offender are released they re-offend. The society therefore does not gain the security that it sought to achieve through punishment. See D. Oluwo, "Therapeutic Jurisprudence: Transforming Legal Education and Humanising Criminal Justice in Africa" *De Jure*[2010](43) p.96

⁵⁰ Victims' Rights Movement emerged in the 1970 as a convergence of opinions on the need to re-conceptualise and re-prioritise the objective of criminal justice from the primary focus of the needs of society which is actualised through punishment towards evolving a system that would also focus on the primary need of victims, which usually is to have redress for the harm they have suffered usually through restitution. The; he robbed the victim. His debt is therefore not to society but the victim" Randy Barnett, p.288 victim perspective was effective set out by Barnett and he said " The armed robber did not rob society; he robbed the victim, His debt is therefore not to society but the victim" Randy Barnett, "Restitution,: A New Paradigm for Criminal Justice" *Ethics* p.288

⁵¹ Jennifer Llewellyn and Robert Howse, *Restorative Justice: A Conceptual Framework* (Law Commission of Canada, Ontario, 2000) p.9

⁵² According the Laster, the justification of the punishment of an offender as adequate justice for victims is predicated on the belief that victims derive a vicarious thrill when offenders get punished. See R.E. Laster, "Criminal Restitution: A Survey of its Past History and an Analysis of its Present Usefulness" *University of Richmond Law Review* [1970] (6)(1) p.82

conducted and also because it is the standard by which the decision of the courts is measured. It has also helped to shape the way that access to justice is conceived. Legal justice has been defined in the Blacks' Law Dictionary as the fair and proper administration of law.¹⁵ This conceptualization of justice makes law the ultimate standard for measuring what is just or unjust. The use of the law has been justified on the basis that the wisdom of the law is wiser than the wisdom of any individual.¹⁶ This may be because the law represents the collective wisdom of the society which has evolved in tandem with the needs of the society and it is regarded as the best reflection and determinant of what the society accepts as fair and equitable. Due to the pivotal role of the courts as interpreters and administrators of the law, they are equally seen as the administrators of justice. Despite the over-arching importance of legal justice, it has its limitations. Apart from the conceptual challenges that legal justice creates for justice generally, it has also limited the framework upon which access to justice is conceived and assessed.

7.3 Legal Justice and the Evolution of Access to Justice Reforms

Although justice according to law is regarded as the best standard of justice, it also has its limitations. The most important standard that legal justice is subjected to is the requirement of fair hearing and procedural fairness. The outcome of a judicial process will, therefore, be adjudged fair if all the principles of fair hearing are adhered to.

This use of procedural fairness as the benchmark for determining the fairness of legal justice is not without its limitations. Rhodes for example has suggested that the ability of a litigant to enjoy all the procedural guarantees provided by the law is dependent on their ability to get the needed legal resources to present their case effectively; Where they do not have access to such resources, access to court becomes meaningless and for indigent litigants even when they receive their day in court, "they do not always feel that justice has been done"¹⁷ The technical nature of the judicial procedure in common law countries has therefore meant that the attainment of fair hearing is dependent not only on providing access to court but also on guaranteeing to litigants the ability to effectively navigate the judicial process.

The realisation of the fundamental nature of access to legal representation to effective access to court has also shaped government responses to the challenge of access to justice. In *Solomon Ogboland Anor vs. FRN*,¹⁸ the Supreme Court of Nigeria also reiterated the connection between access to court and access to

¹⁵ Garner op. cit. p.287

¹⁶ Coke, cited in V. D. Mahajan, Jurisprudence and Legal Theory (Eastern Book Company, Delhi, 2014) p.119.

¹⁷ Deborah Rhodes, *Access to Justice* (Oxford University Press, London 2004) p.6

¹⁸ (2000) 8 MJSC, 69.

justice. It had observed that "the right to counsel is at the root of fair hearing and its necessary foundation."

In most societies, poverty has been identified as one of the biggest limitations to access to counsel, access to justice policy has therefore been predicated on overcoming this challenge. The mechanisms that have evolved for improving access to justice have therefore largely been directed towards improving the ability of indigent litigants to access legal services through the provision of free or subsidised legal services.¹⁹ This approach is essentially based on the need to ensure procedural fairness and in acknowledgement of the role that access to legal representation plays in ensuring this fairness.

Another limitation of legal justice in promoting access to justice is predicated on the extent to which legal justice is perceived by litigants as constituting a fair result. This is determined by the extent to which it is capable of meeting the needs of the parties, and also the extent to which it correlates with popular standards of justice.²⁰ The perception that legal justice does not always meet the needs of litigants and that it also falls short of meeting the expectation of citizens on what form justice should take has resulted in calls for alternative models of justice that would better reflect the needs and expectations of litigants.²¹

Whilst legal justice is the acceptable and universal value of justice, making the court the primary focus of justice will not adequately serve the ultimate goal of justice as reflected in the highlighted limitations. This has naturally influenced law reform discourse towards moving justice beyond legal justice. The evolving nature of the discourse on access to justice will therefore be examined.

7.3.1` Evolution of Access to Justice Reforms

The quest to improve access to justice has given rise to various reforms leading to strategies aimed at improving access to justice. It is however generally acknowledged that the first-wave of access to justice reforms revolved around the provision of legal aid to indigent litigants. Initially, this service was provided by legal practitioners who took on legal representation without compensation. The

¹⁹ The earliest model of such law was the Poor Law of England, otherwise known as the *Infirma Pauperis Act*, II Henry 7, C12 [England], subsequently the first legal aid Act was enacted in England in 1948, Legal Aid and Advice Act, 1949; in Nigeria, it is currently provided for under the Legal Aid Act, 2011

²⁰ It has been generally observed that in most societies there exists elements of disconnection between legal justice or community perception/expectation of justice (popular justice). the implication is that the way the courts decides cases is not how people expect such cases to be decided. See P.H, Robinson, "Democratising Criminal Law: Feasibility, Utility and the Challenge of Social Change" *North Western University Law Review*, [2017](111)(6) p.1568

²¹

State sometimes guarantees the provision of this service by mandating lawyers to provide free legal services to indigent litigants.²² In order to further encourage lawyers to take up cases for indigent counsel, governments later introduced the payment of token amounts to lawyers representing indigent litigants. This practice eventually evolved into the legal aid scheme, which was initially introduced in England in 1949²³ and has since spread to different jurisdictions across the world.

The pivotal role played by legal aid in providing access to justice is reflected in the fact that virtually all countries now have formal schemes for the provision of legal aid to their citizens. The association of legal aid with access to justice has been so fundamental that it has been described as epitomising the first wave of access to justice reforms.²⁴ Although the importance of legal aid remains indisputable, however, society is dynamic and the problem of access to justice is also evolving. In its more recent manifestations, the challenge has been associated more with the quality of justice than access to court. While highlighting this challenge, Currie said:

*"It is a fair statement that as a field of scholarship and praxis, access to justice has focused too much on access to justice and too little on the quality of justice itself."*²⁵

It has been deemed necessary to move beyond legal aid in resolving the challenges of access to justice. Consequently, while legal aid can be said to constitute the earliest and most comprehensive response to the problem of access to justice of the modern era; other strategies for resolving the problem of access to justice have subsequently emerged.

In their seminal study on access to justice, *Garth* and *Cappelletti*²⁶ had adopted the metaphor, "waves" to describe the emergence of successive strategies that have been evolved to resolve the problem of access to justice. This metaphor has

²² The earliest form of such legislation was the Inform Pauper Act 1495, 11 Hen. 7, C. 12. This extended the pre-existing right of indigents to sue free of charge that already existed in ecclesiastical.

²³ Wikipedia, *Legal Aid*, available <https://www.en.m.wikipedia.org> accessed 13th August 2023

²⁴

²⁵ Ab Currie, *Riding the Third Wave: Rethinking Criminal Legal Aid within an Access to Justice Framework* (Research and Statistics Div. Dept of Justice, Canada) p.11; An engaging and expensive definition of access to justice has been suggested by Roberge. He suggested that it ought to be conceived as access to a form of justice that should be seen as a form of justice for the person for whom it is intended and that meets his needs and expectations of justice. See Jean-Francois Roberge, "Emerging Trends in Access to Justice and Dispute Resolution in Canada" *Journal of Arbitration and Mediation* [2014] p. 75

²⁶ *ibid*

also been adopted by other authors²⁷ and it is from this perspective that the formal strategies for improving access to justice will be examined.

7.3.2 First and Second Wave of Access to Justice Reforms

As stated, legal aid is usually regarded as constituting the first wave of access to justice reforms.²⁸ The justification of the use of legal aid can be attributed to the fact that the primary concern had been the actualization of justice for the individual. However, when it was also realized that collective rights were equally as important as individual rights, mechanisms for the introduction of collective rights were introduced and this marked the emergence of the second wave of access to justice reforms, which was therefore predicated on Public Interest Litigation and Class Actions.²⁹

The second wave of access to justice reforms has been said to be characterized by efforts aimed at protecting "group and collective-diffuse-interests other than those of the poor".³⁰ The emergence of this trend has been ascribed to the period between 1965 – 70 when significant amendments to civil procedural rules; moved the precincts of civil litigation from individual protection of rights towards an era when private entities and non-governmental organisation could institute actions to protect diverse interests.³¹

For example, in the United States of America, the most significant effect of the second-wave of reforms was the introduction of class action litigation. These were largely undertaken by private legal practitioners for the protection of group and diffuse interests and rights. In other parts of the world however, governments were reluctant to delegate this important role to private legal practitioners, thus the protection of diffuse interests was undertaken by government officials such as the Minister of Public in Civil Law jurisdictions, the German *Staatsanwalt* and the Soviet *Prokuratura*.³² There was also an attempt in the United States to introduce a system of public advocates, who would be a class of government paid lawyers specially entrusted with the protection of the rights

²⁷ Macdonald while writing on access to justice had also adopted the adjective. Unlike Garth and Cappelletti, he came up with five waves rather than three. See Roderick Macdonald, "Whose Access? Which Justice" [1992] (7)(1) pp.175-184 *Canadian Journal of Law and Society*

²⁸ This is because it was the main strategy that was used to improve access to justice from the immediate period after the second world war till the 1970s

²⁹ The change from legal aid is also a demonstration of the change from the protection of individual rights to the protection of diffuse interest and collective rights.

³⁰ Garth and Cappelletti, op. cit. 210.

³¹ The whittling down of the over bearing influence of the principles of *locus standi* had made this possible.

³² Garth and Cappelletti, op. cit. p.211.

of special classes of people in society. While making arguments to justify this model in Wisconsin, it was asserted as follows:

*There is an imbalance in advocacy which in many cases, can only be corrected by government-paid lawyers representing the unrepresented interests of consumers, the environment, the elderly, and other similarly unrecognized interests. A "public advocate" must speak for those interests if they are to be heard at all.*³³

In addition to the public advocacy model, attempts were also made for the protection of diffuse interests and rights through the establishment of administrative/regulatory bodies such as the Consumer Ombudsman in Sweden which was created to represent the "collective" fragmented interests of consumers, by negotiating contract clauses with the business community on behalf of consumers as a whole.³⁴

Although the second wave of access to justice reforms had a significant effect on access to justice in other parts of the world, concerning the protection of group rights, it is a less developed aspect of the access to justice policy in Nigeria. While significant milestones have been achieved in other parts of the world through the use of class-actions, public interest litigation has remained an under-developed and under-explored mechanism for the provision of access to justice in Nigeria. One reason, to which this can be attributed, is the fact that for a long time after the rule on *locus standi* had been liberalized in other common law countries, it remained a sacrosanct aspect of the judicial system in Nigeria.³⁵ However, there have been subsequent efforts to liberalize the rule of *locus standi* through amendments to the procedural rules for the enforcement of fundamental rights;³⁶ these amendments are yet to result in significant improvement in the protection of fundamental rights that can be comparable to what has been achieved in other countries, such as India.³⁷

³³ Centre for Public Representation, *Toward Fairer and more Responsive Administration* (Madison, Wisconsin, 1975).

³⁴ Garth and Cappelletti, p. 213.

³⁵ Federal Republic of Nigeria 1999, (as amended) *Adesanya .v. The President of the Federal Republic of Nigeria* (1981) 1 All NLR (pt. 1) 1.

³⁶ *Fawehinmi .v. Akilu* (1987) 4 NWLR, (pt. 67) 797. Fundamental Rights Enforcement Procedure Rules, 2009.

³⁷ Z. Holladay, "Public Interest Litigation in India as a Paradigm for Developing Nations" *Indiana Journal of Global Legal Studies* [2012] (19)(2) p.555 and R.K. Salman and O Ayankogbe, "Denial of Access to Justice in Public Interest Litigation in Nigeria: Need to Learn from Indian Judiciary" *Journal of Indian Law Institute*, pp594-625

It is also significant that whereas public interest litigation has resulted in considerable improvement in access to civil justice, its effect on criminal justice has been less significant. It can therefore be asserted that the second-wave access to justice reforms has not been well-developed in Nigeria.

7.3.3 Third-Wave of Access to Justice Reforms

Although the reforms introduced in the criminal justice system under the first and second waves of access to justice reforms have remained integral parts of the criminal justice system, the quest to further enhance access to justice resulted in what has been described as the third wave of access to justice reforms. The totality of reforms introduced under the third-wave has been described as "the access to justice approach".³⁸

This third wave of reforms has three main strategies viz:

- a. General reforms to procedural rules of courts and process of litigation.³⁹
- b. Devising alternative models to deciding legal claims.⁴⁰
- c. Introduction of special institutions and procedures for certain types of claims of particular social importance.⁴¹

However, attention will be given to reforms that seek to devise alternative models for deciding legal claims as this is the focus of this article.

7.4 Alternative Models for Deciding Legal Claims

a. Arbitration and Conciliation

Arbitration can be said to be among the earliest systems adopted by societies to resolve disputes,⁴² it was displaced by judicial adjudication in the common law legal tradition in the medieval era.⁴³ It however made a

³⁸ Garth and Cappelletti, p. 223.

³⁹ Garth and Cappelletti, p. 228.

⁴⁰ *ibid*, 232.

⁴¹ The three main strategies were identified by Cappelletti and Garth as what could be used to actualize the third wave of reforms, only the second strategy will be considered in this article.

⁴² The system for the administration of justice in primitive legal systems was described by Zehr as Community Justice due to the fundamental role that the community played in the process, but more importantly he opined that the administration of justice was primarily a mediatory and negotiating process rather than been dependent on adherence to strict rules and the imposition of decisions by the judge. See Howard Zehr, *Changing Lenses: A New Focus for Crime and Justice* (Herald Press, Waterloo, 1990) p.100

⁴³ Anthony Mason, "Restorative Justice: Courts and Civil Society" in Heather Strang and John Braithwaite (eds) *Restorative Justice: Philosophy to Practice* (Ashgate, London 2004) p.1

successful re-emergence in the 1970s, as a viable means of formal dispute resolution. Its usage since its re-introduction has largely been restricted to civil litigation. One of the distinctive features of arbitration is that the dispute is resolved through an informal process presided over by an arbitrator(s) appointed or approved by the parties. The arbitrator could be a legal expert or a person with other forms of technical expertise.

Although conciliation is similar to arbitration in the sense that it adopts mediation rather than adjudication, the most important point of distinction lies in the fact that the process is not merely aimed at resolving legal disputes between the parties but actual conflict resolution. The process of conciliation therefore goes beyond legal disputes but probes further into the root causes of the disputes to mend the relationships that have been disrupted.⁴⁴

b. Encouraging Fair Settlement by Manipulating the Economic Incentives of the Parties

This aspect of the access to justice strategy involves the prevention of litigation by selective use of financial incentives for litigants who decide to settle their disputes out of court. The most prevalent method through which this strategy has been practiced in jurisdictions like England, Australia, and Canada is through a penalty system for litigants who refuse reasonable offers of settlement made by the other party. Where the court eventually finds for the other party, (usually the defendant) the plaintiff would have to bear the cost incurred by such a defendant.⁴⁵

Despite the well-intentioned reasons behind the use of economic incentives, it has been suggested that it may not promote fairness, particularly in a contest between parties that are unfairly matched economically. A plaintiff without adequate resources that would facilitate an effective presentation of his case would still suffer the distressing consequences of having to foot the bill of the defendant.⁴⁶ Thus, it has been suggested that the strict use of financial incentives may not be a fair solution to the problem of access to justice.⁴⁷

7.4.1 Third-Wave of Reforms Concerning Criminal Justice

The earliest studies on access to justice were primarily focused on studying the concept from the perspective of civil litigation.⁴⁸ While this perspective helped to

⁴⁴Garth and Cappelletti, 233. It should be noted that conciliation is not a common approach to conflict resolution in European countries and countries whose legal systems are based on that of western European countries.

⁴⁵ibid

⁴⁶ See Michael Zander, "Is the Payment-into- Court Rule Worth Copying" *Rabels Zeitschrift* [1976] 750 cited in Garth and Cappelletti *op. cit.* 237

⁴⁷Garth and Cappelletti, *op. cit.* p.

⁴⁸ Garth and Cappelletti *op.cit*

facilitate a better understanding of the challenges of access to justice in the conduct of civil litigation, it had a lesser impact on the administration of criminal justice. Since the emergence of the third wave of access to justice reforms, civil litigation has begun to move beyond legal justice towards a conceptualisation of justice that is not dependent on provisions of the law alone but also determined by the agreement of the parties on how their conflict should be resolved. As stated, this has been achieved through the introduction of alternative dispute resolution mechanisms such as arbitration, mediation, and conciliation, Criminal justice on the other hand has remained fixed on the narrow framework of legal justice, which usually translates to punishment.

With the growing realization that criminal justice is not effective⁴⁹ and acceptable to the most important class of people that are affected by crimes, the victims, there emerged various social movements that have tried to bring about the redefinition of criminal justice.⁵⁰ These movements were founded on the simple mantra of providing victims with the kind of justice they need and want. The simple questions that galvanized the movement were how sufficient punishment was in meeting the needs of victims and whether victims would be better satisfied with a different form of justice. Some of the opinions were from the perspective that criminal justice had not been very beneficial to victims. It has been asserted⁵¹ that punishment only serves the interest of the State because it is a means through which the State asserts its power and authority which does little or nothing for victims. However, the general perception is that the need of victims concerning criminal justice is vengeance⁵²; which the State exacts on their behalf

⁴⁹ The ineffectiveness of punishment is attributed to the fact that it does not stop offenders from re-offending. The government spends money to punish offenders, the goal been to promote security of the society, but the usual case is that once incarcerated offender are released they re-offend. The society therefore does not gain the security that it sought to achieve through punishment. See D. Oluwo, "Therapeutic Jurisprudence: Transforming Legal Education and Humanising Criminal Justice in Africa" *De Jure*[2010](43) p.96

⁵⁰ Victims' Rights Movement emerged in the 1970 as a convergence of opinions on the need to re-conceptualise and re-prioritise the objective of criminal justice from the primary focus of the needs of society which is actualised through punishment towards evolving a system that would also focus on the primary need of victims, which usually is to have redress for the harm they have suffered usually through restitution. The; he robbed the victim. His debt is therefore not to society but the victim" Randy Barnett, p.288 victim perspective was effective set out by Barnett and he said " The armed robber did not rob society; he robbed the victim, His debt is therefore not to society but the victim" Randy Barnett, "Restitution,: A New Paradigm for Criminal Justice" *Ethics* p.288

⁵¹ Jennifer Llewellyn and Robert Howse, *Restorative Justice: A Conceptual Framework* (Law Commission of Canada, Ontario, 2000) p.9

⁵² According the Laster, the justification of the punishment of an offender as adequate justice for victims is predicated on the belief that victims derive a vicarious thrill when offenders get punished. See R.E. Laster, "Criminal Restitution: A Survey of its Past History and an Analysis of its Present Usefulness" *University of Richmond Law Review* [1970] (6)(1) p.82

when it punishes offenders. There are however indications that beyond vengeance, victims' expectation of justice also includes restitution.⁵³

While the ancient practice of restitution may indicate that the importance of restitution is an ancient truth⁵⁴, the modern practice of restitution⁵⁵ has however evolved beyond the traditional limits of financial compensation to include restoration of victims. Restorative justice therefore focuses on, not only the material harm that victims have suffered but also the emotional harm that they suffer as a result of the crime against them. Restorative justice is defined as the process whereby all the parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future.⁵⁶ Implicit in this definition and definitions are requirements that a process must comply with before it can be described as a restorative justice process. This includes:

- a. A voluntary encounter between all the parties involved in the crime. While this is often limited to the victim and the offender, their families and immediate community can also participate in the process.
- b. Mediation between the parties to identify the damage that the victim has suffered because of the crime, acceptance of responsibility of responsibility by the offender, and evolving a mutually agreeable restitution for the victim.⁵⁷
- c. An outcome that is not measured by the amount of punishment that the offender deserves but by the amount of restitution that the victim needs.

The focus of restorative justice is not only on the outcome of the process of litigation but also on the process through which the conflict is resolved. It is based on its comprehensive approach to the reform of criminal justice that it

⁵³ Hazel Genn, *Paths to Justice: What people do and Think about Going to Law* (Oxford Hart, Oxford) p.11

⁵⁴ See F. Pollock and E. Maitland, *The History of English Law* (1895) p.514 they had said: "it is perhaps worth noting that our barbarian ancestors were wiser and more just than we are today, for they adopted the theory of restitution to the injured, whereas we have abandoned this practice to the detriment of all concerned"

⁵⁵ Initially described as creative restitution by Albert Eglash, "Creative Restitution: A Broader Meaning for an Old Term" *Journal of Criminal Law, Criminology and Police Science* [1987-1958] (48) (6) p.619, the importance of the concept developed Eglash has also been reiterated by modern scholars. See ShaddMaruna, "The Role of Wounded Healing in Restorative Justice: An Appreciation of Albert Eglash" *Restorative Justice: An International Journal* [2012] (2)(1) p.2

⁵⁶ Tony Marshall, "The Evolution of Restorative Justice in Britain" *European Journal of Criminal Policy and Research* [1996] (4) (4) p.

⁵⁷ This will usually be arrived at based on the quantification of the harm that the victim as suffered and often to promote fairness, what the offender can afford.

has been suggested as a viable means through which alternative dispute resolution can be actualized in the administration of criminal justice.⁵⁸

7.5 Access to Criminal Justice in Nigeria and the Third Wave of Access to Justice Reforms: Opportunities and Limitations Provided by the Administration of Criminal Justice Act, 2015

Because one of the most important ways through which the thirdwave of access to justice reforms as it relates to criminal justice can be realised is through restorative, the question that naturally arises is how prepared is Nigeria to reposition its access to justice polity and strategy to effectively institutionalize and provide restorative justice for Nigerians. The answer to these pertinent questions will be the primary focus of this concluding section.

At present, the most important legislation regulating the administration of criminal justice is the Administration of Criminal Justice Act, 2015. This is because it is gradually replacing the Criminal Procedure Code and Criminal Procedure Act, which had hitherto provided the major legal framework for the administration of criminal justice. It will therefore be examined to determine its capacity to support the practice of restorative criminal justice.

1.5.1 Guaranteeing a More Active Role for Victims:

One of the important elements of restorative justice is increasing victim participation in the criminal justice role. Hitherto, the victim was relegated to being a passive participant in the criminal justice process with little control over the process; also the extent to which they would be involved is determined by the prosecution and this rarely goes beyond acting as witnesses on behalf of the prosecution. In ACJA however, the victim has been granted more powers of participation in the criminal justice process. This is most obvious in the plea-bargaining process. In a clear departure from their earlier position as fringe participants in the criminal justice process, Section 270(2) of ACJA provides for the consent of the victim before a plea bargain is entered into with an accused/defendant. This provision therefore gives victims some autonomy albeit a very limited one over the process of plea bargaining. While this provision constitutes an important innovation, it cannot be said to measure up to the powers that victims exercise in a classical restorative justice process. These include:

- i. Victims have a voice beyond being witnesses for the prosecution. They should be able to talk directly to the offender about the effect the crime

⁵⁸ Restorative justice since its emergence in the 1970s has become one of the most important ways through which reforms to the criminal justice is actualized especially in improving access to criminal justice. It has therefore be positioned as the criminal law version of alternative dispute resolution in civil litigation.

- had on them. This is common when the victim-offender mediation model is adopted.
- ii. The victim should also have a say in a reparative plan that will be designed for the offender.
- iii. One of the important outcomes of the restorative justice process is the healing of both the victim and offender. The offender is expected to apologize to the victim and the victim recognizing the remorse of the offender would express words of forgiveness to the offender. It is this expression of forgiveness that serves as an important indication that restoration has taken place.⁵⁹

1.5.2 Defendant Remorse and Accountability:

Another important requirement for plea-bargaining is that the defendant must show remorse or contrition for his criminal act. They should also be willing to assume responsibility for their conduct. This requirement is important and it is also a fundamental requirement in restorative justice.⁶⁰ The only challenge with this requirement is that acknowledgment of responsibility is only required of offenders who are participating in the plea-bargaining process and not at any other stage of the criminal justice process.⁶¹

7.5.2.1 Costs, Compensation, Damages and Restitution:

Section 319 of the ACJA provides that a court may while sentencing a defendant, order the defendant to pay compensation to any person injured by the offense, irrespective of any other fine or punishment that may be imposed on the defendant, where substantial compensation is in the opinion of the court recoverable by civil suit.

This can also be regarded as another aspect of restorative justice that has been introduced into the criminal justice process. While this provision can constitute an important innovation, it can be argued that the way restitution is used in the restorative justice process is more sophisticated. It is on this basis that restitution as used in the restorative justice process has been described as "creative

⁵⁹United Nations Office on Drugs and Crime, *Handbook on Restorative Justice Programmes: Criminal Justice Handbook Series* (United Nations Publications, Vienna 2006) p.18

⁶⁰*Ibid* p.8

⁶¹Under the principle of right against self-incrimination, an accused person is not required to participate in the trial process. They may choose to keep quiet all through and no negative inference may be reached on this. See s. 36(11) of the Constitution of the Federal Republic of Nigeria 1999 (as altered) in the Administration of Criminal Justice Act, or the situations where a plea bargain would be offered to an offender/defendant is where he has agreed to return the proceeds of the crime or make restitution to the victim representative. see s. 270(2)(b) Administration of Criminal Justice Act, 2015

restitution".⁶² This is because restitution as conceived in restorative justice is expected to address not just the physical impact of the criminal act but equally its emotional effects. It has been suggested that the real harm the victims suffer is the harm that occurs to their sense of security and basic restitution may be inadequate to redress this. Creative restitution seeks to restore the relationship between the victim and offender to an ideal state of social equality. It could therefore involve a service that an offender would render to his victim to demonstrate his remorse and willingness to right the wrong occasioned by his criminal act.⁶³

Aside from the broader conception of restitution, the conceptualization of crime under the restorative justice model also affects the way that compensation is conceived. In restorative justice theory, crime is conceived as a violation of not just the primary victim but the society. Compensation on the other hand is generally directed at redressing the physical damage caused by the criminal act; consequently, it is usually monetary. In the restorative justice process, however, compensation can be both monetary or in the form of a service. In the latter situation, it is aimed at providing emotional compensation to the victim. The diversified approach to compensation and restitution also allows restitution to be used in victimless crimes such as driving while intoxicated or over-speeding. In such situations, the society is considered a secondary victim of the crime. Restitution can therefore be made to the society as a whole rather than to a specific victim.

In light of this broader approach to restitution under the restorative justice approach, it would be appropriate to assert that the provisions of ACJA in its current form can only provide access to restitution rather than restorative justice.

7.5.3 Non-Custodial Sentences

Another important provision of ACJA is its provisions on non-custodial sentences, particularly community service.⁶⁴ The use of non-custodial sentences has also been an important aspect of restorative justice. The stated objectives behind the use of non-custodial sentences as stated in ACJA include:

- a. To reduce congestion in prisons;
- b. To rehabilitate prisoners by making them undertake productive work;
- c. Prevent convicts who commit simple offences from mixing with hardened criminals.⁶⁵

⁶²Eg lashop.cit.

⁶³Eg lash while describing restitution made by the offender in this manner, could involve an offer to wash the victim's car every week in addition the payment of financial restitution.

⁶⁴ S. 460 ACJA

⁶⁵ S. 416 ACJA

As laudable as these goals are, the process of rehabilitation of offenders is a complex one which may require in addition to the use of community service and non-custodial sentences, the provision of specialised care and treatment for offenders whose criminal behavior is associated with underlying emotional, and psychological behavioral challenges.

In restorative justice processes, a therapeutic approach is also adopted. Rehabilitation is therefore not just an element of the sentence but an integral part of the process and the sentence.⁶⁶ As such, in addition to the use of non-custodial sentences which may help protect offenders from further corrupting influence or promote their rehabilitation, specialised treatment plans are also incorporated into their sentence. Convicted offenders could therefore be required to participate in counseling or rehabilitation for issues such as anger management or drug addiction. Such treatment programmes are essential aspects of restorative justice programmes such as community and circle conferencing. The community together with the offender evolves a treatment for the underlying causes of criminal behaviour. This plan is then submitted to the judge for approval. The implementation of the plan is monitored by the community and probation officers.⁶⁷ Under ACJA however, rehabilitation of offenders is not embedded in the use of community sentencing, and community sentence is conceived more as an alternative to custodial sentencing and not as a mechanism for the rehabilitation of the offender.

7.6 Conclusion

The use of alternative dispute resolution and specialised justice is gradually influencing significant changes in the administration of criminal justice around the world. Given the fact that the agitations for reforms of the criminal justice system in Nigeria have been sustained and long-standing, it is expected that in due course there will be significant reforms to the criminal justice system.

⁶⁶Acceptance of responsibility is an integral part of the restorative justice process. Although the primary objective is to provide emotional restoration to the victim because it is expected that once the wrongdoing is accepted that the offender would also apologise to the victim. While the apology is therapeutic for the victim, it is also therapeutic for the offender because that act of taking responsibility facilitates the rehabilitation of the offender as well. See Gerry Johnson, *Restorative Justice: Ideas, Values and Debates* (2nd ed. Routledge, 2011) p. 86. He had asserted that the restorative justice provides for the offender the opportunity for restoration of moral status through confession, repentance and reparation

⁶⁷Theo Gavrielides, *Restorative Justice Theory and Practice: Addressing the Discrepancy* (European Institute for Crime Prevention and Control, Helsinki 2007) p.34

The enactment of ACJA was touted, as the expected change, and the precursor of the much-needed reforms.⁶⁸ Some of its innovative provisions particularly plea-bargain have been equated with alternative dispute resolution in criminal justice, restorative justice has also been discussed within the same narrow framework and inadequate attention has been paid to identifying the points of distinction between restorative justice and the other mechanisms for ADR.⁶⁹ While it is acknowledged that the ACJA has huge potential in laying the foundation for a new direction in the administration of criminal justice in Nigeria, it is asserted that its provisions as they are, are short of what would be adequate to institutionalize restorative justice which has been identified as a foundation of the third-wave of access to justice reforms and the future of criminal justice. It is therefore important that the necessary amendments are made to ACJA so that the goal of expanding the frontier of criminal justice and criminal justice reforms can be achieved.

⁶⁸While the reception to the enactment of ACJA has generally been positive and demonstrative of the belief that it would introduce the practice of restorative justice into the Nigerian legal system, a cautionary approach has also been advised. See Y.D.U Hanbali, Administration of Criminal Justice Review in Nigeria: Mere Revision or Revolution" in Isa Hayatu and Yusuf Dadem (eds), *Nigerian Association of Law Teachers(NALT) Conference Proceedings*(NALT, Abuja, 2018)p.42

⁶⁹Kevin Nwosu, "Criminal Justice Reforms in Nigeria: The Imperative of Fast Track Trials; Plea Bargains; Non-Custodial Options and Restorative Justice"