THE ADAPTATION OF THE SOUTH AFRICAN TRUTH AND RECONCILIATION COMMISSION MODEL IN ADDRESSING CRIMES OF CORRUPTION IN NIGERIA.

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BEING THE DISSERTATION IN PARTIAL FULFILLMENT OF LL.M REQUIREMENTS OF THE FACULTY OF LAW, LEAD CITY UNIVERSITY IBADAN.

CERTIFICATION

This is to certify that this research project titled: 'The Adaptation of Truth and Reconciliation Commission Model in Addressing Crimes of Corruption in Nigeria' was conducted and completed by Olukayode Ojedokun in the Faculty of Law, Lead City University, Ibadan.

Prof. Kolapo Omidire **Date**

Dr Oluyemisi Abimbola (Dean) **Date**

DECLARATION

I, Olukayode Ojedokun declare that this work titled 'The Adaptation of Truth and Reconciliation Commission Model in Addressing Crimes of Corruption in Nigeria' is as a result of my research efforts undertaken in the Faculty of Law, Lead City University, Ibadan, under the supervision of Prof Kolapo Omidire. I make further declaration that to the best of my knowledge and belief it contains no material previously published or written by another person nor material to which a substantial extent has been accepted as a diploma or degree of any university or other institution of higher learning except where due acknowledgements have been made in this text.

DEDICATION

To an awesome God!

ACKNOWLEDGEMENTS

I owe a great debt for the completion of this work to the Pro-Chancellor of the Lead City University, Ibadan, Prof. 'Jide Owoeye who made available a generous scholarship to cover this study after years of prodding me to get on with it. There are others who deserve mention, my supervisor, previous lecturer (at Great Ife!) and Dean, Prof. Kolapo Omidire for his painstaking and useful suggestions to the research, to the current Dean, Dr. Oluyemisi Abimbola and all members of my department, Public and International Law and the wider Law Faculty. I offer profuse gratitude and appreciation to my friend and partner in legal and social research and in legal practice, Ms. Jamila Suleiman who has been enduring in her support throughout this journey. I have gained and benefited enormously from her in our current and our ongoing collaborations. To Dr. MaryAnn Ajayi, my 'aburo', she has nudged me on endlessly to start and finish this degree. The Lead City University, Vice-Chancellor, Prof. Kabiru Adeyemo for the personal interest he has always taken in my progress and for the trust he placed upon me three years ago. To the Chaplain, Venerable Olugbenga Olagundoye and members of the Chapel of Peace and Joy, my primary place of ministry for your unquestionable love. To Mrs. Arubuola my former PA and Ayomikun Akinwunmi my immediate former PA, King's College Old Boy's Association class set of 77 to 82, my brother Adebowale and my ever loving mother, the memory of my twin, Folashade that propels me on and many others that remain unmentioned your reward will surely come.

To my darling wife, Olajumoke who has borne my continued absence with resolute love and unsurpassed support, to my children, Moyondafoluwa and Oluseyitan for their support both materially and spiritually, to my granddaughter, Mofeyifoluwa who always delights me with so much joy, I thank you all.

ABSTRACT

Truth and Reconciliation Commissions (TRCs) have become essential instruments for mediating in societies fractured and laden with systematic and widespread criminal atrocities. By explorative and descriptive design the study has relied upon secondary data to theorise on the adaptation, in Nigeria, of the South African TRC model, as a forum, which could represent an alternative or an extension to the penal justice system for addressing crimes of corruption. One of the issues that arises is whether such forum would represent a competing or reconcilable paradigm. After noting the ineffectiveness of anti-corruption institutions in Nigeria, this study concludes the attraction of the TRC model as an alternative to the traditional penal justice system could lay within its capacity to retain the elements of retribution, rehabilitation and deterrence of the traditional criminal justice system and to introduce the value of reconciliation into the system. This study further concludes that this could create the incentive for an efficient dispensation of justice leading to the basis for a more harmonious society. It suggests the adaptation of the TRC model's enduring legacy could be achieved by some necessary modifications of the country's constitutional and penal codes or even as an extension of existing penal codes.

CHAPTER 1

1.1 BACKGROUND TO THE STUDY

In many parts of the world, Truth and Reconciliation Commissions hereafter referred to as TRCs, or similar bodies, are usually set up by governments with the objective of resolving animosities left over from past internal conflicts ranging from civil wars as in Guatemala[1], tyrannical rule in Germany[2], human rights violations like Chile[3] where there was military dictatorship and like what occurred in Panama[4] and the compulsory assimilation policies that occurred in Canada.[5]

The following are examples of bodies that have been set up: The Oputa Panel in Nigeria,[6] The National Commission on the Disappeared in Argentina,[7] The

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[1] Garrett FitzGerald, The Graduate Journal of Harvard Divinity School The Truth Commissions of Guatemala Pluralism and Particularity Within the Human Rights Paradigm (2010)<https://projects.iq.harvard.edu/hdsjournal/book/truth-commissions-guatemala > accessed on 2 September 2021.

[2] Richard Overy Nuremberg: Nazis On Trial (2011) .<https://www.bbc.co.uk/history/worldwars/wwtwo/nuremberg_article_01.shtml> accessed on 2 September 2021.

[3]Eric Brahm The Chilean Truth and Reconciliation Commission <https://www.beyondintractability.org/casestudy/brahm-chilean >accessed on 2 September 2021.

[4] Bishnu Pathak A Comparative Study of World's Truth Commissions: From Madness to Hope <https://www.transcend.org/tms/2017/07/a-comparative-study-of-worlds-truth-commissions-from-madness-to-hope/> accessed on 2 September 2021.

[5] Final Report of the Truth and Reconciliation Commission of Canada, Volume One: Summary: Honouring the Truth, Reconciling for the Future (Lorimer, Truth and reconciliation Commission of Canada, 2005).

[6]United States Institute of Peace. 1999 <https://www.usip.org/publications/1999/06/truth-commission-nigeria > accessed on 2 September 2021.

"On June 4, 1999, President Olusegun Obasanjo appointed a Commission to investigate human rights abuses committed from January 1, 1994 until taking office on May 29, 1999. In formally inaugurating the Commission on June 14, he extended the inquiry further into the past, to December 31, 1983, when President Shehu Shagari was deposed in a military coup. The panel's mandate was:

- "To ascertain or establish, to whatever extent the evidence and circumstances may permit, the causes, nature and extent of human rights violation or abuses and in particular all known or suspected cases of mysterious deaths and assassinations or attempted assassinations committed in Nigeria since the last democratic dispensation;
- to identify the person or persons, authorities, institutions or organisations which may be held accountable for such mysterious deaths, assassinations or attempted assassinations or other violations or abuses of human rights and to determine the

Commission of Inquiry into the Crimes and Misappropriations Committed by Ex-President Habre[8] his Accomplices and/or Accessories in Chad,[9] and at other times by the United Nations as with The Commission on the Truth in El Salvador[10], Liberia's Truth and Reconciliation Commission.[11]

To date, by far the most comprehensive and ambitious in scope, diversity, application, is the use of TRC as an alternative penal justice system is the South African model.[12]

motives for the violations or abuses, the victims and circumstance thereof and effect on such victims or the society generally;

- to determine whether such abuses or violations were the product of deliberate state policy or the policy of any of its organs or institutions or individual or their office or whether they were the acts of any political organisation, liberation movement or other group or individual, and
- to recommend measures which may be taken, whether judicial, administrative, legislative or institutional to redress past injustices and to prevent or forestall future violations or abuses of human rights."

Chaired by Justice Chukwudifu Oputa, the panel was constituted by Alhaji Ali Kura Michika, Rev. Matthew Kuka, Elizabeth Pam, Mallam Mamman Daura (replaced later by Alhaji Adamu Lawal Bamalli), Tunji Abayomi, Modupe Areda and T.D. Oyelade, serving as its secretary.

The chairman of the panel, Justice Oputa, had requested that enabling legislation be enacted to clarify the Commission's status and powers, including by providing it with power of subpoena. Within its first two months of existence, the Commission had received thousands of submissions."

[7] Elias Canetti, Nunca Mas: The Report of the Argentine National Commission on the Disappeared (Farrar Straus & Giroux, Argentina 1986)

[8] Sam Garkawe, The South African Truth and Reconciliation Commission: a suitable model to enhance the role and rights of victims of gross violations of human rights?, (2003) *Melbourne University Law Review* < http://www.law.unimelb.edu.au/files/dmfile/27_2_3.pdf > accessed on 6 February 2021

[9] United States Institute of Peace Truth Commission Chad. (1990) <https://www.usip.org/publications/1990/12/truth-commission-chad> accessed on 2 September 2021

[10] United States Institute of Peace Truth Commission El Salvador. (1992) <https://www.usip.org/publications/1992/07/truth-commission-el-salvador> accessed on 2nd September 2021

[11]Proscrovia Svard, *Liberia's Truth and Reconciliation Commission: The Importance of Documentation in Postwar Education and Reconciliation* (2013) <https://kujenga-amani.ssrc.org/2013/04/29/liberias-truth-and-reconciliation-commission-the-importance-of-documentation-in-postwar-education-and-reconciliation/> accessed on 12 July 2021

[12] Olu Ojedokun. *I found my voice* (Charleston, Createspace 2014).

The study observes that there were challenges posited within the context of an Act[13], which was replete with contradictions—in its goals, subject matter, means and remedies. It raised many questions such as: How can the goals of national unity and reconciliation address the issues of individual redress, especially with a mandate to establish a picture of the system of Apartheid through investigations and hearings on individual human rights violations? How can the complicity of other state apparati—the media, judiciary, education, health, business—be acknowledged and made part of compensation to those subject to victimhood? Will these people within South Africa and in the front-line countries be individually or collectively restored? The study explores whether truth and justice are in opposition in this process, or can the glimmer of hope of amnesty and threat of criminal prosecution be blended tactically in tandem for both the state's interest and those of victims and utilised? Finally and perhaps most fundamentally, is the process of reconciliation between victim and perpetrator made apparent whilst communicating that they are private individual matters or are reconciliation and reparations steps towards leveling the economic playing field and engaging the existing, glaring disparities in wealth and the power relations? Albie Sachs opines that it was an attempt to make some success of the process those contradictions had to be resolved and the act of speaking to power was part of this resolution.[14]

While these considerations have been relevant to most of the sixteen commissions that were up prior to 2000.[15] South African's emphasis on communicating transparency including through the use of the concept of Ubuntu as a political tool to

[13] The official Truth and Reconciliation Commission **Website** <https://www.justice.gov.za/trc/ > accessed 5 September 2021.
[14] Albie Sachs, We the People Insights of An Activist Judge (Wits University Press 2016).
[15] Priscilla B. Hayner Unspeakable Truths: Confronting State Terror and Atrocity (Routledge, New York 2002) 344.

unite people around its idea distinguishes its utility from many of its other international contemporary bodies and was among its unique features.[16] The Truth and Reconciliation Commission was (i) implemented by a government committed to human rights and a party, the ANC, which established four commissions in 1984, 1989, 1992 and 1993 to investigate allegations of its own internal abuses; (ii) had broad investigative powers, including subpoena power; (iii) was mandated by statute to deal with an inclusive range of human rights abuses and to name names of perpetrators; (iv) conducted public hearings; (v) had a long two-year life span, ending in December 1997.[17]

The study draws from the South African model and attempts to adapt it for particular utility within a Nigerian context to achieve progress in its war against corruption. This is because Nigeria still appears to present a lacuna[18] on the domestic scene when it comes to the question of tackling corruption and the study engages with this.[19]

Nigeria[20] is currently faced with the confounding[21] and particular problem of political corruption crimes[22] and this study is concerned with the exploration of how and why

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[16] Francesca Mussi Literary Legacies of the South African TRC: Fictional Journeys into Trauma, Truth, and Reconciliation (Palgrave Macmillan; 1st ed. 2020 edn. 2021).

[17] **The official Truth and Reconciliation Commission Website <**https://www.justice.gov.za/trc/ **> accessed 5 September 2021.**

[18] Matthew T. Page *A New Taxonomy for Corruption in Nigeria.* (Carnegie Endowment for International Peace July 17 2018) < https://carnegieendowment.org/2018/07/17/new-taxonomy-for-corruption-in-nigeria-pub-76811> accessed on 10 July 2021.

[19] Yomi Kazeem, 'Corruption is bad in Nigeria—but just how bad'? *Quartz* (Africa June 18 2021.)<https://qz.com/africa/1058356/how-bad-is-corruption-in-nigeria/> accessed 6 August 2021.

[20]For Nigeria's latest CPI ranking, see: "Nigeria," Transparency International, <https://www.transparency.org/country/NGA> 5 March 2021.

[21] Naijaquest, Corruption In Nigeria – Causes, Types, Effects, And Solutions, March 9, 2020. https://naijaquest.com/corruption-in-nigeria/ accessed on 2 August 2021 from describes the confounding effects of corruption by stating:

"*Overages, the country has been held hostage In shackles and coffin of corruption in Nigeria and its adverse effect on the countrymen and women, it is no longer that new corruption has become a household menace that erupts from public office holders to the floor of common man in the room….*"

[22] See Page 61 for infographics, which show the extent of Nigeria's corruption crises.

it needs to move beyond the traditional adversary role of its penal system (in practice) in addressing this, moving it on to a justice system seeking to restore normality to the Nigerian polity, thus, restorative system by use of a Truth and Reconciliation Commission process. Secondly, it explores whether such a restorative justice system constitutes a competing or reconcilable process to the traditional one in existence? In other words, the study raises the issue of theorisation of the possibility, appropriateness, and the validity of an alternative penal justice system in addressing the crimes of corruption.[23] The study takes cognisance of the earlier attempt by Nigeria to use the TRC model through the Oputa Panel[24] as a tool but which appeared to fail because its objectives were obscured and not clearly stated in the relevant legislation.

The following below, which were part of the Oputa Panel's remit required the use of subpoenas and yet it had no such powers:[25]

- To ascertain or establish, to whatever extent the evidence and circumstances may permit, the causes, nature and extent of human rights violation or abuses and in particular all known or suspected cases of mysterious deaths and assassinations or attempted assassinations committed in Nigeria since the last democratic dispensation;
- to identify the person or persons, authorities, institutions or organisations which may be held accountable for such mysterious deaths, assassinations or attempted assassinations or other violations or abuses of human rights and to determine the motives for the violations or abuses, the victims and circumstance thereof and effect on such victims or the society generally.

Indeed the chairman of the panel, Justice Oputa, had requested that enabling legislation be enacted to clarify the Commission's status and powers, including by the

[23] Andrea Kupfer Schneider and Cynthia Alkon *Our Criminal Justice system: Plagued by Problems and Ripe for Reform* Dispute Resolution Magazine (ABA, January 29 2020).
[24]United States Institute of Peace. 1999 *Op. Cit.*
[25] *Ibid.*

provision of it with the power of subpoena.[26] There was also little evidence of communicating through the National Assembly or preparing the ground for the process before June 4, 1999, when President Olusegun Obasanjo announced through legislation[27] the establishment a Commission to investigate incidents of Transitional Justice Institutions and Organizations gross violations of human rights committed in Nigeria between January 15, 1966, until taking office on May 29, 1999.[28] The Nigerian ex military leaders who were summoned to appear, namely Major-General Muhammadu Buhari, General Ibrahim Babangida, Brigadier Halilu Akilu and General Abdulsalami Abubakar blatantly ignored the subpoena of the commission without any ensuing legal consequences. Eventually, General Babangida filed a lawsuit challenging the authority of the Oputa Panel to summon him and won. This enraged the Nigerian population but equally reduced the legitimacy of the commission.[29]

Besides, the Supreme Court ruled that the investigative power granted to the commission was unconstitutional because the state government had the power to set up an investigatory body instead of the Federal government.[30] Consequently, President Obasanjo complied with this verdict of the Supreme Court of Nigeria.[31]

However, this study proceeds on a premise which accepts that TRCs have become useful instruments for mediation in societies fractured and ladened with systematic

[26] Oluwatosin R. Ifaloye, Sheriff F. Folarin and Moses M. Duruji Investigating The Challenges That inhibited The Success of Nigeria's Human Rights Violations Investigation Commission Proceedings of ADVED 2019- 5th International Conference on Advances in Education and Social Sciences (Istanbul, Turkey 21-23 October 2019) 933.

[27]Statutory Instrument 8 of June 1999 pursuant to the Tribunals of Inquiry Act of 1990 (and later amended by Statutory Instrument 13 of 1999).

[28]United States Institute of Peace. 1999 *Op. Cit.*

[29] Bola Akinterinwa. A Nigeria: Oputa Panel: Sacred Cows And Immunity. *ThisDay*, available at <http://allafrica.com/stories/200108130346.html .>(Lagos August 31st 2001).

[30] Yusuf Hakeem Travails of Truth: Achieving Justice for Victims of Impunity in Nigeria *International* [2007} 1(2) *Journal of Transitional Justice*. 268–286.

[31] Oluwafunke Folarin, et al. A Strategic and Prescriptive Approach to Nation-Building and National Development in Nigeria (Astra Salvensis 2018).

and widespread crimes,[32] the study explores the effectiveness or otherwise of anti-corruption institutions in Nigeria, [33] and examines the attraction of the TRC model as an alternative to the traditional penal justice system in a situation where the model departs from conflictual situations that has previously involved sides in a war like situation. [34] Further examples of this departure lie in past internal conflicts ranging from civil wars as in Guatemala[35], tyrannical rule in Germany[36], human rights violations like Chile[37] where there was military dictatorship and like what occurred in Panama[38] and the compulsory assimilation policies that occurred in Canada.[39] That TRC were set up to resolve.

The study is premised on the capacity of the TRC model to retain elements of retribution, rehabilitation and deterrence of the traditional criminal justice system whilst injecting the value of reconciliation into the system.[40]

It explores whether the core elements of outcome for a traditional judicial system can be maintained if a TRC is utilised as alternative penal justice system for addressing

[32] Human Rights Watch, Tunisia: *Truth Commission Outlines Decades of Abuse, Identifies High-Level Suspects; Recommends Overhaul of Judiciary, Security* April 2019 <https://www.hrw.org/news/2019/04/05/tunisia-truth-commission-outlines-decades-abuse> accessed on 20 July 2021.

[33] Stanley Widianto, *Indonesia to revive 'truth and reconciliation' commission* (Reuters 2019) <https://www.reuters.com/article/us-indonesia-politics-idUSKBN1YV0IJ> accessed on 12 July 2021.

[34] Rebekka Friedman Hybrid TRCs and national reconciliation in Sierra Leone and Peru. (PhD thesis, 2012 The London School of Economics and Political Science).

[35]Garrett FitzGerald, The Graduate Journal of Harvard Divinity School The Truth Commissions of Guatemala Pluralism and Particularity Within the Human Rights Paradigm (2010) <https://projects.iq.harvard.edu/hdsjournal/book/truth-commissions-guatemala > accessed on 2 September 2021.

[36]Richard Overy Nuremberg: Nazis On Trial (2011) <https://www.bbc.co.uk/history/worldwars/wwtwo/nuremberg_article_01.shtml> accessed on 2 September 2021.

[37]Eric Brahm The Chilean Truth and Reconciliation Commission <https://www.beyondintractability.org/casestudy/brahm-chilean >accessed on 2 September 2021.

[38] Bishnu Pathak A Comparative Study of World's Truth Commissions: From Madness to Hope <https://www.transcend.org/tms/2017/07/a-comparative-study-of-worlds-truth-commissions-from-madness-to-hope/> accessed on 2 September 2021.

[39] Final Report of the Truth and Reconciliation Commission of Canada, Volume One: Summary: Honouring the Truth, Reconciling for the Future (Lorimer, Truth and reconciliation Commission of Canada, 2005).

[40] Marain Yankson-Mensah. *The National Reconciliation Commission in Hindsight: An Evaluation of Impact***.** Transitional Justice in Ghana. (Springer, T.M.C Asser Press, New York 2020).

crimes of political corruption.

1.2 STATEMENT OF THE RESEARCH PROBLEM

1. Nigeria[41] is currently faced with the confounding[42] and particular problem of political corruption crimes[43] and this study is concerned with the exploration of how and why it needs to move beyond the traditional adversary role of its penal system (in practice) in addressing this, moving it on to a justice system seeking to restore normality to the Nigerian polity, thus, restorative system by use of a Truth and Reconciliation Commission process. Whether such a restorative justice system will constitute a competing or reconcilable process to the traditional one in existence.
2. The study seeks establish how to draw from the South African model and adapt it for particular utility within a Nigerian context to achieve progress in its war against corruption. This is because Nigeria still appears to present a lacuna[44] on the domestic scene when it comes to the question of tackling corruption.[45]
3. The study raises the challenge of how Nigerian society resolves the fracture

[41]For Nigeria's latest CPI ranking, see: "Nigeria," Transparency International, <https://www.transparency.org/country/NGA> 5 March 2021.

[42] Naijaquest, Corruption In Nigeria – Causes, Types, Effects, And Solutions, March 9, 2020. <https://naijaquest.com/corruption-in-nigeria/> accessed on 2 August 2021 from describes the confounding effects of corruption by stating:

"*Overages, the country has been held hostage In shackles and coffin of corruption in Nigeria and its adverse effect on the countrymen and women, it is no longer that new corruption has become a household menace that erupts from public office holders to the floor of common man in the room….*"

[43] See Page 61 for infographics, which show the extent of Nigeria's corruption crises.

[44] Matthew T. Page *A New Taxonomy for Corruption in Nigeria.* (Carnegie Endowment for International Peace July 17 2018) <https://carnegieendowment.org/2018/07/17/new-taxonomy-for-corruption-in-nigeria-pub-76811> accessed on 10 July 2021.

[45] Yomi Kazeem, 'Corruption is bad in Nigeria – but just how bad'? '*Quartz* (Africa June 18 2021) https://qz.com/africa/1058356/how-bad-is-corruption-in-nigeria/ accessed 6 August 2021.

exacerbated by overburdened courts in terms of the large scale of corruption cases, the length it takes to resolve many, which in some instances are reportedly up to 20 years, reveals elements of retribution to and the rehabilitation of the offenders is simply not working within the system.[46]

1.3 RESEARCH QUESTIONS

1. How does the existing penal system[46] in Nigeria address the problem and scale of corruption crimes, the societal fractures and to question any progress[47]made in addressing it?[48]
2. Whether the current treatment of crimes of corruption in Nigeria raises the theorisation of the possibility, appropriateness and the validity of an alternative penal justice system to address the crimes of corruption?
3. Is the adaptation of the TRC model to our existing penal system an effective and durable way to address the crimes of political corruption in Nigeria, will it construct an encompassing model that encapsulates the aims of deterrence, retribution, restoration, denunciation, protection and reconciliation?
4. The study also asks could the Nigerian government with respect to the problem of corruption move towards a more complete adaptation of the template of the South African TRC to unlock the impasse and allow the opening of a new chapter?

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[46] Unini Chioma, Special courts for corruption cases August 25, 2015 The Nigerian Lawyers <https://thenigerialawyer.com/special-courts-for-corruption-cases/ > accessed 3 September 2021
[46] *Ibid.*
[47] Bassey Udo, *African Union Asks President Jonathan of Nigeria To Declare His Assets, Others Too*, (Lagos, 2015) <http://newsrescue.com/corruption-african-union-asks-president-jonathan-nigeria-declare-assets-others/#axzz3SnCFg6B9> accessed on 15 June 2021.
[48] Martha Minow, *Do Alternative Justice Mechanisms Deserve Recognition in International Criminal Law?:* Truth Commissions, Amnesties, and Complementarity at the International Criminal Court. [2019] (60) *Harvard International Law Journal* 1.

1.4 SCOPE OF STUDY

The scope of this study raises the theorisation of the possibility, appropriateness and the validity of an alternative penal justice system in addressing the crimes of corruption. The scope of the study is limited to South Africa and Nigeria though it draws inferences from other Commissions' adaptability,[49] to allow it to explore the adaption of the success of the former ones, and in doing so see whether it succeeds in the latter one.

Although this study recognises that the proper evaluation of the efficacy of a system of justice would involve the post evaluation of offenders on the extent to which rehabilitation prevents recidivism, the scope of this research does not include such enquiry but the study takes cognisance that in national criminal justice systems of most Western countries (particularly those states with adversarial common law legal systems), there has been increasing attention paid to, and the awareness of, the plight of crime victims, leading to moves to enhance their role and rights during the criminal justice process. For instance, in Australia and New Zealand a conference process is used more commonly.[50] In this case, the victims of crime and offenders who admit their crimes, each with supporters come together to discuss the offence, its impact, and an appropriate penalty (agreement or outcome).[51] In this context it can be argued

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[49] Final Report of the Truth and Reconciliation Commission of Canada, Volume One: Summary: Honouring the Truth, Reconciling for the Future (Lorimer, Truth and reconciliation Commission of Canada, 2005).

[50] Sam Garkawe The South African Truth and Reconciliation Commission: A Suitable Model To Enhance The Role and Rights of The Victims of Gross Violations of Human Rights? [2003] (27) (1) *Melbourne University Law Review.*

[51] Chris H. Van Zyl and Jacques Pretorius *Reconnaissance of South African standards and values in the fight against corruption: Building capacity through the integration of restorative justice practices* Paper presented at "New Frontiers in Restorative Justice: Advancing Theory and Practice", (Centre for Justice and Peace Development, Massey University at Albany, New Zealand, 2004).

that there appears to be the absence of discrete set of victims since the Nigeria State is itself the victim. The research touches on but does not pursue in depth the study of some of the relevant body of literature which has developed around these issues leading to what many now regard as a new academic discipline - 'victimology' - previously been seen as a sub-discipline of criminology.[52] However, Max Siollun in his book goes further and argues that the citizenry of Nigerian are simultaneously victims, accomplices, and active participants in their own corrupt downfall adding a further layer of complexity to the concept of victimhood here.[53] What seems clear in this study, however, is that the contestation of victimhood in the face of Nigerian corruption crimes could change the dynamics and they way in which TRC models can be adapted in dealing with its victims. However, this study attempts to demonstrate that reparation is a useful tool even if it was poorly applied under the South African model. Indeed William Gumede reported that:[54]

> One of the biggest limitations of the Truth and Reconciliation Commission (TRC) was its failure to provide redress or reparations for the victims of apartheid.

The case of Canada's TRC, however, does provide some evidence that more than 30,000 Survivors were compensated financially by the Government of Canada for their experiences in residential schools, but the legacy of this experience is ongoing today. This report explains the links to high rates of Aboriginal children being taken from their families, abuse of drugs and alcohol, and high rates of suicide.[55] This

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[52] Kathleen Daly, *Mind the Gap: Restorative Justice in Theory and Practice*. Andrew von Hirsch, Julian Roberts, Anthony E. Bottoms, Kent Roach, and Mara Schiff (eds.) *Restorative Justice and Criminal Justice: Competing or Reconcilable Paradigms?* (Hart Publishing Oxford 2002).
[53] Max Siollun, *Op. Cit.,* (2013)184.
[54] William Gumede Need for reparations still with us (2019) <https://mg.co.za/article/2019-01-04-00-need-for-reparations-still-with-us/ >accessed on 2 September 2021.
[55]The Final Report of Canada's Truth and Reconciliation Commission Volume Six Section Two Chapter Report of the Reparation and Rehabilitation Committee

compares to the South African TRC which reported that as of 30 November 2001, when the Reparation and Rehabilitation Committee was closed down, a total of 17,016 forms for UIR grants had been submitted to the President's Fund, of which some 16 855 payments had been made, totalling R50 million.[56]

1.5 SIGNIFICANCE OF STUDY

The need to explore the ineffectiveness of anti-corruption institutions in Nigeria, and to examine the attraction of a TRC model as an alternative for adaptation to the traditional penal justice system possessing within it the capacity to retain the elements of retribution, rehabilitation and deterrence of the traditional criminal justice system whilst introducing the value of reconciliation into the system is essential because the study has the potential for a TRC in Nigeria focused on crimes of political corruption, clearing the enormous stalemate within the courts[57] and to serve as incentive for a more efficient dispensation of justice, thereby, creating a basis for a more harmonious society.

1.6 RESEARCH METHODOLOGY

This is a qualitative research which relied on secondary sources from South African TRCs, Economic and Financial Crimes Commission, EFCC, Independent Corrupt Practices Commission (ICPC), Administration of Criminal Justice Act, 2015, herein referred to as ACJA, Lagos State Public and Anti-Corruption Commission (LSPAC)

(1998).<https://reparations.qub.ac.uk/assets/uploads/South-Africa-TRC-vol6_s2.pdf> accessed on 3 September 2021.

[56] *Ibid.*

[57] Unini Chioma, Special courts for corruption cases August 25, 2015 The Nigerian Lawyers <https://thenigerialawyer.com/special-courts-for-corruption-cases/ > accessed 3 September 2021.

and Oyo State Anti-Corruption Body (OSAC) and in its method it is exploratory and descriptive in its design. In its data analysis it employs content and some limited comparative method to address the questions raised. Its content analysis allows data to be systematically and objectively categorised creating the space for the making of valid inferences and conclusions and engaging in application and adaptability.[58] In this sense it goes beyond comparison by drawing applicable principles and engaging it its workability with a different system and context.

In some sense it is also an exploratory research, which explores the research questions and does not necessarily offer final and conclusive solutions to the existing problems. The study is conducted in order to determine the nature of the problem without necessarily providing conclusive evidence, but helps to have a better understanding of the problem faced.[59]

[58] Jamila Suleiman 'The Application of Gender-Sensitive Justice in addressing Conflict-Related Gender Based Violence in the North East Region of Nigeria.' Being a thesis proposal submitted to the Centre for Peace and Security Studies, Modibbo Adama University, Yola, in partial fulfillment for the award of degree of Doctor of Philosophy in Peace and Conflict Studies. (2021).
[59] John Dudovskiy Business Research Methodology <https://research-methodology.net/research-methodology/research-design/exploratory-research/> accessed 15 October 2021.

CHAPTER 2

LITERATURE REVIEW

2.1 THEORETICAL CONSIDERATIONS

Theoretically in a TRC process, amnesty is conditional upon full disclosure of crimes.[60] This motivates perpetrators to reveal all of the salient information about their crimes in exchange for amnesty. Therefore, the study aims to establish whether or not TRC can be applied in responding to crimes of corruption in Nigeria.[61] It examines various literatures, both in the distant past since the creation of the TRC, and most current literature relating to its possible adaptation.

The traditional function of any penal justice system is to bring about a sense of justice to societies and to individuals inflicted with injury. Okonkwo and Naish offer the elements of retribution to and the rehabilitation of the offender and also of deterrence to would be offenders as determinants for the achievement of justice.[62] Over passage of time the belief has been that the concept of justice can be achieved through

[60] Nir Eisikovits Rethinking The Legitimacy of Truth Commissions: "I am The Enemy You Killed, My Friend" (Oxford Metaphilosophy LLC and Blackwell Publishing Ltd 2006)3.
[61] Bonny Ibhawor, (London, 24th January 2019), *Op. Cit*.
[62] Cyprian Okechukwa Okonkwo and Michael Naish, *Criminal Law in Nigeria* (Sweet and Maxwell, ,London 1990)379.

recourse to the court system, which provides a judicial penal system of justice characterised with jail terms or life sentences for offenders when found culpable. Establishing culpability therefore results in the imposition of sanctions; thus sanctions aim to impose justice by punishing perpetrators of crimes. However, according to Azemi, the form and the question of sanctions remains one of the most complex issues facing criminal justice.[63] This study aligns itself with the argument that ultimately sanctions[64]need not only aim to punish perpetrators of crimes but also to restore peace and repair fractured societies.[65] Fractured in this sense applies to Nigeria's criminal justice system because of the degree of institution of corruption and its impact on the system.[66] It posits the challenge of how does Nigerian society resolve the fracture exacerbated by over burdened courts without becoming the fracture itself? This in terms that the large scale of corruption cases, the length it takes to resolve many, in some instances 20 years as Chioma reports, reveal elements of retribution to and the rehabilitation of the offenders is simply not working within the system.[67]

In paying close attention to the courts, Lauchland suggests they provide an open, public, accountable procedure. The judges are trained in law, rules of evidence and fair procedure.[68] They are paid by the State, and have no personal interest in the cases therefore they must decide objectively. The neutral judge also has power to compel

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[63] Ferid Azemi, Ethical and Social Justice Issues: The Case of Correctional Institutions (2019)(22)(4) *Journal of Legal, Ethical and Regulatory Issues.*

[64] Charles Villa Vicencio and Wilhelm Verwoerd (eds), (University of Cape Town Press, 2000)322.
[65] Olufemi Taiwo, 'The best way to respond to our history of racism? A Truth and Reconciliation Commission*.' Washington Post* (Washington June 30 2020).
[66] Max Siollun. Soldiers of Fortune: Nigerian Politics From Buhari to Babangida 1983 -1993'(Cassava Republic Press Book 2013) 179-187.
[67]Unini Chioma, Special courts for corruption cases August 25, 2015 The Nigerian Lawyers <https://thenigerialawyer.com/special-courts-for-corruption-cases/ > accessed 3 September 2021
[68]Kay Lauchland, "Jurisdictions over defendants," [2004]10(2) *The National Legal Eagle* 5 http/epublications.bond.edu.au/nle/vol10/iss2/5 accessed 27th January 2015.

the parties to behave properly and present their cases in accordance with developed rules of natural justice. They work to ensure both sides are fairly heard, and the case is resolved on its merits. Judges, because of their exercise of state endowed powers, manage the conduct of cases and can redress a power imbalance between the parties. Even though Lauchland goes on to advocate the use of alternative dispute resolution in cases of conflict,[69] he limits it to civil matters and proceeds to argue that some conflicts must be resolved in the courts. Lauchland writes that:

> Justice (or even any result) often cannot be achieved across a negotiating table where the parties are arguing over a point of principle, or a scarce resource, or where one party is over-borne by the other - especially in cases of abuse.[70]

Whilst we note the concession in civil matters to alternative dispute resolution mechanisms this study sees a reinforcement of this view regarded criminal cases, in Avruch and Vejarano who posit that a host of authors view recourse to the court system as the only justified avenue to justice. In that case, where lies the hope for Nigeria with respect to prosecution of corruptions cases if the same courts seen as indispensable are simply unable to function?[71] This study sees a major disadvantage in this argument, mainly that the courts do not always have the ability to sufficiently reconcile the injured persons and the offenders.[72] The study will argue that the real difficulty the Nigerian criminal justice system presents is how to reconstruct society and recast national unity while at the same time stigmatising the perpetrators of corruption crimes.

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[69]Florina Cristiana Matei and Andrés de Castro García, *Transitional Justice and Intelligence Democratization,* International (2019)(32)(4) *Journal of Intelligence and Counterintelligence*, 717-736.

[70] Kay Lauchland *Op. Cit.* (2004) 2.
[71] Unini Chioma, Special courts for corruption. *Op. Cit*. (2015).
[72] Kevin Avruch and Beatriz Vejarano, Truth and Reconciliation Commissions; [2001](2) 1(2) *A Review Essay and Annotated Bibliography*, *Social Justice, Peace and Human Rights*, 47-108.

Although this work recognises that the proper evaluation of the efficacy of a system of justice would involve the post evaluation of offenders on the extent to which rehabilitation prevents recidivism, the scope of this study does not include such enquiry. Also it is aware that in national criminal justice systems of most Western countries (particularly those states with adversarial common law legal systems), there has been increasing attention paid to, and the awareness of, the plight of crime victims, leading to moves to enhance their role and rights during the criminal justice process. For instance in Australia and New Zealand a conference process is used more commonly. [73] In this case the victims of crime and admitted offenders and their supporters come together to discuss the offence, its impact, and an appropriate penalty (agreement or outcome). The discussion evokes feelings of remorse in the offender, which leads to genuine apology and a desire to repair the harm. All conference professionals and participants are treated fairly and with respect. Participants then discuss an appropriate penalty (or agreement or outcome). Everyone has a say, and participation by the professionals is kept to a minimum.[74]

There is a large body of literature that has developed around these issues leading to what many now regard as a new academic discipline - 'victimology' - which had previously been seen as a sub-discipline of criminology.[75] But the concern of this study is actually the exploration of how and why Nigeria may need to move beyond the traditional adversary role of its penal system in addressing crimes of corruption to a justice system that seeks to restore the Nigerian polity; thus restorative system by

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[73] Kathleen Daly, Mind the Gap: *Restorative Justice in Theory and Practice.* Andrew von Hirsch, Julian Roberts, Anthony E. Bottoms, Kent Roach, and Mara Schiff (eds.) *Restorative Justice and Criminal Justice: Competing or Reconcilable Paradigms?* (Hart Publishing Oxford 2002).
[74] *Ibid.*
[75] Sam Garkawe, *The South African Truth and Reconciliation Commission: a suitable model to enhance the role and rights of victims of gross violations of human rights?* [2003] 27 *Melbourne University Law Review* 3 <http://www.law.unimelb.edu.au/files/dmfile/27_2_3.pdf> accessed on 6th February 2015.

use of a TRC; and secondly, whether such a restorative justice system will constitute a competing or reconcilable process to the traditional. While it is advantageous to clearly identify the parties, the perpetrators and victims, this study does not believe its essential in order to engage with possible adaptation of the TRC model because of the Nigerian situation.[76] To buttress this identification conundrum Max Siollun argues that the citizenry of Nigerian are simultaneously victims, accomplices, and active participants in their own corrupt downfall adding a further layer of complexity to the concept of victimhood here and also placing them on the same pedestal as the state itself.[77] In this case the Nigerian state is pivotal as a victim and also as a perpetrator even in its acquiescence. This state of affairs is relevant because the reformation or replacement of its penal system here is part of the concern of this study.[78]

In other words the scope of this study raises the theorisation of the possibility, appropriateness and the validity of an alternative penal justice system in addressing the crimes of corruption. On this premise, the study examines the questions as to whether the validity of a TRC or like body model could sufficiently serve as an alternative penal justice system or even allow the system to extend its scope in addressing corruption and its ensuing fractures whilst establishing the basis for national reconciliation. This study therefore seeks to explore a search for an alternative, which provides the necessary reconciliatory element within the structure of a society faced with rampant and even state encouraged criminality.[79] It explores whether a Truth and Reconciliation Commission (TRC) or by whatever name so called could be such a restorative tool.

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[76] Max Siollun Op. Cit. (201)184.
[77] Max Siollun Op. Cit. (201)179.
[78] *Ibid.*
[79] Hannah Easley '10 Facts About Corruption in Nigeria' *The Borgen Project* (January 27, 2020) <https://borgenproject.org/10-facts-about-corruption-in-nigeria/#:~:text=Corruption%20in%20Nigeria%20affects%20poorer%20families%20most%20severely.,increase%20in%20the%20country%20due%20to%20corruption%20.> accessed 5 September 2021.

This review explores how or whether the ability and success of curbing corruption in Nigeria depends on the combination of a number of factors, namely, the exhaustiveness of legal provisions of statutes to meet with the innovative tendencies developed for private accumulation at the expense of the public, the efficacy of the police and anti-corruption commissions to properly investigate and arraign suspects, the efficacy of judicial officers to properly prosecute as well as the willingness and ability of the executive to insist on the implementation of laws whilst desisting from tacit approval of corrupt practices.

Furthermore, it will consider whether the effective adaptation and implementation of the TRC model will encourage increased admission of involvement in illicit private accumulation of wealth from public funds, rather than face the option of long jail terms put at "not less than 15 years and not more than 25 years" by, for instance, the EFCC Act.[80] The review will also establish from the existing body of work whether or not the core elements of retribution, rehabilitation and deterrence[81] for a traditional judicial system can be maintained if a TRC is utilised as alternative penal justice system for corruption?

[80] S. *27 (3) of the EFCC Act 2004.*
[81] Cyprian Okechukwa Okonkwo and Michael Naish *Op. Cit.* (1990), 379.

A review of the book *'The Global Impact and Legacy of Truth Commissions',*[82] indicates it was written in response at a time when a growing criticism of both truth commissions and transitional justice as a whole emerged. Its purpose is to understand the impact and legacy of these institutions over the past fifty years.[83] In the chapter titled *'Towards an Understanding of How Truth Commissions Can Use Their Amnesty Powers to Enhance Their Impact and Legacy'*,[84] Jeremy Sarkin argues TRCs attempts to clarify the national narrative of such societies, and to establish a set of facts as a basis of the truth about the history and evolution of a given conflict, in order to devise a new and more acceptable national narrative. He posits that whilst truth gathering is unquestionably of great value and importance, the issue of accountability is of greater complexity. The emergence of truth can open the door for accountability to come to the fore. However, Kochanski recently argued that truth commissions in fact decreases the possibility of achieving accountability and justice in post-conflict societies.[85] Thus, there is a view that truth commissions are, at times, replacements for retributive justice. The study goes with this argument to suggest it could also sometimes be seen as an extension beyond retributive justice adding a layer of reconciliation[86] and reparations.[87] This leads us conveniently into Luke Moffet's work.

Luke Moffet proceeds to trace the historical context of transitional justice, indicating that it emerged after the Second World War as a set of discrete measures, such as trials, truth commissions or reparations, to address the atrocities of a past regime and

[82] Jeremy Sarkin, ed. *The Global Impact and Legacy of Truth Commissions* (Intersentia, 2019).
[83] *Ibid.*
[84] Jeremy Sarkin, Ed. *Op. Cit.* (2019).
[85] Adam Kochanski Mandating Truth: Patterns and Trends in Truth Commission Design [2020] (21) *Human Rights Review* 113-137.
[86] Marain Yankson-Mensah. *Op. Cit.*, (2020).
[87] Luke Moffett *Op. Cit.* (2019) 143 -168.

to transition societies away from the recurrence of atrocities.[88] He narrates that since the 1990s there has been an increasing emphasis on the need for multifaceted, comprehensive transitional justice measures to effectively deal with impunity and the consequences of mass violence.[89] It is no longer considered effective to pigeonhole discrete transitional justice mechanisms. Instead there is increasing discussion of a comprehensive package of measures that complement each other. Each of the areas of transitional justice – truth, justice, reparations, amnesties, guarantees of non-recurrence and, to a certain extent, demobilisation, disarmament and reintegration (DDR) – have their own particular focus, benefits and limitations.[90] Although such measures can be complementary, there can also be overlap and tension between them, such as when trying to carry out prosecutions while at the same time seeking to secure truth, which requires careful crafting of social, political, economic and legal factors to avoid derailing the transition itself.[91]

In attempt to demonstrate the adaptability of TRC models beyond direct political fractures in society and create a linkage to reparations The Final Report of Canada's Truth and Reconciliation Commission and its six-year investigation of the residential school system for Aboriginal youth and the legacy of these schools reveals more.[92]

The full text of the Commission's 94 recommendations for action includes attempts to address the past legacy through the use of reparations.[93]

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[88] Luke Moffett *In the Aftermath of Truth: Implementing Commissions' Recommendations on Reparations – Following Through for Victims* In J Sarkin (Ed), *The Global Impact and Legacy of Truth Commission* (Intersentia 2019) 43 -168.
[89]Luke Moffett (2019) *Op. Cit.*
[90] Luke Moffett and James Gallen Reparations, Responsibility and Victimhood in Transitional Societies (2020) <https://reparations.qub.ac.uk/assets/uploads/QUB-TRCs_Report_UPDATED130120.pdf > accessed 3 September 2021.
[91] Luke Moffett *Op. Cit.*(2019) 143 -168.
[92] The Final Report of Canada's Truth and Reconciliation Commission *Op. Cit.*
[93] The Final Report of Canada's Truth and Reconciliation Commission *Op. Cit.*

The report laid bare a part of Canada's history that until recently was little-known to most non-Aboriginal Canadians.[94] The Commission discusses the logic of the colonisation of Canada's territories, and why and how policy and practice developed to end the existence of distinct societies of Aboriginal peoples. Using brief excerpts from the powerful testimony heard from Survivours, the report documents the residential school system which forced children into institutions where they were forbidden to speak their language, required to discard their clothing in favour of institutional wear, given inadequate food, housed in inferior and fire-prone buildings, required to work when they should have been studying, and subjected to emotional, psychological and often physical abuse. In this setting, cruel punishments were all too common, as was sexual abuse.[95]

The report reveals that the Government of Canada has financially compensated more than 30,000 survivors. This is an attempt to address their experiences in residential schools, but the legacy of this experience is ongoing today. The report explains the linkage to high rates of Aboriginal children being taken from their families, abuse of drugs and alcohol, and high rates of suicide. The report documents the drastic decline in the presence of Aboriginal languages, even as survivors and others work to maintain their distinctive cultures, traditions, and governance.

In the report is an offer of 94 calls to action on the part of governments, churches, public institutions and non-Aboriginal Canadians as a path to meaningful reconciliation of Canada today with Aboriginal citizens.[96] Even though the historical experience of residential schools constituted an act of cultural genocide by Canadian government authorities, the United Nation's declaration of the rights of aboriginal

[94] *Ibid.*
[95] *Ibid.*
[96] *Ibid.*

peoples and the specific recommendations of the Commission offer a path to move from apology for these events to true reconciliation that can be embraced by all Canadians. This study very much sees an argument here in this report for a particular model of transitional justice that was afforded perpetrators and victims in Canada and may be extended to the victims of crimes of corruption in Nigeria.[97]

The study considers it essential to interrogate and attempt to unpack political corruption at this stage. Inge Amundsen assists on the proper conceptualisation of political corruption, he writes that in the definition shared by most political scientists, political corruption is any transaction between private and public sector actors through which collective goods are illegitimately converted into private-regarding payoffs.[98] His definition does not, however, distinguish clearly between political and bureaucratic corruption. It does, however establish the necessary participation of the state and state agents in corruption. A definition that is stricter involves political decision makers. His assertion is that political or grand corruption takes place at the high levels of the political system and that it is when the politicians and state agents, who are entitled to make and enforce the laws in the name of the people, are themselves corrupt that we have political corruption.

He opines:

> Political corruption is when political decision-makers use the political power they are armed with, to sustain their power, status and wealth. Thus, political corruption can be distinguished from bureaucratic or petty corruption, which is corruption in the public administration, at the implementation end of politics. Even when the distinction between political and bureaucratic corruption is rather ambiguous as it depends on the separation of politics from administration (which is unclear in most political systems), the distinction is important in analytical and in practical terms. Political corruption occurs at the top level of the state, and it has political

[97] The Final Report of Canada's Truth and Reconciliation Commission *Op. Cit.*
[98] Inge Amundsen,'Political Corruption: An Introduction to the Issues' (Chr. Michelsen Institute Development Studies and Human Rights WP 1999)7.

> repercussions. Political corruption not only leads to the misallocation of resources, but it also affects the manner in which decisions are made. Political corruption is the manipulation of the political institutions and the rules of procedure, and therefore it influences the institutions of government and the political system, and it frequently leads to institutional decay. Political corruption is therefore something more than a deviation from formal and written legal norms, from professional codes of ethics and court rulings. Political corruption is when laws and regulations are more or less systematically abused by the rulers, side-stepped, ignored, or even tailored to fit their interests ... The formal legal framework of the state is therefore insufficient as terms of reference to assess and judge the problem of political corruption. Moral, normative, ethical, and indeed political benchmarks will have to be brought in, not at least because it will be necessary to discern legality from legitimacy when it comes to political corruption. Besides, whereas bureaucratic corruption normally can be dealt with through auditing, legislation, and institutional arrangements, the degenerative effects of political corruption cannot be counteracted by an administrative approach alone. Endemic political corruption calls for radical political reforms.[99]

However, Max Siollun in his seminal work, titled *'Soldiers of Fortune: Nigerian Politics From Buhari to Babangida 1983 -1993'* attempts to contextualise the history, gravity and extent of the problem with political corruption in Nigeria. He traces its legacy in damning fashion to the 1980s where he argues that infectious corruption was turned into an art form. He explained that the extent of illicit financial dealings in the government goes beyond patrimonialism and patron-client relations. He posits that the Nigerian society bred something far more sinister and sophisticated than petty graft and bribery. He refers to Nuhu Ribadu's (the former EFCC Head) quote, arguing that "it's not even corruption. It's gangsterism. It's organised crime."[100]

In tracing the root of political corruption in Nigeria, Siollun argues that patrimonialism is at the heart of Nigerian government, politics and society.[101] But more fundamentally he claims that corruption in Nigeria is not just an offshoot of collapsed social and governmental institutions, nor is it the result of a hostile

[99] Inge Amundsen*, Op. Cit.*(1999)7.
[100] Max Siollun. Soldiers of Fortune: Nigerian Politics From Buhari to Babangida 1983-1993'(Cassava Republic Press Book 2013)187.
[101] *Ibid.*

economic environment, that the roots go much deeper and are symptomatic of a residual breakdown of Nigerian societal values and morality.[102] He goes on to describe the institutionalisation of corruption in Nigeria's governance:

> Why was all this corruption possible, and why did the perpetrators get away with it? The lack of detail in press exposes of corruption was a factor. They are often presented in sensationalist rhetoric akin to rumour and innuendo. They rarely contain substantiated detailed instances of corruption that could be used to prosecute. Even when sufficient evidence existed, those supposed to investigate corruption were unable to do so because of those in the government they were supposed to investigate and prosecute. However, there are other social and cultural factors.
> Patrimonialism is at the heart of Nigerian government, politics and society. Political leaders compete to appropriate a "share" of national resources so they can then redistribute to their own community and network of followers. The resources accumulated are used to maintain their power…Patrimonialism has led to the failure to distinguish between the public purse and private pockets.[103]

The above captures the schizophrenic plight of the state as perpetrator and victim in Nigeria.[104] It also indicates unless we construct an encompassing model that encapsulates the aims of deterrence, retribution, restoration, denunciation, protection and reconciliation our penal system will continue to be broken.[105]

2.2 EXPLORING EXISTING LEGISLATIVE FRAMEWORK

The study now proceeds to review the array of laws put in place to tackle corruption in Nigeria.

2.2.1 *The Administration of Criminal Justice Act,* 2015, (ACJA)

This study seeks to address this drawing from an overview from Professor Yemi Akinseye-George SAN, which is explored further in chapter four of this study. In the

[102] Max Siollun. *Op. Cit.* (2013) 187.
[103] *Ibid.* 184.
[104] Max Siollun. *Op. Cit.* (2013) 84.
[105] Cyprian Okechukwa Okonkwo and Michael Naish *Op. Cit.* (1990) 379.

review he refers to the establishment of a Police Central Criminal Registry, which is provided for in section 16 of the ACJA establishing within the Nigeria Police Force a structure, a Central Criminal Record Registry to detail all arrests made by the police.[106] The registry is to be located at the Police Headquarters and at every state police command. Akinseye-George indicates that the Act further states that every state including the Federal Capital Territory is to ensure that the decisions of the court in all criminal trials are transmitted to the Central Criminal Records Registry within thirty days after delivery of judgment. The establishment of a Central Criminal Record Registry will ensure that all arrests and judgments are well documented.[107]

This will avoid a repeat of what happened in the case of *Agbi v. Ibori*.[108] The central figure in this case was Chief James Onanefe Ibori, the then Governor of Delta State. At the time of commencement of this action at the High Court of the Federal Capital Territory, Abuja he was a candidate for the 2003 General Elections. In an action before the said High Court two persons suing as Plaintiffs began a joint action to challenge Ibori's qualification to stand as a gubernatorial candidate for the 2003 election having been an ex-convict. The action did not succeed before the High Court. However, on appeal to the Court of Appeal, the Court in a unanimous judgment allowed the appeal of the Plaintiffs, set aside the judgment of the High Court and ordered that the case be heard afresh by another Judge of the High Court. The proceedings commenced at the High Court of the Federal Capital Territory and one of the main issues was whether the record of proceedings of Bwari Upper Area Court in case N0. CK 81-95 (Exhibit A) wherein one James Onanfe Ibori was convicted was

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[106] Yemi Akinseye-George, SAN. *An overview of the Administration of Criminal Justice Act, 2015* (2016) <https://nji.gov.ng/images/Workshop_Papers/2016/Refresher_Magistrates/s02.pdf> accessed on 16 July 2021.
[107] *Ibid.* 4.
[108] *Agbi v. Ibori* (2004) All FWLR (PT. 202)1799.

sufficient to act against the 5th Defendant/Appellant (James Onanfe Ibori) as an ex-convict. During the trial the Upper Area Court Judge came to court and testified that James Onanfe Ibori was an ex-convict. James Onanfe Ibori on the other hand, contented that Exhibit A did not conform to section 157 (1) of the Criminal Procedure Code. The court gave judgment in favour of James Onanfe Ibori and the matter was dismissed. With the new provision in the ACJA, cases like this would no longer pose a major problem as there would be sufficient information on all convicted persons, which should make it easy to identify them in subsequent proceedings.[109]

It is interesting to note that in section 314 of the ACJA focuses on the victim: [110]

> **Compensation to victims of crime:** Often times, victims of crimes are neglected without any form of compensation even when the offender has been found guilty. The Act has addressed this ugly trend by broadening the powers of the court to award costs, compensation and damages in deserving cases, especially to victims of crime. By the provisions of section 319 of the Act, court may order a convict to pay compensation to any person injured by the offence, irrespective of any other fine or other punishment that may be imposed or that is imposed on the defendant.[111]

The objective of the ACJA in its enactment is as follows:

> The purpose of this Act is to ensure that the system of administration of criminal justice in Nigeria promotes efficient management of criminal justice institutions, speedy dispensation of justice, protection of the society from crime and protection of the rights and interests of the suspect, the defendant, and the victim.

Yemi Akinseye-George argues that the purpose of the Act as captured above is a deliberate shift from punishment as the main goal of our criminal justice to restorative

[109] Yemi Akinseye-George SAN *Op. Cit.* (2016).
[110] *Agbi v. Ibori* (2004) All FWLR (PT. 202) 1799.
[111] *Agbi v. Ibori Op. Cit*. (2004).

justice, which pays attention to the needs of the society, the victims, vulnerable persons and the rights and interest of a defendant.[112]

He elaborates on the role of the Act of the Administration of Criminal Justice Monitoring Committee. The Act establishes the Administration of Criminal Justice Monitoring Committee (the Committee) in section 469(1). The body is charged with the responsibility of ensuring effective application of the Act. It comprises of nine members with representatives drawn from the Judiciary, Federal Ministry of Justice, Police, Prisons, Legal Aid, Nigeria Bar Association, civil society organisation and National Human Rights Commission with the Chief Judge of the Federal Capital Territory as the Chairman and a Secretary appointed by the Attorney-General of Federation. The Committee has the responsibility of ensuring effective and efficient application of the Act by the relevant agencies. In doing this, the Committee shall among other things ensure that criminal matters are speedily dealt with; congestion of criminal cases in courts is drastically reduced; congestion in prisons is reduced to the barest minimum; and persons awaiting trial are, as far as possible, not detained in prison custody.[113]

This study continues to examine some of the extant Nigerian legislation relating to Anti-corruption bodies. The Nigerian law firm of SPA Ajibade provides an excellent

[112] Yemi Akinseye-George *Op. Cit.* (2016)

[113] Yemi Akinseye-George *Op. Cit.* (2016).

summary of anti-corruption legislation in Nigeria relevant to this study.[114] It begins with the Corrupt Practices and Other Related Offences Act [115](ICPC Act).

2.2.2 *The Corrupt Practices and Other Related Offences Act* 2000 (ICPC Act)

The study begins here with the Corrupt Practices and Other Related Offences Act (ICPC Act**)** generally prohibits the various perceived acts of corrupt practices arising from interactions or transactions involving public/government officers and the general public or private individuals. [116] The basic thrust of the ICPC is prohibition of corrupt practices and bribery the essential elements of which are: giving or receiving a thing of value to influence an official act. The ICPC defines corruption to include bribery, fraud and other related offences while persons are defined to include natural persons, juristic persons or anybody of persons corporate or incorporate.[117] Although the ICPC seems to focus more on acts of corruption in public offices, institutions and parastatals, it equally seeks to curb corrupt practices in private business transactions and inter personal relationships among individuals and persons. The ICPC, which is made up of 56 sections is not clearly marked into parts.[118] However, the main concern here is how the ICPC is able interact with the potential to reconcile with a model that allows a TRC process for addressing crimes of corruption. There is already evidence in the past that ICPC in its activities has given emphasis to the victims in its

[114] Executive Summary of Anti-Corruption Legislations with a view to advising Foreign Investors in Nigeria on Anti-Corruption Programmes. http://www.spaajibade.com/resources/executive-summary-of-anti-corrupt-legislations-with-a-view-to-advising-foreign-investors-in-nigeria-on-anti-corruption-programmes/ >accessed on 10tJuly 2021
[115] Corrupt Practices and Other Related Offences Act, Cap C31, Laws of the Federation of Nigeria 2004
[116] *Ibid.*
[117] Corrupt Practices and Other Related Offences Act, *Op. Cit.* 2004.
[118] Yemi Akinseye-George *Op. Cit.* (2016).

operations.[119] See below:

> Operatives of Independent Corrupt Practices and Other Related Offences Commission (ICPC) have recovered the sum of nine million, six hundred thousand from fraudsters operating illegal outreach campuses of the Akwa-Ibom State Polytechnic and the Imo State Polytechnic respectively. The money was recovered from one James Okon Ekon and Victor Iheanachor by the Asset Tracing and Monitoring Unit of the ICPC during an investigation into the activities of the suspects. Unsuspecting students had been deceived into parting with various sums of money to gain admission into the illegal outreach campuses operated by Ekon and Iheanachor. The students were made to believe that the outreach centres situated in Obokun High School, Ilesha Osun State were affiliated to the Akwa-Ibom State and Imo State Polytechnics respectively. The money recovered from the fraudsters, has been handed over to the authorities of the two Polytechnics…The sums of four million six hundred and seventy three thousand naira only (4,673,000.00) and four million, nine hundred thousand only (4,900.000.00) were handed over to Akwa Ibom State Polytechnic and Imo State Polytechnic respectively.[120]

The offences and penalties sections run from section 12 to section 29. The various offences punishable under the sections include willful giving and receipt of gratification and bribery to influence a public duty, fraudulent acquisition and receipt of properties, deliberate frustration of investigation by the anti-corruption commission (ICPC), making of false returns, making of false or misleading statement to the Anti-Corruption Commission, attempts, conspiracies and abetments of the offences under the Act. The Act created four categories of offences in the eighteen sections dealing with offences under the Act. The four categories of offences are:

- Giving and Receiving of bribes to influence public duty;[121]
- Fraudulent Acquisition and Receipt of Properties;[122]
- Failure to Report Bribery Transaction;[123]

[119] Independent Corrupt Practices & Other Related Offences Commission ICPC Disburses N9.6m to Victims of Fraud (February 26, 2015) < https://icpc.gov.ng/2015/02/26/icpc-disburses-n9-6m-victims-fraud/ >accessed on 3 September 2021.
[120]Independent Corrupt Practices & Other Related Offences Commission ICPC Disburses N9.6m to Victims of Fraud February 26, 2015 *Op. Cit.*
[121] Section 8 & 9 Corrupt Practices and Other Related Offences Act, 2000.
[122] Section 12 Corrupt Practices and Other Related Offences Act, 2000.
[123] *Ibid.* Section 23.

- Concealment of Information and Frustration of Investigation.[124]

The second legislation reviewed is that of the Economic and Financial Crimes Commission (Establishment) Act.[125]

2.2.3 The *Economic and Financial Crimes Commission Act* 2002 (LFN 2004) (the EFFC Act)

The EFFC Act came into force on the 14th December 2002. The Act establishes the Economic and Financial Crimes Commission EFCC (hereafter "the EFFC") as the overarching body designated with the primary responsibility of investigating and prosecuting economic crimes and bringing perpetrators of such crimes within the ambit of the law. Section 46 of the EFFC Act defines "economic crime" as a nonviolent criminal activity committed with the objectives of earning wealth illegally" Section 5 of the EFCC Act sets out the various offences with which the Act is concerned and the list is not exhaustive. The EFCC Act is designed as a tool for holistic approach to combating economic crimes in Nigeria. This can be seen when a review is made of the membership of the EFCC and its powers under the EFCC Act. The membership of the EFCC is drawn from virtually all the government bodies saddled with economic issues while the EFCC has the powers of not only investigating and enforcement of the provisions of the EFCC Act but also the enforcement of other legislations dealing with various economic crimes. Thus section 7 of the Act confers special powers on the EFCC to enforce the provisions of such other laws as:

[124] *Ibid.* Section 24.
[125] The Economic and Financial Crimes Commission Act 2002 (LFN 2004) (the Act).

- The *Money Laundering Act.*[126]
- *The Advanced Fee Fraud and Other Related Offences Act.*[127]
- *The Failed Banks (Recovery of Debt and Financial Malpractices in Banks) Act.*[128]
- *The Banks and Other Financial Institutions Act.*[129]
- *Miscellaneous Offences Act.*[130]
- Any other law or regulation relating to economic and financial crimes.[131]

However, the relevant provisions for the purpose of this study as it relates to the powers of Commission are:

1. Coordination and enforcement of all economic and financial crimes laws and enforcement functions.[132]
2. Adoption of measures to eradicate the commission of economic and financial crimes.[133]
3. Adoption of measures for the prevention of economic and financial crimes.[134]
4. Facilitation and rapid exchange of scientific and technical information and the conduct of joint operations geared towards the eradication of economic and financial crimes.[135]
5. Examination and investigation of all reported cases of economic and financial crimes with a view to identifying individuals and corporate

[126] Money Laundering (Prohibition) Act, 2011
[127] Advance Fee Fraud and other Fraud Related Offences Act, 2006
[128] *Failed Banks (Recovery of Debts) And Financial Malpractices in Banks Act, 1994*
[129] *The Banks and Other Financial Institutions Act, 2020*
[130] *Miscellaneous Offences Act, 1983*
[131] *Business Crimes Laws and Regulations, 2021*
[132] *Section 6(n) The Economic and Financial Crimes Commission Act 2002 (LFN 2004)*
[133] *Ibid.* Section 6(e)
[134] *Ibid.* Section 6(f)

[135] *Ibid.* Section 6(g)

bodies involved.[136]

6. Collaborating with government bodies within and outside Nigeria carrying on functions wholly or in part analogous with those of the commission. [137]
7. Identification and determination of whereabouts and activities of persons suspected of being involved in economic and financial crimes.[138]
8. Movement of proceeds or properties derived from the commission of economic and financial crimes.[139]
9. Establishment and maintenance of a system for monitoring international economic and financial crimes in order to identify suspicious transactions and persons involved.[140]
10. Taking charge of supervising, controlling, coordinating all the responsibilities, functions and activities relating to the current investigation and prosecution of all offences connected with or relating to economic and financial crimes in consultation with the attorney general of the federation.[141]
11. The coordination of all existing and financial crimes investigating units in Nigeria.[142]
12. Carrying out such other activities as are necessary or expedient for the full, discharge of all or any of the functions conferred on it under the Act.[143]

It is apparent that both individuals as well as corporate bodies in their day-to-day

[136] Section 6(h) The Economic and Financial Crimes Commission Act *Op. Cit.*
[137] *Ibid.* Section 6(j) i-vi
[138] *Ibid.* Section 6(j) i
[139] *Ibid.* Section 6(c)
[140] *Ibid.* Section 6(m)
[141] *Ibid.* Section 6(j) iv
[142] *Ibid.* Section 6(m)
[143] *Ibid.* Section 6(q)

business might commit or be a victim of one or more of the various criminal activities proscribed by the EFCC Act. This might be deliberate or through inadvertence. It is therefore important that they are watchful of how their business operates, so as to ensure that they are not caught by the provision. It is worth mentioning that the list provided in section 5(1) is not exhaustive, but is only intended to give an idea of the nature of offences, which the EFCC will investigate.

2.2.4 *The Money Laundering (Prohibition) Act* 2011

Then there is the Money Laundering (Prohibition) Act 2011,[144] (hereafter "the MLPA") which is directed or aimed at tracing, finding, freezing and possibly forfeiting among other things money and properties that have been acquired through illegal or prohibited means. Its intent is to prevent culprits from legitimising proceeds from their criminal activities. It aims to detect, prevent and capture money acquired through one of many illegal means. The progenitor of the MLPA was basically enacted to combat "dirty money" gotten through trading in illicit drugs.[145] However, over time, the scope of the law has been expanded through amendments to accommodate the dynamism of money laundering.

The MLPA is significantly symbiotic in nature, pooling resources and various anti money laundering agencies together in the battle against one of the most sophisticated crimes in the world. Thus bodies such as:

a.) The Central Bank of Nigeria.

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[144] Money Laundering (Prohibition) Act 2011.
[145] *Ibid*. Section 9(1).

b) The Nigerian Customs Service.

c) The Nigerian Securities and Exchange Commission.

d) The National Drug Law Enforcement Agency.

e) The Economic and Financial Crimes Commission.

f) The Corporate Affairs Commission; and even

g) The Federal High Courts are united under the MPLA to fight money laundering.

Recently various states in Nigeria have enacted various anti corruption laws and a summary is provided below.

2.2.5 O*yo State Anti-Corruption Agency and For Other Matters Connected* 2019

The Oyo State House of Assembly has recently passed a Law to establish O*yo State Anti-Corruption Agency and For Other Matters Connected Therewith* called the Oyo State Anti-Corruption Law 2019 (hereafter the "OSAC")[146] assented to on 10 December 2019, by His Excellency, Governor Oluseyi Makinde. The purpose of the law established the Oyo State Anti-Corruption Agency (the "Agency"), to check corruption in the state and other connected matters. In this context, corruption means unlawful gratification given or promised to any person in the performance of his

[146] *Oyo State Anti-Corruption Agency and For Other Matters Connected Therewith* (2019) <https://oyaca.ng/wp-content/uploads/2021/08/ANTI-CORRUPTION-AGENCY-AND-OTHER-MATTERS-CONNECTED-THEREWITH-signed-1.pdf >accessed on 3 September 2021.

duties. Under section 2 of the Interpretation of OSAC law, it defines corruption as including "…bribery, fraud, undue influence and other related offences;"[147]

The Law considers the following as corruption: at any moneys, fees, donations, loans, gifts, reward, office, dignity, valuable security, property or interest in property (being property of any description, whether movable or immovable), given or promised to be given as consideration for the performance of a public administrative duty.[148] The major provisions of the Law are stipulated below:

The Law generally empowers the Agency to investigate and prosecute matters of corruption in the state. Particularly, it makes the following provisions:

1. The Law shall be targeted at Public Officers. For this purpose, "Public Officers" means a person elected, employed or engaged in any capacity in the public or civil service of the State or Local Government and includes Officers of the Judiciary. Impliedly, the provisions of the law do not directly affect private persons in their private capacities.[149]

2. The Law specifically states that the Agency shall have power to investigate the administrative acts by any Ministry, Department or Agency of the State or Local Governments or such other Government Parastatals or any statutory corporation, public institution or company set up or owned by the Government or any officer or servant of any of the aforementioned bodies.[150]

[147] *Oyo State Anti-Corruption Agency and For Other Matters Connected Therewith 2019. Op Cit.* section 2, Interpretation section.
[148] *Ibid.* section 2(a), Interpretation section.
[149] *Ibid.* Section 2, Interpretation section, sections 22(2), 22(2)b, 23(1), 23(2), 27.
[150] *Ibid.,* section 22(1).

3. The Law creates corruption offences, including the offences of obtaining property, procuring property, obstruction of investigation, mismanagement of Government revenue, inducement of public officer, bribery for giving assistance regarding contract, official corruption and unlawful gratification.[151]

4. It gives power to the Agency to collaborate and synergise with any law Enforcement Agency within the State in questioning, investigating or interrogating any person whose conduct or affairs are under investigation and to partner with the Federal Anti-Corruption Agencies such as EFCC and ICPC in tracking corruption cases in the State and training the Agency's staff on Anti-Corruption related matters.[152]

5. The Agency may issue an invitation directed to any suspected persons or any other person who may have valuable information to aid and facilitate the investigation of a claim. The law goes further to places a legal obligation on persons required by the Agency to furnish relevant information, to give the information requested.[153]

6. Where the Agency intends to prosecute a corruption matter, the Law states that the Agency shall, after investigation, refer the matter to the Attorney General of the State for prosecution in the High Court of Oyo State. The Attorney General has the power to delegate the power to prosecute to any person or authority.

7. The Law provides for seizure of any movable property, which is the subject of an ongoing investigation. However, in certain circumstances when any

[151] Oyo State Anti-Corruption Agency and For Other Matters Connected Therewith 2019. *Op Cit.* section 2(g)
[152] *Ibid.* section 2(m).
[153] *Ibid.,* section 9(6).

movable property has been seized, it may be temporarily returned to the owner subject to terms and conditions stipulated in the Law to constitute sufficient security, as well as an undertaking to ensure that the property shall be surrendered on demand being made by the officer who authorized the release in the first place.[154]

In conclusion the OYSAC Law makes provision for general criminal procedure in accordance with the Constitution in terms of the right to fair and speedy trial, as well as the right of appeal and the presumption of innocence.[155] This Law also reiterates the focus of the Oyo State Government to fight corruption in the state especially in the civil and public service of Local Governments and the State as a whole.[156]

2.2.6 *Lagos State Public Complaints and Anti-Corruption Commission Law* 2021

The Lagos State government set up the Lagos State Public and Anti-Corruption Commission (hereafter the "LSPCAC") in an attempt to decentralise the fight against corruption in the country. The recently established LSPCAC is tasked with the responsibility to investigate to investigate any alleged corrupt practices or financial crimes emanating from administrative actions taken by any Lagos State Government's ministry, department, agency, parastatal, local governments, statutory corporations, public institutions, companies owned by the State Government, and any officer of the above-mentioned bodies, agencies or ministries.[157] The anti-corruption

[154] Oyo State Anti-Corruption Agency and For Other Matters Connected Therewith 2019. *Op Cit.* section 38.
[155] *Ibid.,* section 47(1).
[156] *Ibid.,* section 9(1).
[157] Lagos State Public Complaints and Anti-Corruption Commission Law, 2021' Section 13(3) of the law reads, "The commission shall upon thecommencement of this law take over the investigation of all anti-corruption and financial crime cases involving the finances and assets of Lagos State Government being investigated by any other agency."

agency is also empowered to investigate any offence under the criminal laws of the State – especially as it concerns corruption and financial crimes, abuse of office, obtaining property by false pretence, receiving stolen properties or fraudulently obtaining properties and similar offence, fraudulently dealing with properties by debtors; and offences relating to the administration of justice.[158] In April 2021, the Executive Governor of Lagos State, Babajide Sanwo-Olu, signed into law the Lagos State Public Complaints and Anti-Corruption Commission Law, 2021.[159]

The study aggregates all the mentioned legislation above and posits it presents the opportunity to wrestle with various existing legislation. There is evidence of evolution and development of strong anticorruption measures, these include the setting up of a Police Central Criminal Registry under the ACJA, compensation to victims of crime[160] including a recognition of the growing importance of victims.[161] Also there is past evidence of the ICPC's role in terms of victim's compensation where funds recovered from the fraudsters were handed over to the authorities of the two Polytechnics. The sums of four million six hundred and seventy three thousand naira only (4,673,000.00) and four million, nine hundred thousand only (4,900.000.00) were handed over to Akwa Ibom State Polytechnic and Imo State Polytechnic

[158] *Ibid.* section 13(5).
[159]Decentralization Of The Anti-Corruption Fight In Nigeria: A Review Of ***FRN vs Raymond Dokpesi (Former Chairman of DAAR Communications) & 1 other*** <https://corruptioncases.ng/cases/frn-vs-raymond-dokpesi-former-chairman >accessed on 27 July 2021 & <https://www.templars-law.com/decentralization-of-the-anti-corruption-fight-in-nigeria-a-review-of-the-lagos-state-public-complaints-and-anti-corruption-commission-law/> accessed 10 July 2021
[160] Often times, victims of crimes are neglected without any form of compensation even when the offender has been found guilty. The ACJA has addressed this ugly trend by broadening the powers of the court to award costs, compensation and damages in deserving cases, especially to victims of crime. By the provisions of section 319 of the Act, court may order a convict to pay compensation to any person injured by the offence, irrespective of any other fine or other punishment that may be imposed or that is imposed on the defendant.
[161] *Section 314 of the ACJA*.

respectively.[162] However, there is very little contained in the relevant provisions of the anti-corruption agencies that indicate it can wrestle Nigeria from the stalemate of corruption.

It is encouraging for this study that, however, when we consider the Canadian TRC there is an indication of a degree of adaptability beyond the traditional TRCs by extending its ambit to cover beyond direct political fractures in society and linking reparations to the into its process. The Final Report of Canada's Truth and Reconciliation Commission and its six-year investigation of the residential school system for Aboriginal youth and the legacy of these schools reveals in the full text of the Commission's 94 recommendations for action to address that legacy which includes reparations to a great extent.[163] Mikkel Jarle Christensen also provides a window that may be found within the punitive and non punitive even in the absence of what he describes as a framework to begin to explore sanctions other than those that are punitive to address crimes of corruption without the victims feeling shortchanged.[164]

The study suggests drawing from Smulovitz[165] that in the desire to achieve domestic demands for accountability and justice a process in Nigeria with respect to crimes of political corruption it is required to be transparent and publicly held, to focus on the political corruption conundrum and past crimes rather than the present. No doubt any TRC process we adopt will also require direct and broad engagement with the

[162] Independent Corrupt Practices & Other Related Offences Commission ICPC Disburses N9.6m to Victims of Fraud February 26, 2015 <https://icpc.gov.ng/2015/02/26/icpc-disburses-n9-6m-victims-fraud/> *Op. Cit.*
[163] The Final Report of Canada's Truth and Reconciliation Commission., *Op. Cit.*
[164] Mikkel Jarle Christensen (2020)(14)(3464–482, *Op. Cit.*
[165] Smulovitz, C. Comparing the Effectiveness of the Accountability Mechanisms in Eastern Europe and Latin America‖ jointly organized by El Colegio de México and the United Nations (2005).

affected population to gather their experience and the preparation of a report that is an OFFICIAL acknowledgement of suffering and loss to the Nigerian people.

The review of various literatures, particular the legislation alludes to the extent of Nigeria's corruption but does not detail it. However, the information reported below reveals more of the scale of Nigeria's challenge.[166] Nigeria recorded, 1729 cases on corruption in the space of 2003 and March 25, 2020, of which 1444 number of cases and 285 number of cases were discovered in private and public sector respectively. Also, money laundering and fraud have taken the highest number between the public and private sectors accordingly. It may be argued that this is why the Nigerian state is overwhelmed and the penal system is barely coping.[167] The context here is that even as far back as 2005 there were over five million cases pending in Nigerian courts with some of them having been appealed and argued for more than 20 years. According to Justice Fred Oho of Delta State High Court It had created broad political and economic implications and endangered Nigerian Society," says Justice Fred Oho of Delta State High Court.[168]

2.3 CONTEMPORARY ACADEMIC EXPLORATION

The study continues the review of some academic articles and contributions on possible solutions to addressing crimes of corruption. Tabia Princewill wrote on 'Time for creative solutions: An innovative approach to dealing with corruption.' It states:

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[166]Damilola Dorcas Deep Dive on Corruption Cases Data In Nigeria. <https://www.orodataviz.com/deep-dive-on-corruption-cases-in-nigeria/> (2021) accessed on 2 August 2021.

[167]*Ibid.*

[168] Unini Chioma, Special courts for corruption cases August 25, 2015 The Nigerian Lawyers <https://thenigerialawyer.com/special-courts-for-corruption-cases/> accessed 3 September 2021.

> The key here, if one is to go by the dealings of South Korea in reforming itself in the last 15 years, is not to imprison or harass past offenders but rather, to seduce them into bringing their money back into the Nigerian system and to benefit ordinary Nigerians by investing in public works and infrastructure and building businesses from which, yes, they will profit, but the majority also stands to gain through employment and the modern services provided. I for one refuse to accept that the billions in foreign currency sitting out there somewhere are lost to Nigerians, who will never see this money used to impact their daily lives. This is a creative, workable and most of all, real, answer to past stolen funds. Then, a mixture of punishment and deterrence can be employed to discourage new cases of corruption.

The article goes on to argue about the paramountcy of the political will to fight corruption, ensuring that anti-corruption agencies are totally free from police and political control.[169]

This study has gained accessed to and reviewed the Corruption Cases Database, a project of TransparencIT[170] it summarises all cases of corruption including those of 'political' corruption which simplifies its information with detailed infographics, providing for each of the matters the date of arraignment, the Presiding Judge and the Designated Court, the Nature and the Number of charges, the Summary of Cases, the Prosecuting Agencies, the Status of Cases, the Stages of Case, the Length of Trials, the Cases Update, the ACJA/ACJL (Administration of Criminal Justice Law) Compliance.[171] It reveals evidence of inexcusable delays and non-compliance with the ACJA and the extent of how corruption has riven the Nigerian society and this study intends to engage, interrogate and subject some of these cases to what a TRC model will look like in addressing them.

[169] Tabia Princewill *Time for creative solutions: An innovative approach to dealing with corruption.* Vanguard Newspapers (Lagos January 27, 2015).
[170] Corruption Cases Database <https://corruptioncases.ng/> accessed on 16 July 2021.
[171] Corruption Cases Database <https://corruptioncases.ng/> *Op. Cit.*

A review is also conducted on Matthew T. Page's article on '*A New Taxonomy for Corruption in Nigeria*.'[172] Where he suggests that corruption is the single greatest obstacle preventing Nigeria from achieving its enormous potential. He argues that it drains billions of dollars a year from the country's economy, stymies development, and weakens the social contract between the government and its people. He claims that Nigerians view their country as one of the world's most corrupt and struggle daily to cope with the effects. He goes on to highlight the gap and lacunae in the analytical tools, which exist for examining the full range and complexity of corruption in Nigeria's economy. His paper proposed a new, context-specific framework for understanding a problem that will remain a focus of international and domestic Nigerian policy discussions for decades to come.[173] Corruption in Nigeria appears to be ubiquitous and takes many forms: from massive contract fraud to petty bribery; from straight-up embezzlement to complicated money laundering schemes; from pocketing the salaries of nonexistent workers to steering plum jobs to relatives and friends. Some officials enjoy perquisites so excessive that they are widely seen as a form of legalised corruption.

He observes that even Nigerians view their country as one of the world's most corrupt; it perennially ranks in the bottom quartile of Transparency International's Corruption Perception Index.[174] He refers to the reports and commentary about corruption are a staple of the country's vibrant media and among its writers and filmmakers. He observed further that: "Yet popular—and even official and academic—narratives

[172] Matthew T. Page *Op. Cit.* (2018).
[173] *Ibid.*
[174]Nigeria's latest CPI ranking, see: "Nigeria," Transparency International, <https://www.transparency.org/country/NGA>

about corruption in Nigeria lack a common framework for understanding a topic so expansive and variegated."[175]

He draws from claim that there are thirteen types are: bribery, extortion, exchange of favors, nepotism, cronyism, judicial fraud, accounting fraud, electoral fraud, public service fraud, embezzlement, kleptocracy, influence peddling, and conflicts of interest.[176]

Kevin Nwosu a former Director of Academics Nigerian Law School in the paper, *'Criminal Justice Reforms in Nigeria: The Imperative of Fast Track; Plea Bargains; Non-Custodial Options and Restorative Justice'* raises germane issues for this study.[177] Apart from a conceptual analysis of alternative dispute resolution (ADR), he argues for the need to undertake a fully charted path for their effective adoption and mainstreaming in the criminal justice system in Nigeria. Essentially he aims to explore the extent to which the new alternative disputes resolution mechanisms and restorative/reparative justice principles can contribute to current efforts at criminal justice reforms in Nigeria.[178] In addition to highlighting the jurisprudential basis for use of the new measures in criminal justice, he also highlights and considers suitable approaches for unlocking the potential of these concepts and practices in the criminal justice system. The paper covers the following key areas / issues:

[175] Matthew T. Page *Op. Cit.* (2018) .
[176]See: Susan Rose-Ackerman and Bonnie J. Palifka, *Corruption and Government: Causes, Consequences, and Reform* (New York: Cambridge University Press, 2016), 8–9. For the diagram, see page 28.
[177] Kevin Nwosu, *Criminal Justice Reforms in Nigeria: The Imperative of Fast Track; Plea Bargains; Non-Custodial Options and Restorative Justice* (October 18 2010). <http://www.nigerianlawguru.com/articles/criminal%20law%20and%20procedure/CRIMINAL%20JUSTICE%20REFORMS%20IN%20NIGERIA.pdf > accessed on 14 July 2021.
[178] Kevin Nwosu, *Op. Cit.*

- Nigerian Criminal Law and Procedure in Perspective – with statistical data of time frame for disposal of criminal cases, prison population and awaiting trial inmates.
- ADR in Perspective.
- Avenues for Use of ADR in Criminal Justice.
- Designing the appropriate Legal and Institutional Framework for Mainstreaming ADR in Criminal Justice in Nigeria.[179]
- Legal Practitioners' Remuneration in ADR.

Martha Minow in her paper, *Do Alternative Justice Mechanisms Deserve Recognition in International Criminal Law?: Truth Commissions, Amnesties, and Complementarity at the International Criminal Court,*[180] argues that in the aftermath of crimes against humanity and gross violations of human rights, should international legal institutions promote the use of criminal sanctions or instead support forgiveness and reconciliation? Either response is better than silence, but comparing prosecutions and reconciliatory steps brings tough choices, both legally and politically. Adversarial criminal prosecution holds the promise of generating facts, holding individuals accountable, and deterring future horrific conduct, but criminal trials also can be time-consuming, expensive, inevitably selective, remote in time and location from the lives of those most affected, and indifferent to the goals of social peace and personal healing. She points to Truth and reconciliation commissions, exemplified by South Africa's effort following the end of Apartheid, stating they represent an alternative

[179] *Ibid.*
[180] Martha Minow Do Alternative Justice Mechanisms Deserve Recognition in International Criminal Law?: Truth Commissions, Amnesties, and Complementarity at the International Criminal Court (2019) (60)(1) *Harvard International Law Journal,* 1.

justice mechanism that pursues truth-telling and opportunities for reconciliation, rather than punishment. She argues that such methods can provide occasions for individual wrongdoers to apologize, and for victims and survivours to forgive, but these methods can also be marred by corruption, compromise, and an appearance of condoning terrible acts. She posits that the trade of truth for punishment may offer a predicate for social reconciliation, but unconditional amnesties following terrible violence—and pardons following flawed trials—likely signal political pressures to sacrifice justice. However, it could be argued that TRCs still impose informal sanctions in terms of reputational and through other means. Albie Sachs's quote after the completion South African TRC process encapsulated this dilemma:[181]

> There was concern by the members that the ANC were exposing all of their problems to the world and threatening to punish people for the violations that they committed, but where equally concerned about the thousands and thousands of people on the other side who have been torturing, murdering, defaming, arresting, raping, and expelling them for decades. They asked: "… are they to get off scot free?[182]

Justice Albie Sachs clarified it by arguing:[183]

> Accountability to shame, imagine a person goes home and Daddy did you do that its on television? It is not an easy thing, its not getting away scot free, it is not the same as impunity. The fact that it was individualised personalised created a direct link with individual responsibility. There were pragmatic reasons as well, we did not have evidence, we would have had cases dragging on for years, placing burdens on the already overburdened law courts.

The choice among approaches is left open in the design of the International Criminal Court ("ICC"), which seeks to encourage domestic legal systems to pursue

[181] Albie Sachs, *Op. Cit.* (2016).
[182] Olu Ojedokun (2006), *Op. Cit.*
[183] Drucilla Cornell, Karin van Marle and Albie Sachs and Transformation in South Africa: From Revolutionary Activist to Constitutional Court Judge (Birbeck Law Press Oxford, 2014).

international crimes against humanity, genocide, and other gross violations of human rights within their national justice system.[184] Through its notion of "complementarity," the ICC seeks to localise international norms through a relationship between domestic courts and a permanent Court with potential jurisdiction across the world; the ICC actually loses its authority to proceed when the domestic jurisdiction does so in an adequate way. To set the standards for international justice—and to build capacity to pursue justice in nations where mass violence occurs— should the international institution treat truth commissions, grants of amnesty, and other alternatives to prosecution as satisfying the predicate of national action that in turn deprives the ICC of authority to proceed? Martha Minow's article analyses the debates around alternatives to trials in fulfilling complementarity and advances recognition of some domestic restorative justice processes under specified criteria.[185] The issues this article explores have implications not only for international criminal justice but also for alternatives to adjudication in national and local responses to any criminal conduct and it is the latter that concerns this study.

There is an argument that transitional justice is the approach, which allows the space for the consideration of Truth and Reconciliation Commissions as a form of utility.[186] The paper describes it as a response to systematic or widespread violations of human rights and seeks recognition for victims and promotion of possibilities for peace, reconciliation and democracy. It is an approach, which emerged in the late 1980s and early 1990s mainly in in response to political changes in Latin America and Eastern

[184] Martha Minow, 21 (2019*) Op. Cit.*
[185] *Ibid.*
[186]The International Centre for Transitional Justice (2009). *What is Transitional Justice?* <https://www.ictj.org/sites/default/files/ICTJ-Global-Transitional-Justice-2009-English.pdf> accessed on 2 September 2021.

Europe—and to demands in these regions for justice.[187] At the time, human rights activists and others wanted to address systematic abuses by former regimes but without endangering the political transformations that were underway. Since these changes were popularly called "transitions to democracy," people began calling this new multidisciplinary field "transitional justice." Governments then adopted the following, which became basic approaches and now include the following initiatives:

(1) Criminal prosecutions, (2) Truth Commissions, (3) Reparation programmes, (4) Gender justice, (5) Security System Reform, and (6) Memorialization efforts. Whilst for the purpose of this study the focus is on the utility of Truth Commissions as a model, which allows its adaptability. The study notes the argument contained in a United Nations document[188] that the many problems that flow from past abuses are often too complex to be solved by any one action. That experience suggests that to be effective transitional justice should include several measures that complement one another. There is no single measure that is as effective on its own as when combined with the others. This has already been argued drawing on Moffet that although such measures can be complementary, there can also be overlap and tension between them, such as when trying to carry out prosecutions while at the same time seeking to secure truth, which requires careful crafting of social, political, economic and legal factors to avoid derailing the transition itself.[189]

Rwanda presents one of the attempts at utilising transitional justice tool using the establishment of the Gacaca court system to address the fact that there were thousands

[187] *Ibid.*
[188] United Nations. Outreach Programme on the Rwanda Genocide and the United Nations Background Information on the Justice and Reconciliation Process in Rwanda (2016). http://www.un.org/en/preventgenocide/rwanda/about/bgjustice.shtml Accessed on 2nd September 2021
[189] Luke Moffett *Op.Cit.* (2019: 143 -168).

of accused still awaiting trial in the national court system, and to bring about justice and reconciliation at the grassroots level[190] The Rwandan government in 2005 re-established the traditional community court system called "Gacaca" (pronounced GA-CHA-CHA). In the Gacaca system, communities at the local level elected judges to hear the trials of genocide suspects' accused of all crimes except planning of genocide. The courts gave lower sentences if the person was repentant and sought reconciliation with the community. The confessing prisoners often returned home without further penalty or received community service orders.[191] More than 12,000 community-based courts tried more than1.2 million cases throughout the country.[192]

The Gacaca trials also served to promote reconciliation by providing a means for victims to learn the truth about the death of their family members and relatives. They also gave perpetrators the opportunity to confess their crimes, show remorse and ask for forgiveness in front of their community. The Gacaca courts officially closed on 4 May 2012, (United Nations, 2016).[193]

This review then proceeds from a brief analysis of South Africa's political history leading up to the aftermath of conflictual situation and proceeds to draw linkages with the prevailing situation in Nigeria with respect to the fractures presented by the failure to sufficiently address crimes political corruption.

It draws from the work of Drucilla on Albie Sachs,[194] which traced the initial political success of the South African National Party's domination from the second half of the 20th century and attributed the conflictual situation that developed to the fact that

[190] United Nations. Outreach Programme on the Rwanda Genocide and the United Nations Background Information on the Justice and Reconciliation Process in Rwanda (2016). *Op. Cit.*
[191] United Nations, 2016 *Op. Cit.*
[192] United Nations, 2016 *Op. Cit.*
[193] United Nations, 2016 *Op. Cit.*
[194] Drucilla Cornell, Karin van Marle and Albie Sachs (2014), *Op. Cit.*

many of its activities and policies did not represent a major break with the past of apartheid.[195] He suggested this was noticed particularly in the handling of inter-group relations. He explained that the National Party did not invent segregation, which was a hallmark of the reconstruction era under Milner, and had already found expression in the land and urban residential legislation of 1910 to 1924 and (for Natal Indians) of 1943 to 1946. Nor did it invent the colour bar, which dated from before Union and had been regularised by Hetzog in 1926.[196] The same also applied to pass laws, though it held on to them in spite of the Sharpeville revolt of 1960 and need to arrest over 600,000 people yearly in the late 1960s in order to enforce them. Davenport argued[197] that it was, however, the National Party that after 1948 bonded itself to the apartheid ideology,[198] which had been refined in the Broederbond's conclaves. This bond Davenport argued plunged South African politics into a dark age, arising out of the conviction of a few prominent leaders, some of them ideologues and others amoral pragmatists who were not really united.[199]

South African online[200] provides a further historical account from the 1960s, which marked an important watershed in South Africa's struggle against apartheid. This account was linked to the aftermath of the Sharpeville Massacre where the signal of the beginning of a far more brutal phase of state repression to crush internal resistance became apparent. The African National Congress (ANC) and the Pan Africanist

[195] Patrick J. Furlong. The National Party of South Africa: A Transnational Perspective, Martin Durham New Perspectives on the Transnational Right, Switzerland, Springer Nature , 67-84.
[196] Rodney Davenport and Christopher Saunders, South Africa, A Modern History Palgrave Macmillan; 5th ed. 2000 edition 2000:312-369.
[197] *Ibid.*
[198] *Ibid.*
[199] *Ibid.*
[200] South African Online. A History of Apartheid in South Africa (2011) <http://www.sahistory.org.za/article/history-apartheid-south-africa> accessed 2 September 2021.

Congress (PAC) became the first causalities and were forced underground. This led to the adoption of new tactics.[201]

This review returns to Smulovitz[202] and it accepts that in the desire to achieve domestic demands for accountability and justice the process in Nigeria with respect to crimes of political corruption is required to be transparent and publicly held, to focus on the conflict and past crimes rather than present and confronting past crimes. The process will also require direct and broad engagement with the affected population to gather their experience and the preparation of a report that is an official acknowledgement of suffering and loss to the Nigerian people.

The review, however, notes, the following pitfalls would have to be avoided:[203]

- Emphasizing national reconciliation at the expense of individual reconciliation
- Emphasizing a Trade-Off between:
- Justice & Peace.
- Justice & Truth.
- Justice & Reconciliation.
- Giving a sense that Justice is Retributive and Reconciliation is Restorative.

In response to a suggestion that some may also argue that we would be letting historical crimes go unpunished in order to aid political expediency, this study goes to South African's Kadar Asmal rebuttal, which states that:[204]

[201] Rodney Davenport, South, 2000 *Op. Cit.*
[202] Smulovitz, C. Comparing the Effectiveness of the Accountability Mechanisms in Eastern Europe and Latin America‖ jointly organized by El Colegio de México and the United Nations (2005).
[203] Smulovitz, C .*Op. Cit.* (2005).
[204] Kadar, Asmal Hansard, Act No.34 of 1995: Promotion of National Unity and Reconciliation Act 1995:1382 -3.

> I therefore say to those who wear legalistic blinkers, who argue that immunity would be an affront to justice, that they simply do not understand the nature of the negotiated revolution that we have lived through, we must deliberately sacrifice the formal trappings of justice, the courts and trials, for an even greater good: Truth. We sacrifice justice for truth so as to consolidate democracy, to close the Chapter of the past and to avoid confrontation.[205]

This review explores an argument that suggests a proper political communication process could address the commencement of the healing process of fractures present in the Nigerian polity. In response to some concerns that may be raised that this is an advocacy for a process where truth might be compromised. Albie Sachs does not agree that truth itself will be compromised, he concedes depending on the definition of justice, however, justice may have been partially compromised:[206]

> If people say that justice was compromised… but I don't think any truth was compromised whatever your standards. If justice is understood strictly in terms of accountability and punishment, by deprivation, then one might say it was affected. But to my mind justice is a much richer concept than that, accountability yes, there was accountability in the sense of having to publicly acknowledge what you have done that was accepting responsibility. Accountability to shame, imagine a person goes home and the child asks Daddy did you do what you said on television? It is not an easy thing, its not getting away scot-free, it is not the same as impunity. The fact it was individualised, personalised created a direct link with individual responsibility, which is at the heart of accountability. There were pragmatic reasons as well, we just did not have the evidence, we could have had cases dragging on for years, placing burdens on the already overburdened law courts.

Albie Sachs argued that from a purely functional point of view, in the South African process they could not get all the evidence and it could have been arbitrary in its impact that many people who had done terrible things would get off because there was no evidence and others more smaller agents of wrong doing would be sent to jail

[205] Kadar, Asmal., *Op. Cit.* 1382 -3 1995.
[206] Albie Sachs, (2003) *Op. Cit.*

and that a new sense of injustice will emerge.[207] This study therefore suggests that the adaptation process for corruption crimes must have an irreducible minimum, which is a commitment to truth. As Roberto Canas of El Salvador puts it:[208]

> Unless a society exposes itself to the truth it can harbour no possibility of reconciliation, reunification and trust. For a peace settlement to be solid and durable it must be based on truth...[209]

The concept of transitional justice, Mikkel Jarle Christensen argues was originally coined as a scholarly concept, which he explains in his paper *The Borderlands between Punitive and Non-punitive Transitional Justice: Distinct Elites and Diverging Patterns of Import/export*[210] and refers to a range of activities and goals seen as relevant for societies in passage from conflict to more stable or democratic forms of governance. He clarifies the concept of transitional justice stating that it covers criminal prosecutions, truth and reconciliation commissions (TRCs), reparations programmes, security and justice reforms, memorialization efforts, amnesties, and lustration policies. He, however, suggests that in theory and in practice, the different ideals and activities grouped under the broad heading of transitional justice both coexist and conflict.[211]

Mikkel points to the existence of visible conflicts, perhaps most controversially, in the tension between punitive and non-punitive responses to crimes committed prior to transition; between ideals and practices of prosecuting and punishing individuals for their crimes, and ideals and practices related to truth and reconciliation efforts. That

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[207] Albie Sachs, (2003) *Op. Cit.*
[208] Alex Borraine. *Justice in cataclysm: criminal tribunals in the wake of mass violence: alternatives and adjuncts* (1996). <http://www.truth.org.za/reading/speech01.htm > accessed on 2 September 2021.
[209] *Ibid.*
[210] Mikkel Jarle Christensen *The Borderlands between Punitive and Non-punitive Transitional Justice: Distinct Elites and Diverging Patterns of Import/*export (2020)(14)(3), *International Journal of Transitional Justice*, 464–482, <https://doi.org/10.1093/ijtj/ijaa024> .
[211] *Ibid.*

such conflicts also link to wider questions about who has the power to define what initiatives are given preference in specific transitional settings, how these choices are structured by Global North/Global South power dynamics (as reflected for instance in the meeting between internationalised institutions and local stakeholders), and the role that specific elites play in processes where internationalised transitional justice norms meet national and local power dynamics.[212] Furthermore he notes transitional justice as a research endeavour has a strong multidisciplinary character that is not as visible in the more narrow scholarship of international criminal justice, focused as it is on legal technologies, and often produced by scholars who also have a practical legal profile. That within the broader transitional justice literature, political scientists were the most active in terms of articles published, closely followed by law and sociology.[213] However, the Special Summit on National Security 2021 in its final edition speaks about the absence of a transitional justice framework. It states:

> The absence of a transitional justice framework remains a challenge in addressing intractable conflicts in Nigeria. Centre for Democracy & Development (CDD) has already developed a document on Transitional Justice, which was designed with Boko Haram in mind. The transitional justice process in Nigeria has focused on setting up development commission such as the Northeast Development Commission (NEDC) and the Niger Delta Development Commission (NDDC). The problem with these frameworks is that they are not comprehensive and lack the full range of processes and mechanisms to serve justice and reconciliation in addition to the promotion of the rule *of law.*

It is this absence that this study seeks to interrogate. Whilst we are specifically concerned with crimes of political corruption this review has afforded this study the opportunity to wrestle with various existing Nigerian legislation. These as earlier indicate the construction of strong anticorruption measures, including the setting up of

[212] Mikkel Jarle Christensen (2020)(14)(3464–482, *Op. Cit.*

[213] Geoff Dancy et al., Behind Bars and Bargains: New Findings on Transitional Justice in Emerging Democracies, (2019) (63)(1) *International Studies Quarterly* 99-110.

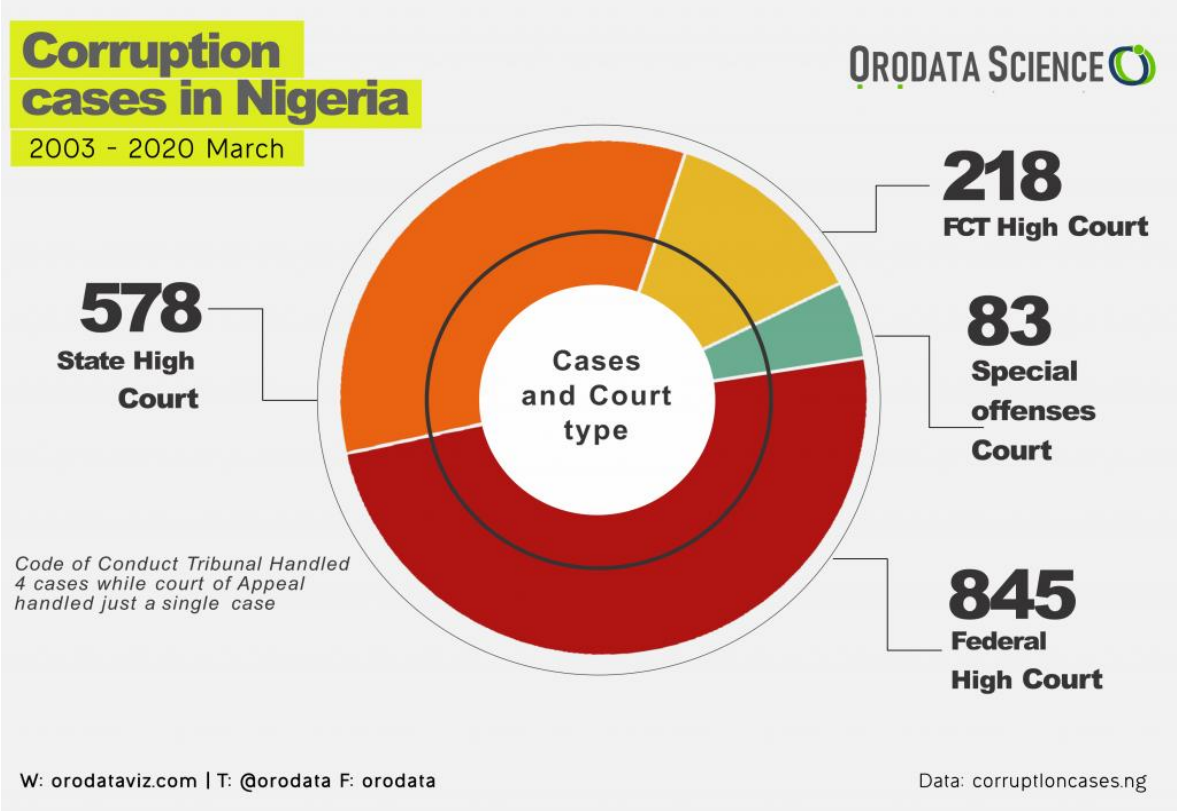
a Police Central Criminal Registry under the ACJA, compensation to victims of crime,[214] a recognition of the growing importance of victims.[215] It also referred to the past evidence of the ICPC's role in terms of victim's compensation where funds recovered from the fraudsters were handed over to the authorities.[216] The study also accepts that there is very little contained in the relevant provisions of the anti-corruption agencies that indicate it can wrestle Nigeria from the stalemate of corruption.

The study refers to the encouragement of the case of the Canadian TRC its indication of a degree of adaptability beyond the traditional TRCs.[217] It notes Mikkel Jarle Christensen's provision of a window that may be found within the punitive and non punitive even in the absence of what he describes as a framework to begin to explore sanctions other than those that are punitive to address crimes of corruption without the victims feeling shortchanged.[218]

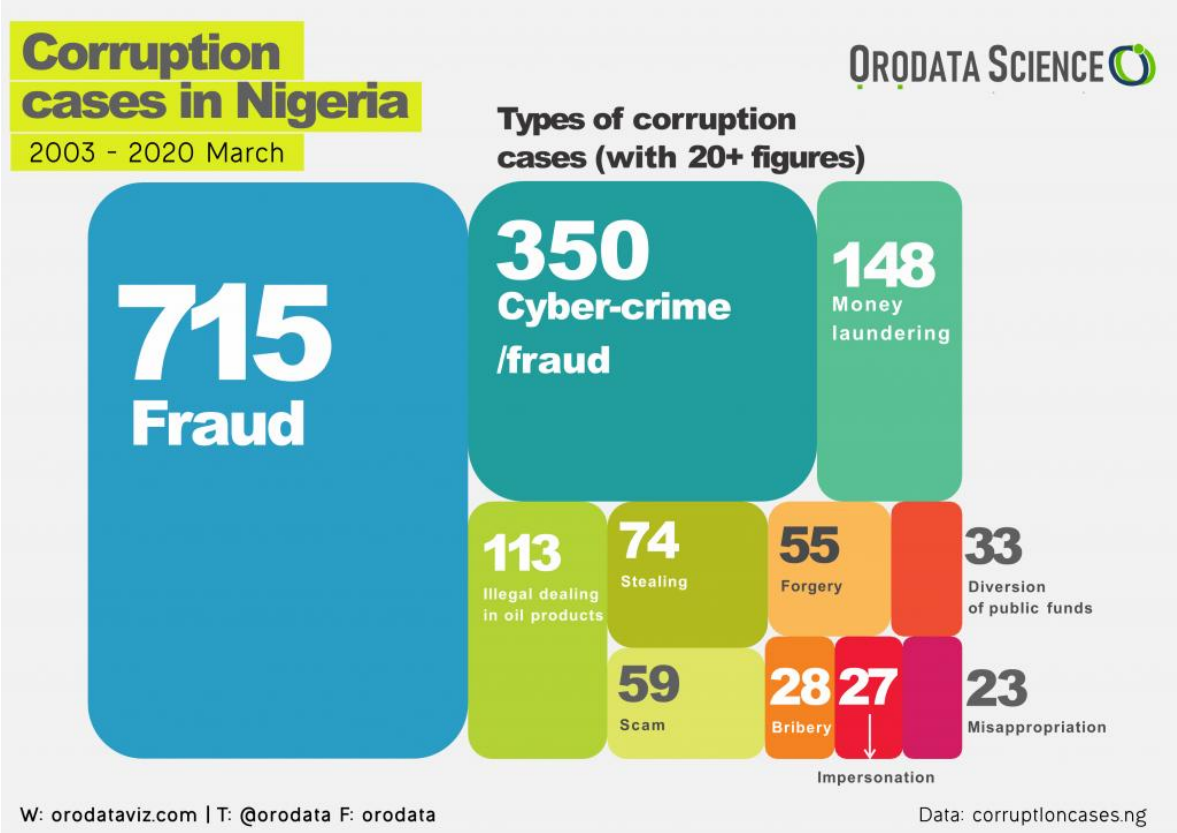
It covered the fact that it draws from Smulovitz[219] desire to achieve domestic demands for accountability and justice and that this is a process that can be applied in Nigeria with respect to crimes of political corruption but will require transparency and need to be publicly held, focus on the political corruption conundrum and confronting

[214] Often times, victims of crimes are neglected without any form of compensation even when the offender has been found guilty. The ACJA has addressed this ugly trend by broadening the powers of the court to award costs, compensation and damages in deserving cases, especially to victims of crime. By the provisions of section 319 of the Act, court may order a convict to pay compensation to any person injured by the offence, irrespective of any other fine or other punishment that may be imposed or that is imposed on the defendant.
[215] Section 314 of the ACJA.
[216] Independent Corrupt Practices & Other Related Offences Commission ICPC Disburses N9.6m to Victims of Fraud February 26, 2015 https://icpc.gov.ng/2015/02/26/icpc-disburses-n9-6m-victims-fraud/ *Op. Cit.*
[217] Volume Six Section Two Chapter One Report of the Reparation and Rehabilitation Committee. 1998 https://reparations.qub.ac.uk/assets/uploads/South-Africa-TRC-vol6_s2.pdf Accessed on 3rd September 2021.
[218] Mikkel Jarle Christensen (2020)(14)(3464–482, *Op. Cit.*
[219] Smulovitz, C. Comparing the Effectiveness of the Accountability Mechanisms in Eastern Europe and Latin America‖ jointly organized by El Colegio de México and the United Nations (2005).

past crimes. We have below some indication of the scale of corruption cases in Nigeria over a specified period. The trajectory is upwards.[220] The study includes infographics on the next two pages, which captures the corruption in its scales without demonstrating that the system is coping when you consider years 2003 to 2020.



[220] Unini Chioma,. *Op. Cit*. 2015.



It is precisely because the existing frameworks are not comprehensive, lack the full range of processes and mechanisms to service justice, reconciliation and promote the rule of law that this study continues the exploration of the TRC model as an option to resolving our present conundrum.

2.4 CONSTITUTIONAL CONSTRAINTS TO ADAPTATION

This part of the review of literature considers suggestions that a careful consideration of the option of a truth and reconciliation process could address potential cleavages brought about by the status quo described by Max Siollun.[221] The question then is could the Nigerian government with respect to the problem of corruption move towards a more complete adaptation of the template of the South African TRC to

[221] Max Siollun, (2013) *Op. Cit.* p.185.

unlock the impasse and allow us to open a new chapter? However, the review recognises that to initiate such a process will require a significant constitutional amendment, which will involve moving the setting up of tribunals into the concurrent or exclusive legislative list allowing the National Assembly to legislate accordingly.[222] This is because of the decision reached in the case of *Fawehinmi v Babangida*. The issues for determination at the Supreme Court were:[223]

> Whether the Tribunals of Inquiry Decree No 41 of 1966 was validly enacted by the National Assembly pursuant to the provisions of Section 315
>
> of the Constitution of the Federal Republic of Nigeria 1999?
>
> Was there a constitutional provision giving power to enact such a statute to set up a Commission of Inquiry to probe human rights violations under military rule in Nigeria?[224]
>
> Whether or not Sections 5(c), 5(d), 10, 11(1)(b), 11(3), 11(4) and 12 of the Tr ibunals of Inquiry Decree No 41 (or any of them) were constitutional and vali d by virtue of Section 35 or 36of the Constitution of the Federal Republic of Nigeria 1999?
>
> Whether the incidental or supplementary powers set forth in Item 44 of the 1 999 Constitution was wide enough to enable Parliament to enact legislation f or the whole Federation of Nigeria giving powers to the Commissioners to ta ke evidence on oath, to compel the attendance of witnesses and the productio n
> of documents?
>
> Whether the Commission was constitutionally empowered under the Tribunals of Inquiry Act 1966, or under other measures, to give effect to the rights and freedoms enshrined in the African Charter on Human and Peoples' Rights (enacted in Cap. 10 Laws of the Federation of Nigeria 1990)?[225]

[222] *Fawehinmi and 2 Others v Babangida and 2 Others* (SC 360/2001) [2003] 9 (31 January 2003). Also see the earlier case of Togun v. Oputa (NO. 2) (**2001**) **16 NWLR** (PART 740) 597 at 621
[223] *Ibid.*
[224] *Fawehinmi and 2 Others v Babangida and 2 Others* (SC 360/2001) [2003] *Op. Cit.*
[225] *Ibid.*

It was held that:[226]

1. **On the competence of the Military Government to make laws**
   Section 6(6)(*d*) of the 1979 Constitution (then relevant and applicable but repeated as Section 6(6)(*d*) of the 1999 Constitution) protected the *de jure* authority and the integrity of the competence which the Military Government assumed to make laws for the country between 15 January 1966 and 30 September 1979 from being questioned in court. That had nothing to do with the courts' power to consider the constitutional or legal validity of such laws. Per Uwaifo, JSC at 254.[227]
2. **On the constitutionality of the Tribunals of Inquiry Decree No 41**
   Sections 5(*d*), 11(1)(*b*), 11(4) and 12(2) of the Tribunals of Inquiry Decree No 41 were unconstitutional and invalid in so far as they purported to empower the Tribunal of Inquiry to impose a sentence of fine or imprisonment, which was a power in contravention of and not in conformity with Sections 35 subsection (1)(*a*) and 36 subsection (1) of the Constitution. On the other hand, Sections 5(*c*), 10 and 11(3) of the Tribunals of Inquiry Act, to compel the attendance of witnesses and the production of documents were constitutional and valid in so far as they applied to the Federal Capital Territory, Abuja. Per Uwaifo, JSC at 254.[228]

1. **On the power of the National Assembly to enact a general law for the establishment of tribunals**
   The National Assembly cannot enact a general Law for the establishment of tribunals of inquiry for, and applicable in, the Federation of Nigeria. The power to enact such a Law has become a residual matter for the States in respect of which the Houses of Assembly can legislate for their respective States by virtue of Section 4(7)(*a*) of the 1999 Constitution. Although the Tribunals of Inquiry Act is an "existing law," its application is limited and has no general application. Per Uwais, CJN at 274.[229]

4. **On the power of the Commission to compel witnesses to testify**
   The power of the Commission to compel witnesses to testify and produce documents has nothing to do with the exclusive power of the National Assembly to legislate on "Evidence" under the Exclusive Legislative List (Item 23) of the Constitution. Per Uwaifo, JSC at 254.[230]

To achieve adaptability a new TRC process will to an extent be independent of government control and have a remit that allows it to revisit historic issues in political

[226] Fawehinmi and 2 Others v Babangida and 2 Others (SC 360/2001) [2003] 9 (31 January 2003) <https://nigerialii.org/ng/judgment/supreme-court/2003/9 >accessed on 3 September 2021
[227] *Ibid.*
[228] *Fawehinmi and 2 Others v Babangida and 2 Others* (SC 360/2001) [2003] *Op. Cit.*
[229] *Ibid.*
[230] *Ibid.*

corruption stemming from independence era. This occurrence will only be achieved with a wide acceptance of Tutu's hypothesis that the entire society is an aggregation of individuals.[231] Therefore the main remit of any such Truth Commission should be to explore the possibility of the communication and establishment of shared ideals, which include unity and reconciliation in a spirit of understanding, which transcends the conflicts and divisions of the past. This study will revisit the recommendations and conclusions to address the questions raised to the problems posed above but provides an initial suggestion of the objectives worthy of consideration:

(1) establish as complete a picture as possible of gross human rights violations and corrupt practices perpetrated between 1960 to the present say by conducting investigations and hearings; (2) facilitate granting of amnesty in exchange for full disclosure of truth for acts with a political objective within guidelines of an Act and on condition in the cases of corruption that appropriate restitution is made to their respective local government areas; (3) make known the fate of victims and restore their human and civil dignity, and allow them to give accounts and recommend reparations; (4) make a report of findings and recommendations to prevent future human rights violations. (5) make provision to exclude all those who have admitted to gross human rights violations and corrupted practices from any future political dispensation in return for their amnesty and on condition that appropriate restitution is made. It should report to a convocation of the peoples in the Nigeria. These could mean that traumatic events that occurred during the recent era are uncovered, ancient myths unravelled, hidden truths exposed.

[231] Tutu, D.M. Church and Nation in the Perspective of Black Theology. *Journal of theology for Southern Africa* No 15 (June 1976).

CHAPTER 3

THE SOUTH AFRICAN EXPERIENCE IN THE MODELLING OF TRC AS A MEANS OF RESTORATIVE JUSTICE

In the past TRCs have sought to offer an outlet for expression of oppressed persons who yearn for admissions of guilt and sometimes for apologies from those who have oppressed them and done them wrong. Luke Moffet argued that since the 1990s there has been an increasing emphasis on the need for multifaceted, comprehensive transitional justice measures to effectively deal with impunity and the consequences of mass violence and the South African TRC appears to be a response to this.[232]

A platform for pacific settlements or management of conflicts, which results from TRCs appear not to provide what is traditionally considered punitive measures but offer avenues for admissions of guilt, apologies and sometimes payment of reparations or compensations; leading to the notion of restorative justice.[233] The lack of traditional penal remedies gives rise to a lot of criticisms of TRCs and the model. The most notable is the argument that it is not punitive in nature and therefore lacking

[232]Luke Moffett *In the Aftermath of Truth: Implementing Commissions' Recommendations on Reparations – Following Through for Victims* In J Sarkin (Ed), *The Global Impact and Legacy of Truth Commission* (pp.143 -168) Intersentia doi: 10.1017/9781780687957.006 (2019).
[233] Ashley DeMinck, *The Origins of Truth and Reconciliation Commissions: South Africa, Sierra Leone, and Peru.* < http://digitalcommons.macalester.edu/soci_honors/8 > accessed on 2 May 2014 (2007).

in the element of deterrence.[234] This study notes that despite this criticism, many jurisdictions from across the world have, and indeed continue to establish and apply the conduct and practice of Commissions such as the TRC under various names. [235]

Besides that argument there is increasing evidence that Nigeria's ACJA contains elements of restorative justice, sitting side by side with traditional elements.[236] This may not be unconnected with Hayner's view that truth commissions exhibit four defining characteristics which are that they: 'focus on the past'; 'they investigate a pattern of abuses over a period of time, rather than a specific event'; they are temporary bodies operating for a defined period; and they are sanctioned, empowered or authorised by the state and sometimes the opposition.[237]

In addition to this, it is noted that from the South African TRC experience, the sight of the criminals themselves publicly confessing to their crimes served to heal the scars of the past. This policy of both ethical and strategic forgiveness is neatly expressed in the Commission's slogan, ''Revealing is healing.''[238] Thus, a commission was regarded as more effective in reconstructing society and promoting social reconciliation than endless and costly trials of a handful of deposed leaders. In consonance with this, it may be the *raison d'etre* why this study seeks to explore this as an alternative to addressing crimes, even of corruption where traditional methods of prosecution seem no longer feasible because of the scale or the enormity.

3.1 THE SOUTH AFRICAN EXPERIENCE

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[234]Richard Wilson, *The Politics of Truth and reconciliation in South Africa; Legitimising The Post Apartheid State,* (New York, NY; Cambridge University Press 2001).
[235] Olu Ojedokun, 2006, *Op Cit.*
[236] *Administration of Criminal Justice Act, 2015.*
[237] Priscilla Hayner, *Unspeakable Truths: Confronting State Terror and Atrocity,* (New York, Routledge, 2001).

[238] Olu Ojedokun Speaking Truth and the Works of Albie Sachs (Unpublished Ph.D Thesis 2006, Nottingham Trent University).

The Truth and Reconciliation Commission of South Africa, which was compiled from the evidence of over 20,000 witnesses is one of the most significant of our time.[239] The South African TRC Report[240] represents the record of thirty-four years under apartheid and breaks the terrible silence that surrounded so many gross violations of human rights committed during those years.

The historical context of the establishment of the TRC is located within the speech of Mandela where he said:[241]

> In this context, I also need to make the point that the Government will also not act unduly with regard to attending to the vexed and unresolved issues of an amnesty for criminal activities in furtherance of political objectives. We will attend to this matter in a balanced and dignified way. The nation must come to terms with its past in a spirit of openness and forgiveness and proceed to build the future on the basis of repairing and healing. The burden of the past lies heavily on all of us, including those responsible for inflicting injury and those who suffered. Following the letter and spirit of the Constitution, we will prepare the legislation which will seek to free the wrongdoers from fear of retribution and blackmail, while acknowledging the injury of those who have been harmed so that the individual wrongs, injuries, fears and hopes affecting individuals are identified and attended to. In the meantime, summoning the full authority of the position we represent, we call on all concerned not to take any step that might, in any way, impede or compromise the processes of reconciliation, which the impending legislation will address.

The highlights of the speech indicated that the nation must reconcile itself in such a manner that persons who had been hurt or injured will be assuaged while those who have caused the hurt or injury will be relieved of their fear of retribution in return for their admissions of guilt and apologies. Importantly, this laudable objective would be achieved within the limits of both the letter and spirit of the law. The speech also

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[239] Truth and Reconciliation Commission of South Africa Report (final report), Section 4, Chapter 3, (Macmillan Press Oxford 1998).
[240] *Ibid.*
[241] Nelson Mandela, Negotiations, the ANC Vision of a New South Africa and the Indian Community Keynote Address by President of the African National Congress, (1993). <http://www.anc.org.za/ancdocs/history/mandela/1993/sp930213.html > accessed on 25th October 2005.

highlighted that the achievement of this would result in the country coming to terms with its past in a way that was both balanced and dignified and providing a conducive atmosphere for the future.

3.2 THE MANDATE AND WORK OF THE TRUTH AND RECONCILIATION COMMISSION

The Truth and Reconciliation Commission (TRC) was established after South Africa's transition to a non-racial democracy by a bill introduced in parliament in 1994. Its primary purpose was to investigate acts of violence and discrimination committed by the apartheid regime.[242] It also hoped to obtain as complete a record as possible of abuses inflicted by individuals and organisations during the apartheid era, including abuses by exiled groups like the ANC and the Pan-Africanist Congress.[243] It hoped that these would foster a climate of reconciliation and that those who confessed to human rights violations could apply for amnesty.

Omar provided further insight by positing that the final clause of the South African Interim Constitution assumed the role of providing an historic bridge between a society of deeply divided past characterised by strife, conflict, untold sufferings and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex.[244]

[242] Promotion of National Unity and Reconciliation Act, 1995. No. 34 of 1995.
[243] Truth and Reconciliation Commission of South Africa Report (final report), *Op. Cit.* 3, (1998).
[244] Dullah Omar, Using State Power to Build a Human Rights Culture: The Truth and Reconciliation Commission in South Africa in (1997) (49) (4) *Monthly Review*, Between Nuremberg and Amnesia: The Truth and Reconciliation Commission in South Africa.

Gibson and Gouws also described the creation of the Commission as an effort for South Africa to put its past firmly behind.[245] They argued that it was based on a number of presuppositions about political psychology. The foremost is the assumption that knowledge promotes forgiveness and reconciliation flows from truth. This study tends to agree with this because the TRC ultimately named the Truth and Reconciliation Commission. It was designed in broad consultation between political parties, human rights NGOs, Church groups, trauma centres, and others who had been involved in the struggle against apartheid. Hundreds of proposals and submissions were put before the design commission, and numerous public hearings were held. After months of discussions the form of the Commission was determined.[246]

3.3 CREATION AND STRUCTURE OF SOUTH AFRICAN TRC

The Truth Commission, ultimately named the Truth and Reconciliation Commission, was designed in broad consultation between political parties, human rights NGOs, Church groups, trauma centers, and others who had been involved in the struggle against apartheid.

Upon creation the Commission was divided into three components: an Amnesty Committee, which would hear Amnesty applications; a Human Rights Committee, which would provide a forum in which victims could come forward and tell their stories; and a Rehabilitation and Reparations Committee which would put forward

[245] In James Gibson and Amanda Gouws, Truth and Reconciliation in South Africa: Attributions of Blame and the struggle over Apartheid. [1999] 93 (3), *American Political Science Review,* they also described the creation of the Commission as an effort for South Africa to put its past firmly behind. They argued that it was based on a number of presuppositions about political psychology. The foremost is the assumption that knowledge promotes forgiveness and reconciliation flows from truth. (1999).

[246] Promotion of National Unity and Reconciliation Act, 1995 *Op. Cit.*

recommendations regarding the transformation of South African civil institutions and the reparation of victims. The Rehabilitation and Reparations Committee was also charged with providing support to victims during the on-going work of the Commission. Each committee worked independently from the others and from the TRC as a whole. This led to occasional problems, such as when the Amnesty Committee granted a blanket amnesty to 37 members of the ANC in contravention of the Commission's mandate.

Archbishop Tutu was the driving force behind the Commission's work. He created the framework through which the work of the TRC was understood. He made little attempt to separate his work on the Commission from his spiritual beliefs, often referred to as Ubuntu theology.[247] Ubuntu is the traditional African notion *"which affirms an organic wholeness of humanity, a wholeness realized in and through other people."* Desmond Tutu merged this traditional thought with Christian values of forgiveness, repentance and reconciliation. This ideology led to a subtle pressure on those who testified to forgive those who had committed crimes against them, as according to the Ubuntu ideology it was only through forgiveness and the recognition of the humanity of the wrongdoer that testifiers could fully reclaim their own humanity.

The Committee on Human Rights Violations listened to over 20,000 statements from people about atrocities that had happened to them or their family members. One of the hardest tasks the Committee had to face, according to a member, Burton[248] in

[247] Desmond Tutu Church and Nation in the Perspective of Black Theology [1976] 15(15) *Journal of Theology for Southern Africa*

[248] Mary Burton, 'Why Some Claims have to be Rejected' in Truth Talk (July 1998).

Adelson,[249] was having to make a decision that what someone had suffered was not a *"gross violation of human rights,"* and thus not eligible for compensation.[250] Claims could be rejected for a number of reasons, such as falling outside the time frame or not fitting the description of a gross violation.

3.4 THE PHILOSOPHY OF THE SOUTH AFRICAN TRC

The creators of the TRC believed that providing victims with the truth would facilitate the healing process. The hope was that by making amnesty conditional upon full disclosure such a truth would emerge.[251] While 7,060 individuals came before the Amnesty Committee, providing significant information for many victims, it is commonly agreed that perpetrators who did not approach the TRC far outnumbered those who did, and that the majority of those who testified failed to reveal information about many of their crimes. Thus, while some critical new information was revealed, the majority of the 20,000 victims who testified before the Human Rights Committee failed to gain any new information.[252]

Theoretically, the fact that amnesty was conditional upon full disclosure of crimes should have motivated perpetrators to reveal all of the salient information about their crimes. However, this study established that the TRC's investigatory department was understaffed and inefficient which limited the amnesty committee's ability to determine whether or not perpetrators had completely disclosed their crimes.

[249] Anne Adelson, 'Reconciliation: Truth and Consequences'. *Peace Magazine* (January-February 1999
[250] *Op. Cit.*
[251] Albie Sachs, *Op. Cit*. (2016).
[252] Carnita Ernest, "A quest for truth and justice: Reflections on the amnesty process of the Truth and Reconciliation Commission of South Africa," Paper presented to the Conference on Ten Years of Democracy in Southern Africa: Historical Achievement, Present State, Future Prospects, (University of South Africa, Pretoria, August 23-25. 2004).

Moreover, the threat of prosecution was always somewhat weak given the enormous number of perpetrators and the high cost of each trial. Perpetrators thus knew that the state was unlikely to bring charges against each of them. The TRC final report made 250 separate recommendations. Among these recommendations was a significant reparations policy that included financial reparations to each of the victims, and the construction of public memorials commemorating suffering of victims.[253]

3.5 OBJECTIVES OF THE SOUTH AFRICAN TRC

Truth and Reconciliation Commission of South Africa Report, (1998) listed among the aim to *"promote national unity and reconciliation in a spirit of understanding which transcends the conflicts and divisions of the past".* And stated the objectives:

(1) to set up as complete a picture as possible of gross human rights violations committed between 1960-1994 by engaging in investigations and hearings; (2) being a facility, granting of amnesty in exchange for full disclosure of truth for acts committed with a political objective within guidelines of the Act; (3) reveal the fate of victims and restore their human and civil dignity, and provide them the opportunity to give accounts and recommend reparations; (4) establish a report of findings and recommendations to prevent future human rights violations.

3.6 SOME UNIQUE FEATURES OF THE SOUTH AFRICAN TRC

[253] Liza Chambers Strategic Choices in the Design of Truth Commissions (John F Kennedy School of Government, 2021).

Liza Chambers notes that while certain traits are common to all previous TRCs that of South Africa had features distinguishing it from its international predecessors. Some such features are highlighted in the following sections below.[254]

In a paper presented by Mr Dullah Omah he noted the key point of departure in the way the Commission was created; it was provided for in the Post amble/Endnote to the interim Constitution of 1993 and enacted by the new parliament in 1995 as the enabling legislation, Promotion of National unity and Reconciliation Act (No 34, 1995), (hereafter referred to as "Reconciliation Act")[255] Its creation was very controversial and many argued that international law and convention forbade granting amnesty for crimes against humanity as well as torture and similar offences. Nonetheless the South African Constitutional Court passed the constitutionality of the Reconciliation Act and the TRC began functioning in 1995.[256]

Through the end of 1998, the TRC received roughly 15,000 statements from victims and approximately 7,000 applications for amnesty. As of December 9, 1998, the TRC had granted 216 amnesties and rejected 160 applications because they denied their guilt.[257]

It is quite evident that the process by which South Africa developed and set up its Commission is a departure from any other Truth Commissions known.[258] South Africans believed it to be essentially democratic, because it provided as many people as possible an opportunity to participate in the development of the Commission. The

[254] Liza Chambers *Op. Cit.* (2021).
[255] Promotion of National unity and Reconciliation Act *Op. Cit.*
[256] Dullah, Omar Justice in Transition – an Explanatory Booklet on the Role of the TRC 1995 <http://www.truth.org.za/back/justice.htm> accessed 4 September 2021.
[257] Liza Chambers, *Op. Cit.* (2021).
[258] Truth and Reconciliation Commission of South Africa, (1998)(1)52.

model of a Truth Commission came first from the African National Congress prior to the elections in 1994. Ironically, this was, against the background of widespread human rights violations committed by the South African state over many decades, the ANC also had accusations of the perpetration of human rights violations against it in some of its camps whilst in exile. The profound response of the ANC was to set up an internal commission of inquiry, named the Skweyiya Commission.[259] A report from this commission was published, this was done to open and widespread criticism in that there were questions about its partiality. A second independent commission, the Motsuenyane Commission was established.[260]Its findings were revealed to the national executive of the ANC and it established that was that there were basis for criticism but lessened the blow by arguing that that these should be looked at against the overall human rights violations which gripped South Africa over a sustained period, and suggested that the way to resolve this was the establishment of a Truth Commission.

Two major conferences held under the auspices of South African civil society. The initial one was simply titled *"Dealing with the Past"* and a number of leading scholars and human rights practitioners from Eastern Europe, Central Europe and South America were invited to share their experiences with a group of South Africans.[261] A book was published under the title of the conference, which was distributed widely throughout South Africa and therefore opening up a debate.[262]

A second conference was held months later titled **"***Truth and Reconciliation"*. The majority of participants were from South Africa but there were key participants from

[259] *Ibid.*
[260] *Ibid.*
[261]The Institute of History and Biography at Open University in Hagen., The Presence of the Past: Transformation and Dealing with the Past in Eastern and Central Europe (23)25(05) (Berlin, Germany· 2002).
[262]Alex Boraine, Janet Levy, Ronel Scheffer Dealing with the Past (Cape Town: IDASA 1994).

Chile and Argentina as well.[263] The newly appointed Minister of Justice, was the keynote speaker and he proposed the idea of a commission, which he had already announced in Parliament.[264] A second book was published under the title of "*The Healing of a Nation*"[265] which, was also widely read and a number of workshops and conferences were held throughout South Africa, examining the concept of a Truth and Reconciliation Commission and considerable input was gained from participants who emerged from society's wide spectrum.

Their contribution was sent to the parliamentary Standing Committee on Justice, which was given the responsibility of engaging with the finalisation of the Parliamentary Bill.[266] Public hearings were held and this was followed by the debate in Parliament where the Promotion of National Unity and Reconciliation Bill was finally passed with an overwhelming majority.

A further and profound contribution to the democratic process was President Mandela's decision to appoint a small representative committee who came up with a list of 25 names from where he decided to appoint the final 17 commissioners,[267] which the Act required. People from varied walks of life were encouraged to apply and 199 names were received. After a procedure, which involved public hearings, 25 names were sent to President Mandela and he in consultation with his cabinet, appointed the 17 commissioners who formed the core of the Truth and Reconciliation

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[263] Dullah Omar *Op.Cit.* 1997.
[264] *Ibid.*
[265] Alex Boraine and Janet Levy (Eds) The Healing of a Nation Cape Town Justice in Transition Booklet on the Role of the TRC 1995 <http://www.truth.org.za/back/justice.htm> accessed 3 September 2021.
[266] Truth and Reconciliation Commission of South Africa Report, *Op. Cit*.(1998) (5)(9)44.

[267] Truth and Reconciliation Commission of South Africa Report, *Op. Cit*. (1998).

Commission.[268] It could therefore be argued that from the very onset the process leading to the actual promulgation of the Act as well as the appointment of the commissioners had been as open and as transparent and as democratic as possible. It could be argued that such a legitimacy may have influenced the extent to what the Commission could achieve.

The Act of Parliament,[269] which birth the Truth and Reconciliation Commission into existence made it very unique, departing from any other Commissions that had existed. In most instances the Commission was appointed by the President or Prime Minister of the relevant country and they worked out their own procedures, objectives, methodologies etc. The benefit of a Commission based on an Act of Parliament is that a democratically elected group of people participated in the debate and finalised the content of the Commission. The objectives were clearly established, restraints were clear and the commissioners had to follow the Reconciliation Act.

The Reconciliation Act established for 17 commissioners to serve full-time. The Commission was time limited to two years to complete its task (with an additional three months allowed in order for the final report to be completed). The Act also provided for three separate committees mentioned earlier.

In addition to the 17 commissioners a number of committee members were allowed for, plus professional and administrative staff and an Investigative Unit.

In the course of the life of the Commission a profound decision was made with respect to the hearings of the Commission, in terms of human rights violations and the stories of victims, as well as the amnesty hearings. Yes there were attendant risks and the additional complications, this, however, did not stop the decision that these

[268] *Ibid.*
[269] Promotion of National Unity and Reconciliation Act *Op. Cit.*

hearings should be revealed and made transparent to the media and to the general public. This placed an enormous burden on the commissioners who travelled throughout South Africa, organising, conducting hearings because they did not have the luxury of working confidentially, quietly and privately, but were constantly under the scrutiny of the media and of the public. On the other hand, there was the enormous advantage of the Nation as full participants in the hearings and the work of the Commission from the very beginning. This occurred through radio, television and the print media and everyone acquired the right to attend any of the hearings. This may have enabled transparency and also provided a strong educative opportunity so that healing and reconciliation was extended beyond a small group and made available to all.

Another departure from the norm was the decision to publish the names not only of the victims and some details of the human rights violations suffered by them, but also the publication of the names of perpetrators.[270] A major problem was the need to ensure due process and a fairly elaborate system was worked out so that people who were named by victims are alerted ahead of time and are invited to make either written representation or, if desired, could appear at a subsequent hearing. These names were not only mentioned during the process of the hearings but once the Investigative Unit had the opportunity to recommend its findings to the Commission, the Commission published the names on the balance of probabilities in its final report and in the Government Gazette.[271]

A further difference from most commissions was the powers, which were vested in the Commission. The Commission had powers of subpoena and of search and seizure.

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[270] Truth and Reconciliation Commission of South Africa, *Op. Cit.* (1998) (5)(9)1.
[271] *Ibid.* (1998) 5(212) 77-257.

This enabled the Commission to firstly invite alleged perpetrators or those who may have critical information to come to the Commission and share that information with the Commission. And it had the power, when, the invitation was spurned to proceed to subpoena those concerned.[272] It also meant that the Commission could secure files and documents, which had been secreted away by the previous government and its agents.[273] This resulted in an agreement by political parties, military and security institutions to make public submissions to the Commission.[274]

There was also a major difference in the approach of South Africa's Truth and Reconciliation Commission to amnesty. To avoid the problem of a general amnesty South Africa proceeded in the following ways:

In the first instance, amnesty had to be applied for on an individual basis - there was no blanket amnesty.

Secondly, applicants for amnesty had to complete a prescribed form which was published in the Government Gazette and which called for very detailed information relating to specific human rights violations;

Thirdly, applicants had to a **"full disclosure"** of their human rights violations in order to qualify for amnesty;

Fourthly, in most instances applicants had to appear before the Amnesty Committee and those hearings were open to the public.

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[272] Truth and Reconciliation Commission of South Africa *Op. Cit.*(1998) (5)(1)102.

[273] Truth and Reconciliation Commission of South Africa *Op. Cit.*(1998) (5)(1)102.

[274] *Ibid.* (1998) 5(1)44.

Fifthly, there was a time limit set in terms of the Act. Only those gross human rights violations committed between the period of 1960 to 1993 would be considered for amnesty. Secondly, there was a 12 month period during which amnesty applications could be made, from the time of the promulgation of the Reconciliation Act, which was in December 1995, and a cut-off point on 15 December 1996.

Finally, there was a list of criteria laid down in the Reconciliation Act (laid out below), which established whether or not an applicant for amnesty would obtain success.[275]

> Where a particular act, omission or offence was an act associated with a political objective was decided with reference to the following criteria:
>
> - the motive of the person who committed the act, omission or offence;
> - the context in which the act, omission or offence took place, and in particular whether the act, omission or offence was committed in the course of or as part of a political uprising, disturbance or event, or in reaction thereto;
> - the legal and factual nature of the act, omission or offence, including the gravity of *the act, omission or offence;*
> - the object or objective of the act, omission or offence and in particular whether the act, omission or offence was primarily directed at a political opponent or State property or personnel or against private property or individuals;
> - whether the act, omission or offence was committed in the execution of an order of, or on behalf of, or with the approval of, the organisation, institution, liberation movement or body of which the person who committed the act was a member, an agent or a supporter; and
> - the relationship between the act, omission or offence and the political objective pursued, and in particular the directness and proximity of the relationship and the proportionality of the act, omission or offence to the objective pursued.[276]

The following criteria were, however, not included:

> ...for personal gain: provided that an act, omission or offence by any person who acted and received money or anything of value as an informer of the State or a former state, political organisation or liberation movement, shall not be excluded only on the grounds of that person having received money or

[275] Promotion of National Unity and Reconciliation Act. *Op. Cit.*
[276] *Op. Cit.*

> anything of value for his or her information; or out of personal malice, ill-will or spite, directed against the victim of the acts committed.

A another pertinent point was that the Truth and Reconciliation Commission set itself up not as a substitute for criminal justice. The fact that 17 former military generals (including the former Minister of Defence) were placed on trial for murder demonstrates this point. The blend of judicial stick and TRC's carrot emerged as a powerful force in flushing out former operatives who have adopted a **"wait-and-see"** style. It could be argued it competed with the existing penal system in South Africa.

3.6.1 CREATION BY LEGISLATION AND MEMBERSHIP

Omar[277] notes some uniqueness in the way the Commission was created. An essentially democratic process, which provided as many people as possible an opportunity to participate in the development of the Commission cumulated in enacting by parliament the Reconciliation Act. Its creation was very controversial and many argued that international law and convention forbade granting amnesty for crimes against humanity as well as torture and similar offences. Nonetheless the South African Constitutional Court upheld the constitutionality of the Act and the TRC began functioning in 1995.[278]

The Act, which promulgated the Truth and Reconciliation Commission into existence, made it very different from any previous Commissions. As indicated previously in many instances a Commission is appointed by the President or Prime Minister of the country concerned and they develop their own procedures, objectives, methodologies

[277] Dullah Omar, (1997) *Op. Cit*.
[278] Promotion of National unity and Reconciliation Act. *Op. Cit.*

etc. The luxury of a Commission being predicated upon an Act of Parliament is that there is a democratically elected group of people became participants in the debate about and finishing the contents of the Commission. The objectives were clearly set out, restraints were laid down and the commissioners had to abide by the Act.[279]

This study sees a further contribution to the democratic process was President Mandela's decision to appoint a small representative committee who drew up a list of 25 names from which he would appoint the final 17 commissioners, which the Act required. People from all walks of life were encouraged to apply and 199 names were received. After a process, which involved public hearings, 25 names were sent to President Mandela and he then, in consultation with his cabinet, appointed the 17 commissioners who formed the heart of the Truth and Reconciliation Commission.

It could therefore be argued that from the very onset the process leading to the actual promulgation of the Act as well as the appointment of the commissioners had been as open, transparent and as democratic as possible. This legitimacy may have influenced the success of the Commission.

The Act provided for 17 commissioners to serve full-time and were allowed professional and administrative staff and an Investigative Unit. The Commission was time limited to two years to complete its task (with an further three months allowed in order for the final report to be completed).[280] The Act also provided for the three separate committees, which were mentioned earlier.

3.6.2 HEARINGS IN OPEN

[279] Promotion of National unity and Reconciliation Act. *Op. Cit.*
[280] Truth and Reconciliation Commission of South Africa *Op. Cit.*1998:1:44.

In the course of the life of the Commission, a profound decision was made relating to the workings of the Commission, in terms of human rights violations and the stories of victims on the one hand as well as the amnesty hearings on the other hand.[281]

There were risks associated with this approach and additional complications, but it was still decided that these hearings should be open to the media and to the general public.[282] This placed an heavy strain on the commissioners who travelled throughout South Africa organising and conducting hearings without the benefit of working quietly and privately and being under constant scrutiny of the media and of the public. On the other hand, there was the broad advantage of the Nation being participants in the hearings and the work of the Commission from the initial stage through electronic and the print media and creating the right of anyone to attend any of the hearings was an added plus. This may have enabled transparency and also a strong educative opportunity so that healing and reconciliation was not confined to a small group but available to all.

3.6.3 PUBLICATION OF NAMES

Another unique feature, departing from the norm was the decision to publish the names of the victims and also to provide some details of the human rights violations suffered by them, and the publication of the names of perpetrators.[283] A major problem was the need to ensure due process and a fairly wide mechanism was fashioned out so that people who were named by victims were informed in advance and were invited to make either written representation or, if desired, could appear in

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[281] *Ibid*.. (1998)5(9)1.
[282] *Ibid.*
[283] Truth and Reconciliation Commission of South Africa *Op. Cit.* (1998) (5)(9)5 .

person at a further hearings. These names were not only indicated during the process of the hearings but once the Investigative Unit had the opportunity to recommend its findings to the Commission, the Commission revealed the names using the balance of probabilities in the report it made finally in the Government Gazette.[284]

3.6.4 POWER OF SUBPOENA AND SEIZURE

A further difference from most commissions was the powers of subpoena and of search and seizure, which were vested in the Commission.[285] This enabled the Commission to proceed to subpoena those who had been invited, whether suggested perpetrators or those who may have critical information and who had spurned the invitation. The Commission also had powers of subpoena for and to secure files and documents, which had been hidden away by the previous government and its agents.[286] This brought about and prompted an agreement by political parties, military and security institutions to make open submissions to the Commission.

3.6.5 POWERS TO GRANT AMNESTY

Also constituting a peculiar trait of the South African TRC was its powers of amnesty. South Africa tried to avoid the problem of a general amnesty in the following way:

First, amnesty application was individualised - there was no blanket amnesty.[287]

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[284] *Ibid.* (1998) 5(212) 77-161.
[285] *Ibid.* 1998:5:102.
[286] Truth and Reconciliation Commission of South Africa *Op. Cit.* (1998) (5)(9)5 .
[287] *Op. Cit.* (1998)(5) 110 -122.

Secondly, a prescribed form was required to be completed by applicants for amnesty this was revealed in the Government Gazette and which asked for very elaborate information relating to specific human rights violations;[288]

Thirdly, applicants were required to offer a "full disclosure" of their human rights violations to qualify for any amnesty;[289]

Fourthly, in most instances applicants had to personally appear before the Amnesty Committee and those hearings were transparent and revealed to the public;[290]

Fifthly, a time limit set in terms of the Act. Only those gross human rights violations committed between the specific period of 1960 to 1993 were qualified for amnesty. Secondly, there was a twelve-month period during which amnesty applications could be forwarded, from the date of the enactment of the Act;[291]

Finally, there was a list of criteria laid down, which determined whether or not the applicant for amnesty would be successful namely:[292]

> "Where a particular act, omission or offence was an act associated with a political objective was decided with reference to the following criteria:
>
> the motive of the person who committed the act, omission or offence;
> the context in which the act, omission or offence took place, and in particular whether the act, omission or offence was committed in the course of or as part of a political uprising, disturbance or event, or in reaction thereto;
> the legal and factual nature of the act, omission or offence, including the gravity of the act, omission or offence;
> the object or objective of the act, omission or offence and in particular whether the act, omission or offence was primarily directed at a political opponent or State property or personnel or against private property or individuals;
> whether the act, omission or offence was committed in the execution of an order of, or on behalf of, or with the approval of, the organisation,

[288] *Ibid.*
[289] *Ibid.*
[290] *Ibid.*
[291] *Ibid.*
[292] Promotion of National Unity and Reconciliation Act,1995. *Op. Cit.*

> institution, liberation movement or body of which the person who committed the act was a member, an agent or a supporter; and
> the relationship between the act, omission or offence and the political objective pursued, and in particular the directness and proximity of the relationship and the proportionality of the act, omission or offence to the objective pursued.

However, it did not include the following criteria:

> …for personal gain: provided that an act, omission or offence by any person who acted and received money or anything of value as an informer of the State or a former state, political organisation or liberation movement, shall not be excluded only on the grounds of that person having received money or anything of value for his or her information; or out of personal malice, ill-will or spite, directed against the victim of the acts committed.

3.6.6 NO SUBSTITUTE TO CRIMINAL JUSTICE

A further point is that the Truth and Reconciliation Commission was not used as a substitute for traditional criminal trials. The fact that 17 former military generals (including a former Minister of Defence) were put on trial for murder illustrates this fact.[293] The blend of judicial stick and TRC's carrot emerged as a powerful force in revealing and teasing out former operatives who had adopted a "wait-and-see" style.

3.7 THE RATIONAL FOR TRC

The experience of South Africa is very similar to those of many other countries' in that several witnesses at the Human Rights Violations Committee hearings of the TRC spoke about their deep fundamental urge to know the truth surrounding the loss

[293] Truth and Reconciliation Commission of South Africa *Op. Cit*. (1998)(5)110 -122.

of their loved one.[294] Many times people pleaded to know what happened to the father or the mother, the sister, the brother, the son or the daughter. Where is he or she buried? Why did they do this? This was a consistent plea at almost every public hearing.[295] The knowledge of the details and circumstances of the human rights violation in itself was part of the healing process. But how will the truth be known if perpetrators remained silent and unseen? The only way is for them to emerge and speak to their story of what they did, why and how. This may be limited in comfort but in terms of the pleas of victims, it offered some consolation to them as they tried to rebuild their existence.

3.8 THE CHALLENGES OF TRCs

There are clear challenges concering any Truth and Reconciliation Commission including that of South Africa. Boraine argued that within the limitations of a negotiated settlement, significant compromises had to be achieved and that the South Africa's Truth and Reconciliation Commission emerged with the best possible outcome.[296] It would seem in the restraints he refers to the issue of the non-application of traditional sanctions regime upon offenders.

The TRC Report 1998, chronicled further problems, which arose regarding the amnesty provisions as set out in the Act. There were those in South Africa (some organisations and individual families), who had suffered very grievously from human rights violations who believed that there ought to have been no amnesty provisions

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[294] Richard Turner. The Eye of the Needle: Towards Participatory Democracy in South Africa (1980 Johannesburg: Ravan).
[295] Chris, Bunting What a bit of Dignity teaches us. The Times Higher November 17, 2000:19.
[296] Alex Borraine (1996) *Op.Cit.*

whatsoever.[297] They wanted nothing more and nothing less than trials, prosecutions and punishment. More especially they were concerned that in terms of the Promotion Act those who applied for amnesty and were successful will never again be liable, either criminally or civilly. Some were even prepared to accept that even if amnesty had to be granted as the price for peace and stability in South Africa there still ought to be an opportunity to bring civil action against the perpetrators whether organisations, the state or individuals. There are those who felt so powerfully about this that they initiated a case against the established Act before the Constitutional Court.[298]

In the case of *Azanian Peoples Organisation (AZAPO) and others v President of the Republic of South Africa, 1996*;[299] the constitutionality of section 20(7) of the *Promotion of National Unity and Reconciliation Act,* which was upheld. The Court conceded that the section limited the applicants' right to *"have justiciable disputes settled by a court of law, or . . . other independent or impartial forum."*

As indicated above the justification for the decision was that if people are encouraged to apply for amnesty under the TRC but remained liable in a criminal court under the penal system or in a civil court, what is the incentive for their coming forward?

Perhaps more fundamentally are the arguments of numerous authors as contained in the work of Avruch and Vejarano that truth seeking is relative as there are many types of truths and therefore such a Commission seeking truth and reconciliation cannot at the same time be judicial and seek justice; and conclude that "restorative justice" is

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[297] *Azanian Peoples Organisation (AZAPO) and others v President of the Republic of South Africa*, Constitutional Court; <http://www.icrc.org/ihl-nat.nsf/0/067632d55386102cc1256b09003f0eac?OpenDocument > accessed 27 July 2021.
[298] *Ibid.*
[299] *Ibid.*

not the same as "retributive justice".[300] It would appear that this argument loses sight of the fact that an offender seeking to avail himself of the benefits of the TRC will also be willing to offer an apology which, to have any measure of meaningfulness, must assuage the injured.

This leads us into the particular Nigerian context of corruption and its seemingly defiance of a resolution leading to a stalemate. However, it could be argued that the reconciliatory outcome of TRC is worth proceeding with as against the stalemate of an alternative continued hostile traditional environment that currently exists in the attempt to address crimes of corruption and this in turn allow an extent by which a TRC could theorise the possibility, appropriateness and the validity of an alternative penal justice system in addressing the crimes of corruption in Nigeria.

CHAPTER 4

4.1 POLITICAL CORRUPTION IN NIGERIA

A website called Naijaquest suggests there are 7 types of corruption in Nigeria and to know them is to remove the veil that shrouds corruption in mystery.[301] They are identified under the following categories

1. **SYSTEMIC/ENDEMIC CORRUPTION**: This is the corruption that is integrated into the structure of the society, as all the society aspect had been

[300]Kevin Avruch and Beatriz Verjarano, Truth and Reconciliation Commissions; A Review Essay and Annotated Bibliography, (2003) 1-2 (2) *Social Justice, Peace and Human Rights*, 47-108.

[301] Naijaquest, Corruption In Nigeria – Causes, Types, Effects, And Solutions, (March 9, 2020) < https://naijaquest.com/corruption-in-nigeria/> accessed on 2 August 2021.

compromised with the state major institutions and processes as a willing tool. This form of corruption is at the level of the system.

2. **SPORADIC/INDIVIDUAL CORRUPTION**: This form of corruption is not wide-spread but occur irregularly as it is at the level of individual and not the system. The exposure of the individual cleanses the rot.'

3. **POLITICAL CORRUPTION**: This is the form of corruption that involves unwholesome transactions between private and public-sector actors as collective wealth is hijacked and converted to personal wealth. This form of corruption is at the level of political decision makers.

4. **GRAND/ HIGH-LEVEL CORRUPTION**: This is the form of corruption that is not materialistic as it is in ideas as it exists in the sphere of policymaking. It can be synonymous with Political corruption but not limited to it.

5. **PETTY CORRUPTION**: This form of corruption is bureaucratic and on a small-scale level as it exists in the implementation state where the public officials meet with the public. It can be seen on the street, in government hospitals, in schools and many more.

6. **LEGAL CORRUPTION**: This is the corruption that is as a result of the breaking of a well-stated law, no matter how unethical it appears, as long as the law does not explicitly condemn it, it is not legal corruption.

7. **MORAL CORRUPTION**: This is the corruption that is in the sphere of emotions and moral discretion, this is where religion and traditional societies play a role as they are the determinants in this jurisdiction.[302]

For the purpose of this study consideration is limited to political corruption, even though it recognises the relationship between all forms of corruption. The study is specifically concerned with this because political corruption is claimed to be is at the level of political decision makers, who are identified as the primary offenders that have created the cofounding situation the country faces.[303]

Chris Wigwe in his work, *Introduction to Nigeria Criminal Law*[304] attempts to conceptualise corruption observing it as a hydra-headed monster that has for several decades bedeviled and plagues the corporate existence of this country, Nigeria. He states that the pandemic of corruption has virtually brought the country to its knees. He links it to a truism that corruption is antithetical to the well cherished democratic ideals and the rule of law.[305] He draws from Hon Justice Kayode Eso, JSC (as he then was) who stated that:

> It is now getting to a stage that the present generation hardly knows what democracy is, having regard to lack of transparency and corruption in practically every sector and wanton acceptance thereof, as a normal way of life.

However, Mathew Page goes further in his attempt to visualise the problem of corruption in Nigeria and asserts that the existing narratives about corruption in Nigeria lack a common framework for understanding a topic, which, he argues is so

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[302] Naijaquest, *Op. Cit*. (2020).
[303] Matthew T. Page, *Op. Cit.* (2018).
[304] Chris Wigwe, *Introduction to Nigeria Criminal Law* (Mountcrest University Press 2016) 301.
[305] *Ibid.*

expansive and variegated.[306] Even the definitions of corruption that this study engages with does not appear to contest Page's assertion. While Morris[307] argues that corruption is the use of public powers illegitimately for private benefits and Benson[308] broadens the notion when he offers the explanation that corruption is:

> …the abuse of public office for private gains. Public office is abused for private gain when an official accepts, solicits, or extorts a bribe. It is also abused when a private agent actively offers bribes to circumvent public policies and processes for competitive advantage and profit. Public office can also be abused for personal benefit even if no bribery occurs, through patronage and nepotism, the theft of state assets or the diversion of state resources.

There is still sense of a clear common framework at this stage, however, further explanation of the term from Osoba revealed that corruption is a global phenomenon that is only intelligible within its social context. It is this context, which may allow us to draw up a common framework.[309] He noted that corruption as an anti-social behaviour confers improper benefits contrary to legal and moral norms and undermines the authorities' capacity to secure the welfare of citizens. Osoba's concern for Nigeria is that corruption has become the principal means of private accumulation and has come to shape political activity within the polity.

Further giving credence to the notoriously recurring character of corruption as a social phenomenon in Nigeria, Udo refers to the African Union (AU) reports which states:[310]

> …cumulatively, Nigeria and Egypt topped the list of ten African countries by illicit financial transfers between 1970-2008, with $217.7 billion (about N36.75trillion), or 30.5 per cent and $105.2billion (about N17.65trillion) or 14.7 per cent respectively,

[306] Matthew T. Page (2018) *Op. Cit.*
[307] Stephen Morris 'Forms of Corruption' (CESifo DICE Report 2011).
[308] Bernadine Benson Analysing Police Corruption and Possible Causes (2011) (24) (1) *South African Journal of Criminology* 83-95.
[309] Segun Osoba *Corruption in Nigeria: Historical Perspectives* in Rwekaza Mukandala (ed): African Public Administration: A Reader, (AAPS Books,Harare 2000).
[310]Bassey Udo, (2015) *Op. Cit.*

> while South Africa had $81.8billion (about N13.74trillion) or 11.4 per cent.

In corroboration, the corrupt tendencies in Nigeria are renowned in the international community. Transparency International (TI) in its Corruption Perception Index (CPI) for 2019,[311] ranked Nigeria 146 and in 2020 ranked it 149 indicating that compared to 2014 Nigeria when it was at rank 136th of the most corrupt of 174 countries in the world and the 3rd most corrupt in West Africa, it would appear it is a continued regression even when considering that in the year 2020 it is based on 179 countries, that is with 3 more countries added.

In the past Ejike has observed that this was not very different from the position Nigeria had taken in the last couple of years.[312] The explanation he maintained for this, rather convincingly is a reflection of the wavering and non-committed efforts on the part of Nigerian Government to fight corruption. Gboyega Akinsanya in a report writes:

> Corrupt practices flourish in Nigeria under the administration of President Muhammadu Buhari just like it did under the government of Dr. Goodluck Jonathan, Corruption Perception Indexes (CPIs) of Transparency International (TI) have revealed.
>
> While Nigeria scored 25.5 out of 100 points on the average under Jonathan's administration, the country only garnered 26.5 points between 2015 and 2020 under Buhari despite making the fight against corruption one of the pillars of his administration.
>
> In a comparative analysis of corruption perception indexes between 2010 and 2020 by THISDAY, TI's reports reveal that there is no significant improvement in the fight against corruption under the two administrations.

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[311] CPI Transparency Index (2019) Results table <https://www.transparency.org/en/cpi/2019/index/nor> accessed d on 13 July 2021.
[312] Ekwueme Ejike, *Nigeria Ranks 136th Most Corrupt Country In Latest Global Corruption* Index (2014) < http://leadership.ng/news/392876/nigeria-ranks-136th-corrupt-country-latest-global-corruption-index> accessed on 12 Jan 2015.

> TI, a global movement working to end corruption, released its 2020 CPI penultimate Thursday in which it rated Nigeria 149th out of the 180 countries surveyed worldwide, scoring 25 out of 100 points.
> With the latest corruption rating, according to the 2020 CPI, Nigeria is currently the second most corrupt country in West Africa behind Guinea-Bissau, the most corrupt in the sub-region. [313]

However, in the same report the Minister for Information & Culture, Alhaji Lai Mohammed disputed the CPI report, which it claimed, was not a true reflection of the country's anti-graft war and that the organisation failed to identify areas the federal government performed well.

It could be argued that it is within this context that Nigeria has enacted several pieces of legislation that seek to criminalise accumulation that cannot be satisfactorily accounted for and which is not directly attributable to income. Thus ICPC Act the EFCC Act, LSPAC Law and OSAC Law as well as the Penal and Criminal codes all seek to ensure that Nigerians keep within the Code of Conduct provisions encapsulated within the Constitution of the Federal Republic of Nigeria 1999, (As Amended).

In proffering explanations for the enactment of the laws and in setting up their respective commissions to prosecute suspects of corrupt practices, Raji writes that the impetus to create the ICPC rested on *"*...The resolve to fight and win the war against corruption in Nigeria…"[314] Likewise, Justice Akanbi, the first Chairman of the ICPC emphasised that the setting up of the Commission was a policy response of the Federal Government to fight and curb corruption that has tragically assumed

[313] Gboyega Akinsanmi 'Like Jonathan, Corruption Thrives under Buhari' *Thisday Newspaper* Lagos (February 7 2021)

[314] H. Raji, *Nigeria Independent Corrupt Practices and Other Related Offences Commission* – a Brief Overview (2000).

monstrous proportions and permeated all levels of the society, corroded its moral fabric, eroded its economic base and threatened its stability.[315]

However, it would appear that in direct contradistinction to these statutory efforts, Lawanti reports that the executive as encapsulated by the President Jonathan publicly confessed that he does not believe in sending people to jail for corruption.[316] This statement appears to indicate a deliberate refusal to enforce the laws of Nigeria in breach of the oath of office *"…to uphold and defend the laws of the country."*[317]

4.1 PRIVATE ACCUMULATION BY LARGE SWATHES OF THE NIGERIAN ELITE

Dada believes that after the departure of the pioneer chairman Ribadu from the EFCC, the enthusiasm to fight corruption went from 100 to zero amid the negatives.[318] He relies on the evidence that shows many corruption trials have not gone beyond the plea stage, some for as long as six years after first arraignment in court.[319] Many former government office holders, with previous accusations of corruption, are still

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[315] Mustapha Akanbi, In Role of Economic and Financial Crimes Commission (EFCC) and Independent Corrupt Practices & Other Related Offences Commission (ICPC) at Ensuring Accountability and Corporate Governance in Nigeria, (2013)(3)(2) *Journal of Business Administration and Education*, I2201-2958, 105-122.

[316] Kabiru Danladi Lawanti, *Between Jonathan and other contestants* <http://www.dailytrust.com.ng/sunday/index.php/comment-debate/18571-2015-between-jonathan-and-other-contestants> accessed 27th January 2015 (2015).

[317] *Ibid.*

[318] Samuel Dada 'How They Looted Nigeria Dry And A Litany Of Abandoned EFCC Corruption Cases' (2013)<http://saharareporters.com/2013/09/26/how-they-looted-nigeria-dry-and-litany-abandoned-efcc-corruption-cases-segun-dada > accessed on 22 January 2015.

[319] Samuel Dada 'How They Looted Nigeria Dry And A Litany Of Abandoned EFCC Corruption Cases' *Op. Cit.* (2013).

free without being subject to any form of sanctions. Some of them were duly elected into the National Assembly and are legislating for the country.

The list from Dada below provides some indication of the number and details of the cases abandoned or which remains in abeyance by the Economic and Financial Crimes Commission (EFCC), in the period 2007 till 2014.[320] This has been updated by the Corruption Cases Database[321] It included the following persons: Senator Iyabo Obasanjo-Bello, Chimaroke Nnamani, Chief Onyema Ugochukwu, Saminu Turaki, Alao Akala, Orji Uzor Kalu, Joshua Dariye, Jolly Nyame, Dimeji Bankole and Usman Nafada, Ndudi Elemelu, Peter Odili, James Ibori, Lucky Igbinedion and others.

The study will now proceed to analyse the cases and provide some indication of what might occur if a TRC model was adapted accordingly.

The full details of their cases are included in paragraph 4.2 below. Whilst the cases of Joshua Dariye, Lucky Igbinedon and Jolly Nyame have been resolved there are a few old and new cases plagued with inexplicable delays.

The common denominator that has plagued the cases is the inordinate delays. Some accused persons have spent up to 14 years on trial, clogging up the criminal justice system and at great expense to the State. That the ACJA heralded as a panacea to some of these issues does not appear to have had a significant impact.

4.2 CASE STUDIES OF POLICTICAL CORRUPTION AND POSSIBLE IMPACT OF A TRC MODEL

[320] *Ibid.*
[321] Corruption cases database <https://corruptioncases.ng/cases/frn-vs-orji-uzor-kalu-former-governor-o> accessed on 15 July 2021.

Senator Iyabo Obasanjo-Bello:[322]

This study begins with this case, which commenced in April 2008. The EFCC initiated the investigation of Senator Iyabo Obasanjo-Bello on an allegation of receiving N10 million stolen from the Ministry of Health. The prosecutors of the Economic and Financial Crimes Commission (EFCC) successfully amended the "charge sheet" to Senator Iyabo Obasanjo –Bello as "defendant number 12" before a Federal High Court judge sitting in Abuja.[323] Professor Adenike Grange, the former Minister of Health and the deputy minister was also placed on trial for stealing over N30, 000,000 from the Ministry's unspent funds from the 2007 budget. Even though the Minister and his deputy lost their jobs, Senator Iyabo Obasanjo-Bello it appears escaped prosecution and departed to the United States where she now resides. In the meantime silence has been maintained silence in the case. There has been neither acquittal nor any adjournments and it is currently not on the Corruption database. It is suggested that millions were expended on this case and the sums in question never recovered. A TRC model adopted might have revealed more of the truth of this case and may have ensured some of the N30,000,000 was returned after a confession by the parties concerned, and paid out in reparations and a loss of reputation by the imposing of reputational sanctions.[324]

Chimaroke Nnamani:[325]

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[322] Segun Dada How They Looted Nigeria Dry And A Litany Of Abandoned EFCC Corruption Cases [Part 1] *NewsRescue* Lagos (September 26 2013).

[323] Sahara Reporters N300 million Health Ministry Scam: Senator Iyabo Obasanjo-Bello now "Defendant number 12" on EFCC charges Sheet. May 1, 2008 <http://saharareporters.com/2008/05/01/n300-million-health-ministry-scam-senator-iyabo-obasanjo-bello-now-%E2%80%9Cdefendant-number-12%E2%80%9D>accessed on 6 September 2021.

[324] Kay Lauchland, *Op. Cit.*, (2004)10.

[325] *FRN vs Chimaroke Nnamani* (Former Governor of Enugu State) & 1 other

The study continues with this case, where the EFCC, on 10 August, 2009, sealed off the premises of Cosmo FM Radio Station, Rainbownet Nigeria Limited and other companies alleged to be owned by the ex-governor of Enugu State, who later became a Senator of the federal republic. Through a court order the properties were seized by the EFCC through a Lagos Federal High Court order in May 2007 following the indictment of Nnamani over alleged corruption and embezzlement of state funds to the amount of N5.3 billion. After arraignment, it appears the case was stepped down because as at 25th September 2010 there was neither conviction nor an acquittal. Currently the case is suffering prolonged adjournments and remains pending. He was a member of the Senate between 2007 and 2011. It is reported that in 2018 a Federal High Court in Lagos expunged proceedings in the trial, Chimaroke Nnamani, charged with N5.3 billion fraud. In 2019 he was returned and re-elected into the 9th Senate.[326] The number of years it took over 11 years to conclude these proceedings was of course very unsatisfactory, it took a lot of resources and no sense of justice achieved. If this had being subject to a TRC process which took significantly less time, there would still have been accountability for N5.3 billion a more speedily resolution of the matter. Its even possible a percentage of the funds would have been obtained to cover the proceedings and adequate reparations[327] provided to people in his state or local government would have been a form of justice.[328]

https://corruptioncases.ng/cases?state=&q=obasanjo Accessed on 6th September 2021.

[326] Agency Report *Court strikes out Nnamani's N5.3bn charge,* EFCC to file fresh charges *Punch Newspaper* Lagos (February 20 2018)

[327] Luke Moffett *Op. Cit.* (2019:143 -168).

[328] The Final Report of Canada's Truth and Reconciliation Commission., *Op. Cit.*

Chief Onyema Ugochukwu:[329]

In this case the EFCC indicted Chief Onyema Ugochukwu the former People's Democratic Party (PDP) governorship candidate for Abia State and former Chairman of the Niger Delta Development Commission (NDDC) at Federal High Court, Abuja for corrupt practices. Chief Onyema Ugochukwu was accused of corrupt handling of about N10.2 billion while serving as the Chairman of the NDDC. The charges were prepared by the Office of the Attorney General of the Federation who accused Chief Ugochukwu of inflating contract value and making false statements in respect of N9.3 billion allegedly trapped in the distressed Societe Generale Bank of Nigeria; inflating of a contract value for the construction of a 15 kilometre road in Obehi-Mkpologwu from N250, 260 million to N880, 000 million; while the second count was based on an accusation of inflating contracts value for the construction of a road in Umuahia from N180 million to N462 million. In the third count, Chief Ugochukwu was accused of furnishing false statements in respect of N9.3 billion claimed to have been trapped in Societe Generale Bank of Nigeria, but which sum was said to have been disbursed by the former Chairman of NDDC while in office. However, the EFCC appears to be handicapped in prosecuting these criminal cases that have been investigated. That is part of the fundamental issue faced by the Nigerian penal system, the powers, it remains limited in its functions.[330] There is seemingly an expression of reluctance in prosecuting the cases cited above. This strengthens the speculation that the anti-graft agency is selective in its operations. In this case will observe that there was a violation of ACJA/ACJL which of courses raises questions about efficacy of

[329] *FRN vs Chimaroke Nnamani (Former Governor of Enugu State) & 1 other* <https://corruptioncases.ng/cases?state=&q=obasanjo> accessed on 6 September 2021.
[330] Chile Okoroma, *Challenges in Investigating and Prosecuting Economic and Financial Crimes in Nigeria* (2015), <*http://icpc.gov.ng/inter-agency-task-team-reviews-progress-report/*> accessed on 11 July 2016.

these anticorruption statues.[331] This case is an example of Okoroma's argument that investigation and prosecution of corruption-related crimes in Nigeria were daunting. According to him, some of the challenges included socio-cultural norms; high cost of prosecuting cases, procedural and evidential issues; undue delays in the judicial process and international cooperation issues. In a TRC model it is likely that all these handicaps will not arise, the costs of production reduced and a measure of justice achieved.[332] A TRC model would ensure our criminal justice system allows for apology, this according to Albie Sachs is very important for restoring a sense of normality in society, because you are acknowledging the wrongdoing that you have done. It is very strong again in African culture, the idea of apology.[333]

Saminu Turaki:

In this case Saminu Turaki, a former governor of Jigawa State was indicted for the misappropriation of the sum of N36 billion from the State funds. He was also alleged to have laundered public funds of various values, an offence the Legal and Prosecution Unit of the EFCC states is punishable under section 14(1) (b) of the money laundering (Prohibition) Act 2004. He was first arraigned on 13th July 2007, a current length of 5,117 days. Aminu Turaki argued that a substantial sum out of the N36 billion allegedly siphoned was invested into the People's Democratic Party third

[331] Section 396 *Op. Cit.* ACJA.
[332] Albie Sachs, Truth and Reconciliation, [1999] (52)1563 *SMU Law Review.* <https://scholar.smu.edu/smulr/vol52/iss4/6 >accessed 5th September 2021.
[333] *Ibid.*

term project (Ploughing the seed of corruption back into party project depicts that *government* encouraged politicians to misappropriate public funds for personal interests). His case with the EFCC remains undecided till date. His bail was contested by the EFCC on the grounds that the former governor possessed multiple nationalities and could jump bail, if granted. Turaki had meanwhile secured the transfer of his trial to his home state. While the argument over his bail was on, Turaki won a seat in the Senate. He was in the National Assembly between 2007 and 2011. The status of the trial remains at the defence stage.[334] The penal system is obviously broken,[335] the length of time its taken and the fact that the accused continues to conduct his runs for office with a serious charge subsisting renders the whole process a mockery. This study is certain that had the opportunity been given to address this under a TRC process, the matter would not last this long, prosecutions cost would have been covered and some refunds would accrued to the state. Another possibility is the system being freed up to deal with other matters other than those of political corruption.[336] The prospects of a speedy conclusion to corruption matters may be an incentive for ensuring the co-operation of the accused persons and ensuring better compliance with TRC provisions than with ACJA/ACJL.[337]

Alao Akala:[338]

In this matter on 11th October 2011 EFCC indicted Alao-Akala; a former Commissioner for Local Government and Chieftaincy Matters, an incumbent senator,

[334] Corruption Cases Database *FRN VS Ibrahim Saminu Turaki* https://corruptioncases.ng/cases/frn-vs-ibrahim-saminu-turaki-former-gov accessed on 15 July 2021.
[335] Section 396 *Op. Cit.* ACJA.
[336] Unini Chioma, Special courts for corruption. *Op. Cit*. (2015).
[337] Section 396 *Op. Cit.* ACJA.
[338] *FRN VS Otunba Alao-Akala and Others* < https://corruptioncases.ng/cases/frn-vs-otunba-alao-akala-former-governo> accessed on 15 July 2021.

Hosea Agboola; and a businessman, Femi Babalola, over alleged misappropriation of N11.5 billion. The EFCC had indicted the trio of conspiracy, illegal award of contracts, obtaining money by false pretence and acquiring property with money derived from illegal act as well as concealing the ownership of such property. One of Alao Akala's co-conspirators is a serving senator of the Federal Republic of Nigeria. The case has taken 3, 565 days till date and it is at the prosecution stage.[339] The case has languished for a total of 3,566 days.[340] It is noted that since these charges were brought, Alao-Akala has had the opportunity of at least two runs for Governor of Oyo State. The resources in terms of manpower and funds that have been expended with no resolution in sight to the case is symptomatic of our penal system.[341] The country simply cannot afford these kind of unresolved corruption cases, it defeats the purpose[342] of retribution, rehabilitation[343] and deterrence and of course the possibility of reconciliation does not exit.[344] A model of TRC that allows the perpetrators to make an open breast of their activities will be less traumatic for them and more advantageous to the country.[345]

Orji Uzor Kalu & Two Others:[346]

In this case the former Abia State Governor Orji Uzor Kalu was indicted on July 27, 2007 before an Abuja High Court on a 107 count charge of money laundering, official

[339] *Ibid.*
[340] Section 396 *Op. Cit.* ACJA.
[341] Unini Chioma, Special courts for corruption. *Op. Cit*. 2015.
[342] Okonkwo and Nash (1990) *Op. Cit.*
[343] *Section 315, Administration of Criminal Justice Act, 2015.*
[344] Tabia Princewill 'Time for creative solutions: An innovative approach to dealing with corruption" *Vanguard Newspaper* Lagos (January 27 2015).
[345] Tabia Princewill *Op. Cit.* 2015.
[346] ***FRN vs Orji Uzor Kalu (Former Governor of Abia State) & 2 others*** <https://corruptioncases.ng/cases/frn-vs-orji-uzor-kalu-former-governor-o > accessed on 6 September 2021.

corruption and criminal diversion of public funds in excess of N5 billion. He approached the Court of Appeal urging it to set aside the ruling of the Federal High Court that he had a case to answer. The appellate court dismissed the appeal as lacking in merit and gave the anti-graft agency the go ahead to prosecute him. With the charges still hanging around his neck, the former governor touted himself as a possible presidential candidate in the year 2015. It is observed that for a while he strolled around for a as a free man, and as an acclaimed spokesperson for the Igbo people.

The court eventually found the defendants guilty and convicted them on an amended 39-count charge of conspiracy and money laundering. The first defendant was sentenced to five years imprisonment on counts 1,2,3,4,6,7,8,9,10, and 11; three years on count 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33; 12 years on counts 34, 35, 36, 37 and 38 and five years on count 39. The second defendant was convicted and sentenced to three years imprisonment on counts 24, 25, 27, 28, 30, 31, 32, and 10 years on counts 34, 37, 38, and 39. All sentences are to run concurrently. The court further made an order that the 3rd defendant, Slok Nigeria Limited be wound up and its assets forfeited to the Federal Government of Nigeria. However, the Supreme Court of Nigeria, on an appeal filed by the second convict, nullified the conviction and ordered a fresh trial before a lower court on the ground that Hon. Justice Muhammed Idris who was elevated to Court of Appeal cannot sit as a judge of Federal High Court in line with Section 396(7) of the Administration of Criminal Justice Act, 2015, on which the then President of Court of Appeal relied on to authorise Justice Idris to return to the Federal High Court to conclude the trial. The Federal High Court in Abuja had granted an application by third defendant seeking leave of court to challenge its retrial arguing that it would amount to double jeopardy

to be tried again in the same case on which it was earlier convicted and sentenced. The first defendant also argued that the Supreme Court did not make his retrial before the lower court as the appeal was not in his name. The status of the case is on trial.[347] This case ended up in the acquittal of Kalu on the grounds that Justice Mohammed Idris, who convicted him and others had been elevated to the Court of Appeal before the judgment and returned to the lower court to deliver the judgment, which it considered as illegal.[348] Another colossal waste of resources, which the country can ill afford, a retrial is now in the offering. The case took about 12 years to conclude in the first instance and at this rate it could take another decade, is this justice, does this ensure the elements of a sane penal system is achieved?[349] A TRC model will certainly not have lasted this long and a greater sense of justice will have been achieved for the people of Abia State. This case is one of the strong adverts for extending our penal system to accommodate and cater of a TRC model s a paradigmatic alternative[350] to criminal prosecutions for corruption in Nigeria.[351] There is also evidence that compliance with ACJA/ACJL is non-existence.[352]

Joshua Dariye:[353]

In the case of the former Governor Dariye of Plateau State, he was indicted by the EFCC before an Abuja High Court on a 23-count charge involving the sum of

[347] ***FRN vs Orji Uzor Kalu (Former Governor of Abia State) & 2 others*** <https://corruptioncases.ng/cases/frn-vs-orji-uzor-kalu-former-governor-o> **accessed on 15 July 2021**.
[348] Sola Kuti Blog EFCC Says Kalu's Acquittal Unfortunate, Ready for Re-Trial as Evidence Against Former Governor Overwhelming (2020) < https://solakuti.com/efcc-says-kalus-acquittal-unfortunate-ready-for-re-trial-as-evidence-against-former-governor-overwhelming/ >accessed on 6th September 2021.
[349] Okonkwo and Nash (1990) *Op. Cit.*
[350] Kathleen Daly (2002), *Op. Cit.*
[351] Chris H. Van Zyl and Jacques Pretorius *Op. Cit.* (2004).
[352] Section 396 *Op. Cit.* ACJA.
[353] ***FRN vs Joshua Dariye (Former Governor of Plateau State)*** < https://corruptioncases.ng/cases/frn-vs-joshua-dariye-former-governor-of> **accessed on 6 September 2021**.

N700million. His first date of arraignment was 13th July 2007. He was granted bail, but he later proceeded to challenge the jurisdiction of the court to try him. He hinged his argument on the fact that the alleged offence committed by him took place in Plateau State and the funds involved belonged to the state, and argued that his trial ought to take place in the state and not in Abuja. The judge dismissed Dariye's objection, which prompted him to proceed to the Court of Appeal, which also threw out the application and ordered him to go and face his trial. While the case was still pending before the court, Dariye won a senatorial seat in the 2011 polls. The prosecution took 11 years, and towards the end of the proceedings Dariye decamped to the ruling APC from the opposition PDP. Senator Dariye, who was elected to the senate on the platform of the PDP, defected to the ruling party APC at a very critical and advanced stage of his prosecution, when conviction appeared inevitable.[354] He was convicted of 15 out of the 23-count amended charge bordering on criminal breach of trust and misappropriation of public funds and was sentenced to 14 years in prison for criminal breach of trust and two years for misappropriation of public funds, to run concurrently. The Court of Appeal, in response to an appeal filed by the convict, upheld the conviction of the appellant but offered a reduction of his sentence to 10 years. The Supreme Court also upheld the decision of the Court of Appeal.[355] The ACJA/ACJL compliance[356] was also violated, the study notes that a conviction after 11 years is no consolation and is no evidence success of our penal system, there is no

[354] Emilia Onyema, Pallavi Roy, Habeeb Oredola and Seye Ayinla The Economic and Financial Crimes Commission and the politics of (in) effective implementation of Nigeria's anti-corruption policy (ACE Working Paper 007 November 2018).

[355] ***FRN vs Joshua Dariye (Former Governor of Plateau State*** <https://corruptioncases.ng/cases/frn-vs-joshua-dariye-former-governor-of > accessed **15 July 2021**.

[356] Section 396 *Op. Cit.* ACJA.

doubt that a TRC process would have been more beneficial of the state and the country at large.[357]

Jolly Nyame:[358]

In this matter a former Governor Jolly Nyame of Taraba State was indicted on 41-count charge in 13th July 2007. He was alleged to have embezzled N1.3billion and collected N180million from a contractor as a kick-back from a N250 million contract awarded to the company for the supply of stationery to the state government. The prosecution of took 11 years, and towards the end of the proceedings Nyame joined the ruling APC from the opposition PDP. Mr Nyame also defected at a critical stage of his prosecution, when conviction appeared imminent.[359] The Defendant was convicted and sentenced to 14 years for criminal breach of trust, 2 years for criminal misappropriation, 7 years for gratification and 5 years for obtaining by dishonesty, with the sentences to run concurrently. The defendant, dissatisfied with the judgement, approached the Court of Appeal, which also upheld the conviction and reduced the sentence to 12 years. The Court of Appeal also fined the convict N495 million. The Supreme Court also agreed with the Court of Appeal and affirmed the guilt and conviction by upholding the Court of Appeal's reduction of the 14 years imprisonment to 12 years. The Apex Court, however, in a unanimous decision, set aside the fine imposed on the convict by the Court of Appeal. This again reveals the ludicrous nature of our penal system, taking 11 years to arrive at a conviction, there is

[357]Sam Garkawe, *Op. Cit.* (2003).

[358] ***FRN vs Jolly Nyame (Former Governor of Taraba State)*<** https://corruptioncases.ng/cases/frn-vs-jolly-nyame-former-governor-of-t**>accessed on 6th September 2021**.

[359] Ade Adesomoju, 'Court delivers judgment in former Taraba gov corruption case', *Punch Newspapers,* (May 30 2018) <https://punchng.com/%E2%80%8Ebreaking-court-delivers-judgment-in-former-taraba-gov-corruptioncase/>.

no evidence that any of the amounts stolen was forfeited or will benefit the Nigerian people and the ACJA/ACJL was violated.[360]

Femi Fani-Kayode:[361]

There are currently two cases he has to answer in respect of corruption related cases. In the first instance he was indicted for receiving through his Police Aide, one Victor Ehiabhi, a sum which was paid to him by the Former Director of Finance and Administration (DFA) of the Office of the National Security Adviser, ONSA, Shuaibu Salisu on the direction of the Former NSA, Col. Sambo Dasuki (rtd). The prosecution's witness testified that the defendant had instructed his domestic servants comprising of his driver and personal assistant to collect N26 million on his behalf from the Office of the National Security Adviser (ONSA). He added that they took the cash sum in a 'Ghana-Must-Go' bag from the account section of the ONSA and delivered it to the defendant as directed in his residence. The trial has been ongoing for 1,762 days and remains at prosecution stage.

In the second case [362] the accused were alleged to have stolen and illegally disbursed the said sum belonging to the Federal Government of Nigeria for political and personal uses. He was indicted on 28th June 2016 on a 17-count charge bordering on conspiracy, stealing, corruption and making payments exceeding the amount authorised by law. The court dismissed the application filed by the defendants seeking to strike out the charge preferred against them by the prosecution on the grounds that

[360] Section 396 *Op. Cit.* ACJA.

[361] ***FRN vs Femi Fani-Kayode (Former Minister of Aviation)***< https://corruptioncases.ng/cases/frn-vs-femi-fani-kayode-former-minister>**accessed on 6 September 2021.**

[362]***FRN vs Femi Fani-Kayode (Former Minister of Aviation) & 3 others*** <https://corruptioncases.ng/cases/frn-vs-femi-fani-kayode-former-minister-1> accessed 6 September 2021.

the court lacked any jurisdiction to entertain the charge because the prosecution failed to specify the location within Nigeria where the alleged offences were committed. The case has been on for 1,897 days. This is another colossal waste of resources and the ACJA/ACJL violated in both cases.[363] Femi Fani Kayode continues to be a high profile political player in the country.[364] This is certainly a case that may have been ripe for a TRC process where amnesty is conditional upon full disclosure of crimes. This would motivate perpetrators to reveal all of the salient information about their crimes in exchange for amnesty.[365]

Ibrahim Shekarau:[366]

In this case he was arraigned on 24th May 2018 and it took 932 days to complete. The Defendants were arraigned for allegedly collecting the said sum from the former Minister of Petroleum Resources, Deizani Alison-Madueke for the purpose of influencing the results of 2015 general election. The presiding judge, while delivering his judgment said the 2nd and 3rd defendants were discharged and acquitted on the ground that the EFCC failed to prove its case beyond reasonable doubt that the money was not received through the financial institution. The court stated that while the defendants had admitted collection of the said money from a financial institution, EFCC was unable to prove the money laundering charge against them. The first

[363] Section 396 *Op. Cit.* ACJA.
[364] Anthony Ademuliyi Femi Fani-Kayode reacts to Sheikh Gumi's call for amnesty for bandits *The Vent Republic* (2021) <https://theventrepublic.com/2021/09/06/femi-fani-kayode-reacts-to-sheikh-gumis-call-for-amnesty-for-bandits/>.
[365] Bonny Ibhawor, (London, 24th January 2019), *Op. Cit*.
[366] *FRN vs Ibrahim Shekarau (Former Governor of Kano State) & 2 others*. https://corruptioncases.ng/cases/frn-vs-ibrahim-shekarau-former-governor> accessed on 16 July 2021.

defendant was also discharged and acquitted by the same court after he initiated and won a case of no submission at the Court of Appeal.[367] This is one of the speediest of political corruption cases it has taken to conclude for it took almost 3 years to complete. It is one of the few that ACJA/ACJL was complied with.[368] This is a limited success in cases were there has been overwhelming failure. A TRC process will certainly have been quicker than this and with a similar outcome.[369]

4.3 IMPLICATIONS AND CHALLENGES OF THE SCALE OF CORRUPTION IN NIGERIA.

The ability to curb corruption in Nigeria and the potential success to do so will depend on the combination of a number of factors. These are namely the following:

- the exhaustiveness of legal provisions of statutes to meet the innovative tendencies developed for private accumulation at the expense of the public;
- the efficacy of the police and anti-corruption commissions to properly investigate and arraign suspects, the efficacy of judicial officers to properly prosecute; as well as
- the willingness and ability of the executive to insist on the implementation of laws whilst desisting from tacit approval of `corrupt practices.

From the scenario presented above, it is obvious that the attainment of the combination of these factors in Nigeria has failed. Investigation, prosecution and conviction have been rendered costly, problematic and almost always unachievable.

[367] *Ibid.*
[368] Section 396 *Op. Cit.* ACJA.
[369] Albie Sachs, *Op. Cit.,* (1999)52 (4) 1563.

The ACJA/ACJL is mainly subjected to a series of non-compliance without any serious consequences.[370] It therefore appears that neither the penal system as it presently operates, nor the political will that subsist are sufficient to cope with and address the scale of crimes of corruption in Nigeria. Indeed, in line with this is the observation of Osoba that:[371]

> Corruption has become a way of life in Nigeria, one which existing Governments neither wish to, nor can control. Combating corruption requires a popular participatory democracy able to monitor and hold to account those in charge of the state and the treasury.

In addition, some other clue as to why the stalemate seems to have arisen, however, may be situated within the argument of Nwosu[372] that Nigeria's legal system places much emphasis on retributive rather than restorative justice and posits this has given rise to lack of remorse on the part of offenders who now demand proof of their culpability during trial rather than show remorse. He questions why the sentencing and custodial option should be adopted and thereafter public funds are spent again to decongest the prisons.[373] He added that the Nigerian legal system proffers stiff penalties, which are in reality unenforceable, which makes a mockery of the whole system.

This goes to the root of the question on the value of justice when the relationship between the injured and the offenders remains fractured by the continued and labourious subjection of perpetrators to corruption criminal trials which achieve little and does not address the yearnings of the injured. Nwosu therefore advocates the use

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[370] *FRN vs Femi Fani-Kayode (Former Minister of Aviation) Op. Cit.*
[371] Segun Osoba 2000, *Op. Cit.*
[372] Kevin Nwosu, Nigerian lawyers insist on criminal reforms (2010)) <http://www.restorativejustice.org/RJOB/nigerian-lawyers-insist-on-criminal-justice-reforms> accessed on 27 June 2015.
[373] *Ibid.*

of restorative justice options such as plea bargaining, bail process and victim-offender mediation these are elements that can be injected into a TRC process. His argument revolves around the cognisance of the underlying issues involved in an offence, which ranges from sociological, psychological and economical.[374]

It is in line with the scenario presented above that the adaptation and implementation of a TRC with its legacy of downplaying the punitive aspects of the traditional criminal justice system and focusing on an alternative penal justice system that allows for the liberty of persons after the process might be considered an appropriate response. According to Deminck, a paradigm shift of sorts from retributive to restorative justice.[375]

Effective adaptation and implementation of the TRC model will encourage increased admissions of involvement in private accumulation from public funds rather than face the option of long jail terms put at "not less than 15 years and not more than 25 years" by, for instance, the EFCC Act.

The study therefore sees the value in adapting a TRC model because of the apparent success achieved as a tool in mediating conflicts around the world and particularly in South Africa. In Nigeria, these are conflicts where significant parts of the governing elite are implicated or where stalemates have ensued. Osoba,[376] Azu[377] agree that Nigeria is in a combat situation as far as corruption is concerned and many of the penalties in place are in reality unenforceable. The study therefore argues for the

[374] Kevin Nwosu, October 2010, *Op Cit.*
[375] Ashley DeMinck, 2007 *Op. Cit.*
[376] Segun Osoba, 2000 *Op. Cit.*
[377] John C. Azu, 'Nigerian lawyers insist on criminal justice reforms' (2010) <http://www.restorativejustice.org/RJOB/nigerian-lawyers-insist-on-criminal-justice-reforms> accessed 27 January 2015.

recognition of some sort of parallel of this war against corruption in Nigeria to those of other conflicted societies.

This parallelisation is helped by available evidence that the TRC process was greatly improved under the South African model.[378] While value exists as suggested by John Azu's in his article *"Nigerian lawyers insist on criminal justice reforms"* in simply extending the penal system to reflect and resolve the concerns of this study, the argument remains that Nigeria faces a combat and emergency situation[379] with respect to corruption, the case studies above refer, and therefore a more fundamental and enduring approach is required.[380] This study therefore takes into account the lessons that have been learnt from the South African TRC model in order to theorise on the adaptation of the TRC model as an alternative penal justice system for Nigeria. This is even more pertinent because of the various definitions of corruption that have arisen within the Nigerian discourse, including that of the past Nigerian President Jonathan during media interaction called 'Presidential Chat'.[381] In a confident claim during his 5th of May 2014 Presidential chat, the then President argued that:

> Over 70 percent of what are called corruption, even by EFCC (Economic and Financial Crimes Commission) and other anti-corruption agencies is not corruption, but common stealing. Corruption is perception, not reality.[382]

4.4 SANCTIONS AND INFORMAL SANCTIONS

Whilst there is some merit in outlining the court of public opinion as an alternative this study goes so far only to consider the aspect that relates to informal sanctions.

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[378] Olu Ojedokun Speaking Truth and the Works of Albie Sachs (Unpublished Ph.D Thesis 2006, Nottingham Trent University).
[379] Unini Chioma, Special courts for corruption. *Op. Cit*. 2015.
[380] Olu Ojedokun 2014, *Op. Cit.*
[381] Presidential Chat , *Op. Cit.* (2014).
[382] *Ibid.*

We avoid court of public opinion in its totality for the reason that in many ways, it is argued that it will lead to a return of a medieval notion of "fama," or reputation and in other ways mob justice: which is sometimes benign and beneficial, sometimes terrible (think French Revolution) therefore defeating the goal of certainty.[383]

It is noted that there is in existence an extensive amount literature on the engagement between formal sanctions and informal non-legal sanctions, these can be compared with punitive and non-punitive punishment earlier discussed above.[384] As indicated above the features of non legal sanctions rests in the loss of standing in a community but this may not necessarily have the desired effect in a society where corruption is institutionalised[385] and the assumption of stigma which may deter undesirable behaviour just as or more effectively that formal legal sanctions may not be a valid outcome in those societies where corruption is part of the fabric.[386] There is also a complementarity of informal and formal sanctions, noting legal penalties may influence the existence and impact of formal sanctions.[387]

The above argument provides some contrast to Avruch and Vejarano who posit that a host of authors view recourse to the court system as the only justified avenue to achieving justice.[388] Part of the study's argument is that the real difficulty a criminal justice system presents is to reconstruct society and recast national unity while at the same time stigmatising the perpetrators of crimes.

This study in engaging with the uniqueness of Nigeria's war on corruption exploring to what extent the innovation of reputational sanctions may be applied. It also seeks to

[383] *Ibid.*
[384] Mikkel Jarle Christensen (2020), *Op. Cit.*
[385] Max Siollun, *Op. Cit.,* (2013) 184.
[386] Stewart Macaulay, Non-contractual Relations in Business: A Preliminary Study. (1963) (28) 55-67, *American Sociological Review.*
[387] Bruce Schneier, *Op. Cit*.(2013).
[388]Kevin Avruch and Beatriz Verjarano (2003), *Op. Cit.*

explore whether the alternative of reputational sanctions is a way forward that addresses the limited resources available to the state in the ongoing war on corruption. Then again it wrestles with its efficacy because of the institutionalisation of corruption.[389] Whilst onerous legal penalties are desirable to act as a deterrent, in reality the cost, time money and effort and there is the lack of certainty even with the most diligently pursued prosecution.[390] However, it may be more economically feasible in the Nigerian context to adjust legal penalties to reflect reputational sanctions if we can get past the institutionalisation of corruption.[391]

The exploration of the innovation of reputational sanctions that several commentators[392] have concluded that the informal losses to the perpetrator of crime are significant only when the victim of the misconduct has a relationship with the wrong doer and not the wrong is to third parties or the public at large. But the question for Nigeria is can reputational sanctions address the concern of the expense and lack of certainty brought about by the traditional sanctions in achieving the aims of deterrence, retribution, restoration, denunciation and protection. The emphasis here is being on the sanctions rather than the process enabling it. But the question is can reputational sanctions of the kind and manner discussed in the previous paragraphs work in Nigeria? Whether the availability of it as an option will motivate many suspected of corruption to come forward to negotiate a kind of plea bargain to avoid onerous sanctions? Will the reputational sanctions be sufficient to capture the key

[389] Max Siollun, 2013 Op. Cit.,184.
[390] Cyprian Okechukwa Okonkwo and Michael Naish *Op. Cit.* (1990) 379.
[391] Edward Iacobucci, 'On the Interaction between Legal and Reputational Sanctions' [2014]43(1) *The Journal of Legal Studies,* 189.
[392] Olu Ojedokun and Jamila Suleiman, *Nigeria and the Problem of Corruption; Exploring the Innovation of Reputational Sanctions* (2018)(6) *Journal on International Relations and Diplomacy.*

roles of deterrence, retribution, restoration as argued by Okonkwo and Naish[393] or protection and denunciation as offered and contained in The Engage Wiki?[394]

Furthermore in a society it is claimed that even the corrupt public official is regarded as a financial representative of his community who will take a slice of the national cake and bring it home to share with his community, thus indicating the family and community members of a public official have a personal stake in inciting corruption how will this work?[395]

In the Tait's report he argued that:

> Clearly, if expensive punishments like prison are shown to increase public safety, then the benefits of the programs can be weighed against alternative ways of achieving the same objectives (through better policing, crime prevention or early intervention programs). On the other hand, if less expensive sanctions (like community service orders or fines) show promising results in terms of public safety, more attention might be paid to fine-tuning these to increase their impact. [396]

In Nigeria there is currently limited evidence, which allows that conclusion with respect to crimes of political corruption, precisely because so few convictions have been achieved in recent times. Whichever type of sanction is identified, one outcome is expected, is a limiting in criminal behaviour, and a consistent or simutaneous increase in public safety.[397]

[393]Okonkwo and Nash (1990) *Op. Cit.*
[394]The Engage, *General purposes of criminal sanctions* (2016), http://wiki.engageeducation.org.au/legal-studies/unit-4/area-of-study-2-court-processes-and-procedures-and-engaging-in-justice/general-purposes-of-criminal-sanctions/ accessed on 10 July 2016.
[395] Max Siollun, (2013) *Op. Cit.* p.185.
[396] David Tait (2001) University of Canberra *The Effectiveness of Criminal Sanctions: A Natural Experiment*, Report, 33/96-7 To The Criminology Research Council.
[397] Corruption Cases Database https://corruptioncases.ng/ 16 July 2021.

The connection between criminal sanctions and rates of recidivism, or re-offending, remains the subject of considerable debate within the criminological literature.[398] There are arguments that more punitive sanctions may reduce crime, others suggest that it increases crime.[399] Providing the range of sentencing options available to courts, and the vastly different costs associated with each, it is relevant to examine the evidence about the relative impact of different penalties. Alternatively, if less expensive sanctions (like community service orders or fines) reveal promising results in terms of public safety, more attention might be given to applying these to increase their impact on society.

This study grapples with the argument that any suggestion of amnesty or TRC treatment for offenders raises questions as to whether it violates the just deserts approach. The 'just deserts' approach to criminal sanctions argues that the requirement that punishments be useful by raising the argument that they must ultimately be fair.[400] Exponents of this school might not find the issues canvassed in this report convincing, since the utilitarian assumptions used here are denied. However the report does take up two of the principles of parsimony and avoiding harm for allocating punishment proposed by the person most associated with this position, Andrew von Hksch.[401] Punishments should be the least intrusive consistent with the gravity of the crime, and should minimise the amount of harm inflicted.[402] Indeed a fundamental question raised by von Hirsch is whether punishment should be

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[398] William, Gerald Gaes, Ryan Kling and Christopher Cutler. The Relationship between Prison Length of Stay and Recidivism: A Study using Regression Discontinuity with Multiple Break Points December 4, 2017, Document No: 251410.
[399] *Ibid.*
[400] Andrew von Hirsch The "Desert" Model for Sentencing: Its Influence, Prospects, and Alternatives (2007)(74) Social Research Punishment: The US Record 413-434. <https://www.ojp.gov/pdffiles1/bjs/grants/251410.pdf> accessed 17 July 2021.
[401] *Ibid.*
[402] Tait, D. *Op. Cit.* (2001).

inflicted at all for some offenders. These considerations were central to the deliberations of the New South Wales (NSW) magistrates who formed the focus of the study drawing from a 'just desserts' perspective. The question this report addresses is: what is the implication of parsimonious sentencing practices for public safety? Does it reduce or increase one form of harm (offences against the public) if another form of harm (penal punishment) is minimised? Okoroma, the then Director of Legal and Prosecution Department of Economic and Financial Crimes Commission (EFCC), argued that in Nigeria a more relevant factor remains the very high cost of prosecution.[403] He argues that investigation and prosecution of corruption-related crimes in Nigeria are daunting. According to him, some of the challenges included socio-cultural norms; high cost of prosecuting cases, procedural and evidential issues; undue delays in the judicial process and international cooperation issues.

This study proceeds to reiterate the core elements of a traditional judicial panel of as follows, retribution, rehabilitation and deterrent. It is suggested that under the alternative TRC means, these are still achieved with apology and reparations constituting an approximation of retribution and deterrent respectively, while the fact of individual application for amnesty and/or indemnity (as opposed to a blanket grant of same) serves as an admission of involvement in the criminal acts as well as an indication of rehabilitation by the state in South Africa. This process being made public[404] like the South African model could produce the significant leverage on the nation participating in the hearings and its work with the right of anyone to attend any of the hearings. This would enable openess and also provide a strong teaching

[403] Chile Okoroma, *Challenges in Investigating and Prosecuting Economic and Financial Crimes in Nigeria* (2015), <*http://icpc.gov.ng/inter-agency-task-team-reviews-progress-report/*> accessed on 11 July 2016.
[404] Olusegun Obasanjo. This Animal called Man (2003). <http://newsbiafrannigeriaworld.com/archive/2003/oct/05/013.html> accessed on 5 September 2021.

opportunity so that healing and reconciliation will be extended beyond a small group and be made open to all in the society.

It would appear that not only are the core values of the traditional criminal justice system met within this model, but also a further valuable element of reconciliation is added. It may also be argued that this element is key to maintaining harmony and therefore, to a large extent, peace in any society. The application of this element of reconciliation effectively extends the core values of humanity and co-existence. As far as Nigeria is concerned the study argues there is a utility in using this model to unlock the logjam that numerous cases of corruption have brought to our penal system. It could ensure that impunity is addressed, through the mechanism, which allows open confession of corrupt practices in a public tribunal in exchange for amnesty and an agreement to forfeit verifiable ill-gotten wealth.

The mechanism will involve apologies and reparations, constituting an approximation of retribution and deterrent respectively[405], while the fact of individual application for amnesty and/or indemnity (as opposed to a blanket grant of same) serves as an admission of involvement in the criminal acts as well as an indication of rehabilitation. This process being made public like the South African model could produce the enormous advantage of the Nation participating in the hearings and its work with the opportunity of any person to attend any of the hearings. In this enablement would provide openness and also provide a strong teaching opportunity so that healing and reconciliation will not confined to a small group but be open to all in the society.

[405] Ashley DeMinck, 2007 *Op. Cit.*

CHAPTER 5

THE ADAPTATION OF TRC MODEL AS EITHER COMPETING OR A RECONCILABLE PARADIGM.

The study believes thus, the true value of the TRC model lies in the answers to the following questions, namely:

1. How does the existing penal system in Nigeria address the problem and scale of corruption crimes, the societal fractures and to question any progress[406] made in addressing it?[407]

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[406] Bassey Udo, *African Union Asks President Jonathan of Nigeria To Declare His Assets, Others Too*, (Lagos, 2015) <http://newsrescue.com/corruption-african-union-asks-president-jonathan-nigeria-declare-assets-others/#axzz3SnCFg6B9> accessed on 15 June 2021.

[407] Martha Minow, *Do Alternative Justice Mechanisms Deserve Recognition in International Criminal Law?:* Truth Commissions, Amnesties, and Complementarity at the International Criminal Court. [2019] (60) *Harvard International Law Journal* 1.

2. Whether the current treatment of crimes of corruption in Nigeria raises the theorisation of the possibility, appropriateness and the validity of an alternative penal justice system to address the crimes of corruption?
3. Is the adaptation of the TRC model to our existing penal system an effective and durable way to address the crimes of political corruption in Nigeria, will it construct an encompassing model that encapsulates the aims of deterrence, retribution, restoration, denunciation, protection and reconciliation?
4. The study also asks could the Nigerian government with respect to the problem of corruption move towards a more complete adaptation of the template of the South African TRC to unlock the impasse and allow the opening of a new chapter?

The study has attempted to address the first question mentioned above by setting and relying on the context set as far back as the year 2005. This refers to over five million cases pending in the Nigerian courts with some of them having been appealed and argued for more than 20 years.[408] Whilst it is accepted that many are not corruption cases but these avalanche of cases limits the resources available that may be devoted to addressing corruption crimes. The study repeats the claim of Justice Fred Oho of Delta State High Court that this has created broad political and economic implications and endangered Nigerian Society.[409] The study's inference from this is that a challenge is posited on how the Nigerian society resolves the fractures exacerbated by over burdened courts without becoming fractured? The evidence gathered in the course of this study indicates that the existing penal system is not working,[410] The

[408] Unini Chioma, Special courts for corruption. *Op. Cit*. 2015.
[409] *Ibid.*
[410] Unini Chioma, Special courts for corruption. *Op. Cit*. 2015.

ACJA/ACJL are largely not complied with.[411] In addressing this it therefore raises the theorisation of the possibility, appropriateness and the validity of an alternative penal justice system to address the crimes of corruption and in this consider its replacement or extension with TRC model to unlock this intractability. It then follows that if this model has proved to have a degree some success in South Africa[412] and has been extended to at least 16 other countries up to year 2000,[413] and recent commissions afterwards have demonstrated greater adaptability with the example of Canada.[414] It is therefore in the view of this study lays a basis to consider and possibly recommend the same for Nigeria.

To place it more succinctly, as reported by Manu,[415] even Justice Chukwudifu Oputa, JSC (as he then was), as the Chairman of the Nigerian version of the TRC was clear about the role any panel should play when he posited that while justice for victims of human rights abuses is essential for reconciliation:

> It ought also to be justice for the perpetrators of those abuses. But most importantly, it will be justice for the nation at large---an eye for an eye may be retributive, and will end up leaving all blind by sparkling off a whirlwind of revenge.

It should be noted that whilst arguments are made in respect of restorative mechanisms used in the international criminal justice system, the study admits Nigeria still has a lacuna on the domestic scene when it comes to the question of tackling corruption. Having said that Nwosu suggests that the current Nigerian

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[411] *FRN VS Otunba Alao-Akala and Others Op. Cit.*
[412] Priscilla B. Hayner., *Op. Cit.* (2002) 344.
[413] *Ibid.*
[414]The Final Report of Canada's Truth and Reconciliation Commission., *Op. Cit.*
[415] W.B. Manu, *Submissions The Sierra Leone Civil Service - A Presentation to The TRC on Behalf of The All Peoples Congress* (APC Party) Appendix 2, Part 4: (2004), <http://www.sierraleonetrc.org/index.php/appendices/item/appendix-2-part-4-submissions>accessed on 25 May 2021.

criminal justice system is retributive.[416] He says the focus is on inflicting punishment and pain on the offender than any real attempt to reform and reintegrate the offender back into the society. He argues that perhaps as a result of the fact that the retributive strategy[417] gained prominence through its use in trial of corrupt politicians and rich business executives by the EFCC.[418] This provision[419] was evoked in the case of *Federal Republic of Nigeria vs. Emmanuel Nwude & Anor,*[420] where the defendants who were charged with defrauding a Brazilian Bank received reduced sentences in exchange for their plea of guilty. Sections 74 – 76. 31 of the EFCC Act encourage:

> …the development of restorative justice policies, procedures and programmes that are respectful of the rights, needs and interests of victims, offenders, communities and all other parties.

Nwosu also argued that victims of crime and even the community who suffer the direct impact of the offence are relegated to the background by the current system.[421] He urges the examination of restorative justice programmes because they focus more on addressing the problems caused by a criminal conduct than just trial and punishment of the offender. He seeks an all-inclusive problem-solving approach that ensures that the interests of major stakeholders in the crime are well addressed and protected. He concluded with the argument that with restorative justice, the victim, the offender and the community all participate in the crime disposal process. Basically, the victim is compensated as much as can be reasonably achieved; the offender is

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[417]Thisday Newspaper, Editorial' Bribe Scandal: Siemens Fined N7bn', Lagos (November 23, 2010)6.
[418] Thisday Newspaper. Editorial 'Cecilia Ibru: One Case, Many Lessons' Lagos (October 18, 2010).
[419] Section 14, EFCC Act *Op. Cit.*
[420] *Federal Republic of Nigeria vs. Emmanuel Nwude & Anor* (2006) 2 EFCSLR 145.
[421]Kelvin Nwosu (2015) *Op. Cit.*

effectively reintegrated back into the community of responsible citizens; and the community is restored to normalcy.[422]

When all the preceding arguments are taken together it becomes increasingly that the adaptation of the TRC model's enduring legacy can be achieved, constructing an encompassing model encapsulating the aims of deterrence, retribution, restoration, denunciation, protection and reconciliation but will require necessary modification of Nigeria's constitutional and the ACJA Act or as an extension thereof and may usher in a reset of attitudes towards corruption. But will this complete adaptation of the template of the South African TRC be sufficient to unlock the impasse and allow Nigeria to open a new chapter?

The review has previously stated that it will require the National Assembly to initiate a process and will require a significant constitutional amendment, which involves a move or transfer of setting up of tribunals into the concurrent or exclusive legislative list allowing the National Assembly to legislate accordingly.[423] This is because of the decision reached in the case of *Fawehinmi v Babangida,* which placed the setting up of tribunals on residual list.

The above position appears reinforced by the TRC model of the South Africa, which was the first truth commission to declare in its report that it was a restorative mechanism of accountability that was victim-centric.[424] Julian Roberts in Mara Schiff[425] describes the possibilities of restorative justice in the context of international criminal justice as demonstrated in the TRC as the 'paradigmatic alternative to

[422] *Ibid.*

[423] *Fawehinmi and 2 Others v Babangida and 2 Others* (SC 360/2001) [2003] 9 (31 January 2003). Also see the earlier case of Togun v. Oputa (NO. 2) (2001) 16 NWLR (PART 740) 597 at 621.

[424] Chis Van Zyl and Jacques Pretorius, *Reconnaissance of South African standards and values in the fight against corruption: Building capacity through the integration of restorative justice practices* Paper presented at "New Frontiers in Restorative Justice: Advancing Theory and Practice", Centre for Justice and Peace Development, (Massey University at Albany, New Zealand 2004).

[425] Kathleen Daly (2002), *Op. Cit.*

criminal prosecution for serious and systematic human rights violations.' So there is some recognition of its utility in these areas but not in the specific area of corruption. So in the position above the study seeks utility in exploring the TRC model as a *'paradigmatic alternative to criminal prosecutions for corruption in Nigeria.'*[426] In so doing we draw from Van Zyl[427]arguing that combating corruption requires a commonly accepted set of ethics. This could evolve out of TRC like public hearings, and allow the construct of a national system of ethics, which must be clear on what constitutes corruption and lead the offenders towards responsibility, rehabilitation and then restoration.

In engaging with the durability of a TRC model we note that since they are temporary bodies operating for a defined period,[428] it is a relevant question to raise since it could be argued that the model only gives credence to a reconciling of a temporary intervention in our penal system. In addressing the question of whether the core elements of outcome for a traditional judicial panel will be maintained if a TRC is utilised as alternative penal justice system for corruption, we draw from Albie: who suggested [429]tying truth-telling as a condition of amnesty. It was in this context that he said, "*Punishment is not the only form of justice. Such justice limits human potential, and deprives justice of its full meaning."*

The study could therefore argue that the core elements of justice, which should be the

[426] Chris Van Zyl, (2004) *Op. Cit.*
[427] *Ibid.*

[428] Priscilla Hayner, *Unspeakable Truths: Confronting State Terror and Atrocity,* (New York, Routledge, 2001).
[429] Lauren McGillicuddy. Lessons From South Africa's Truth & Reconciliation Commission ' Justice Albie Sachs tells Philosophy class: Punishment is not the only form of justice ' (Suffolk University Boston, 2021).

outcome of any penal justice system, can still be maintained. [430]

It is also believed that Albie Sachs[431] goes some distance in addressing the value of justice even when the relationship between the injured and the offender remains fractured despite the subjection of perpetrators to a corruption criminal trial, when he argues that:

> Our criminal justice system doesn't allow for apology, maybe a little bit in libel cases, you can reduce damages if you apologize, but it doesn't seem to be part and parcel of the criminal justice system. Yet it is such a powerful thing. It is very important for restoring a sense of normality in society, because you are acknowledging the wrongdoing that you have done. It is very strong again in African culture, the idea of apology.[432]

The sources of South African and the Nigerian legal system are substantially derived in its orgins from common law and hence share some similar attributes.[433] The study therefore suggests if the South African criminal justice system could cope with a TRC within its penal system, the Nigeria criminal justice system could also cater for a new TRC model within its penal system. This study posits that real test in the Nigerian situation is what we do so that the massive injustices, institutionalised, systemic brought about by political corruption which have led to the violations, are corrected so that the Nigerian people who suffered so much historically can now get on with their lives and enjoy their lives and feel full, free from impunity. Albie Sachs argues that is what justice in the broad sense requires.[434] That is the most profound need in Nigeria, to provide the housing, the education, the water, the electricity, and more than that, the skills, the confidence, the sense of self, the fun, the adventure, the

[430] Cyprian Okechukwa Okonkwo and Michael Naish (1990), *Op. Cit.*
[431] *Ibid.*
[432] Albie Sachs, Truth and Reconciliation, 1999:52:1563 *SMU Law Review.* https://scholar.smu.edu/smulr/vol52/iss4/6 accessed 5 September 2021.
[433] Hendrik Naude Van der Merwe The origin and characteristics of the mixed legal systems of South Africa and Scotland and their importance in globalisation [2006] (18)(1) *A Journal of Legal History.*
[434] Albie Sachs, *Op. Cit.,* (1999) (52) (4)1563.

culture, the ebullience, of a free people and that is the real test before us-not sending a few crooks to jail.[435]

The study has engaged with the question of whether it is appropriate that the new system devised through this mechanism should compete or be reconciled. If we accept the argument by Moffet that since the 1990s there has been an increasing emphasis on the need for multifaceted, comprehensive transitional justice measures to effectively deal with impunity and the consequences of mass violence.[436] If we also accept his further argument that it is no longer considered effective to pigeonhole discrete transitional justice mechanisms and that instead, there is increasing discussion of a comprehensive package of measures that complement each other. Then this study can conclude that such measures can be complementary with an overlap and tension between them, such as when trying to carry out prosecutions while at the same time seeking to secure truth, which requires careful crafting of social, political, economic and legal factors to avoid derailing the transition itself.[437]

Furthermore it has demonstrated that its objectives can be achieved by use of a TRC model and extending the penal system rather that proceeding with the upheaval that a replacement might cause.

It is of benefit to consider Mandela argument when he appeared to address the question of how such a process would grapple against any alternative hostile environment when he argued that:[438]

[435] Albie Sachs, *Op. Cit.,* (1999) (52) (4) 1563.
[436]Luke Moffett *In the Aftermath of Truth: Implementing Commissions' Recommendations on Reparations – Following Through for Victims* In J Sarkin (Ed), *The Global Impact and Legacy of Truth Commission* (Intersentia 2019) 143 -168.
[437]Luke Moffett *Op. Cit.* (2019)143 -168.
[438] Nelson Mandela, (1993) *Op. Cit.*

> In this context, I also need to make the point that the Government will also not act unduly with regard to attending to the vexed and unresolved issues of an amnesty for criminal activities out in furtherance of political objectives…….. The nation must come to terms with its past in a spirit of openness and forgiveness and proceed to build the future on the basis of repairing and healing. The burden of the past lies heavily on all of us, including those responsible for inflicting injury and those who suffered. Following the letter and spirit of the Constitution, we will prepare the legislation which will seek to free the wrongdoers from fear of retribution and blackmail, while acknowledging the injury of those who have been harmed so that the individual wrongs, injuries, fears and hopes affecting individuals are identified and attended to.[439]

The study believes that addressing the nature of the relationship between the injured and the offenders is a by product of responding to the second question on the current treatment of crimes of corruption in Nigeria and the theorisation of the possibility, appropriateness and the validity of an alternative penal justice system in addressing the crimes of corruption. The study is already aware that if the Nigerian penal system as far as crimes of political corruption are subjected to a TRC process which de-emphasises penal sanctions, the dis-emphasis does not imply those sanctions may not be effective.[440]

As Schneier argues that court's sanctions, whatever they are delivers reputational justice.[441] He suggests that if one party makes a claim against another that seems plausible, based on both of their reputations, then that claim is likely to be received favorably. If someone makes a claim that conflicts with the reputations of the parties, then it is likely to be disbelieved.[442] Basterfield posits that reputation is, of course, a commodity, and loss of reputation is the penalty this court

[439] *Ibid.*
[440] Albie Sachs, *Op. Cit.,* (1999) (52)(4) 1563.
[441] David Tait The Effectiveness of Criminal Sanctions: A Natural Experiment, Report, 33/96-7 To The Criminology Research Council (University of Canberra 2001).
[442] Bruce Schneier, The Court of Public Opinion Is About Mob Justice and Reputation as Revenge (2013),< http://www.wired.com/2013/02/court-of-public-opinion/> accessed on 11 July 2016.

imposes. In that respect,[443] it less often recompenses the injured party and more often exacts revenge or retribution. And while those losses may be brutal, the effects are usually short-lived.

The study recognises that the court of public opinion has significant limitations even with respect to reputational sanctions. It works better for revenge and justice than for dispute resolution. It can punish a company for unfairly firing one of its employees or lying in an automobile test drive, but it is less effective at unravelling a complicated patent litigation or navigating a bankruptcy proceeding or even in the prosecution of corruption in Nigeria. In many ways, it will be a reversion to a medieval notion of "fama," or reputation. In other ways, like mob justice, which is sometimes benign and beneficial, sometimes terrible (think French Revolution).[444]

Basterfield recognises that the role of the mass media has enabled this system of reputational sanctions for centuries. But it is the advent of Internet, and social media in particular, that has transformed how it is being used. It now more intentionally used by more and more powerful entities as a redress mechanism. Perhaps because it is perceived to be more efficient or perhaps because one of the parties feels they can get a more favourable hearing in this new court, but it is being used instead of lawsuits. Instead of a sideshow to actual legal proceedings, it is turning into an alternative system of dispute resolution and justice.

Part of this trend is because the Internet makes taking a case in front of the court of public opinion so much easier. It used to be that the injured party had to convince a traditional media outlet to make his case public; now he can take his case directly to

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[443] J.Basterfield, *Reputation – Your Intangible Commodity* (2013), <http://www.jpm-insurance.co.uk/blog/detail/reputation-your-intangible-commodity >accessed 9 July 2016.
[444] Peter McPhee 'Living the French Revolution, 1789-1799' (Palgrave Macmillan Basingstoke 2006).

the people. And while it is still a surprise when some cases go viral while others languish in obscurity, it is simply more effective to present your case on Facebook or Twitter.

Another reason is that the traditional court system is increasingly viewed as unfair relates to the argument that today, money *can* buy justice: not by directly bribing judges, but by hiring better lawyers and forcing the other side to spend more money than they are able to afford.[445] We know that the courts can treat the rich and the poor differently, that corporations can get away with crimes individuals cannot, and that the powerful can lobby to get the specific laws and regulations they want — irrespective of any notions of fairness.[446]

Having suggested that a TRC model (however, so called) be adapted as an appropriate restorative justice mechanism to address the overwhelming crimes of corruption in Nigeria, surely it must be rightful for this study to consider whether the system produced through such a mechanism will compete or be reconciled with the extant traditional justice system. In other words, will the new system exist side by side with, or replace the existing traditional system when considering cases of crimes of corruption?

In laying out key features of the South African TRC in the previous chapter this study has already articulated the viewpoint that that model was not a substitute for, but rather an option to extend the effectiveness of the traditional criminal justice system. This is important because it has also been argued that when the public has been

[445] Bruce Schneier, *Op. Cit*. (2013).
[446] *Ibid.*

harmed and operates a criminal process to hold wrongdoers to account, a public and societal process matters for deterrence and for accountability.[447]

In similar vein there is demonstration that possibilities exist to accommodate a reconcilable paradigm within a traditional penal system; it also indicates that to an extent a paradigmatic alternative to criminal prosecutions was achieved in South Africa. The question reoccurs, why go through upheaval of replacement of the existing penal system when we could achieve the aims of tackling corruption offences by extending it? Australia and New Zealand already demonstrate these possibilities in practical terms through the conference process it uses even with the traditional common law adversary system.[448] In those cases the victims of corruption, (the particular communities in which it directly affects) and admitted offenders and their supporters would come together to discuss the offence, its impact, and an appropriate penalty (agreement or outcome). In those cases the discussions evokes feelings of remorse in the offender, which leads to a genuine apology and a desire to repair the harm. All conference professionals and participants are treated fairly and with respect. Participants then discuss an appropriate penalty (or agreement or outcome). Everyone has a say, and participation by the professionals is kept to a minimum, but in addition it is normally an open and public tribunal with attendant publicity.[449] Attendant publicity reduces the tendency for impunity and would inject a greater measure of accountability into the Nigerian penal system and as Akinseye suggests it will better fulfill the purpose of the ACJA causing a deliberate shift from punishment as the main goal of our criminal justice to restorative justice, which pays attention to the

[447]Martha Minow, *Op. Cit.*. (2019*)* 21.
[448]Bassey Udo, (2015) *Op. Cit.*
[449] Kathleen Daly, (2002) *Op. Cit.*

needs of the society, the victims, vulnerable persons and the rights and interest of a defendant.[450]

We reiterate Albie Sachs'[451] and Martha Minnow'[452] arguments that the existence of a restorative process, an alternative to criminal prosecution, does not necessarily foreclose domestic criminal prosecution.[453] Chapter six covers the precise recommendations this study proposes for Nigeria.

It would seem in this study we find merits in the argument for a reconcilable rather than a competing paradigm. In other words the recommended model can sit within Nigeria's existing penal system but be applied only in cases of established crimes of corruption and still function as a paradigmatic alternative to criminal prosecutions of corruption offences. In view of this, the study argues that an upheaval of replacement might prove costly gratuitous and unnecessary.

In pursuing this argument this study cannot ignore Max Siollun's claim that even the corrupt public official in Nigeria is regarded as a financial representative of his community who takes a slice of the national cake and brings it home to share with his community, thus indicating the family and community members of a public official have a personal stake in inciting corruption and are all too often all conflicted.[454]

[450] Yemi Akinseye-George (2016), *Op. Cit.*
[451] Albie Sachs, *Op. Cit.,* (1999)(52)(4) 1563.
[452]Martha Minow, *Op. Cit.* (2019) 23.
[453] Martha Minow, *Op. Cit.* (2019) 23.
[454] Max Siollun, *Op. Cit.* (2013)185.

CHAPTER 6

CONCLUSIONS AND RECOMMENDATIONS

Theoretically, the adaptation of the TRC model in Nigeria will be of benefit to both the injured society and the perpetrators bringing both sides some measure of satisfaction and reconciliation. The injured society is assuaged and the perpetrators although humbled by their admissions, are insulated from traditional prosecutions and possible resulting sentences; thus, in the Nigerian context we might begin to unravel some of the impunity of corruption. In this sense the study observes ACJA recognises victims by providing for compensation to victims of crime.[455]

It posits that often times, victims of crimes are neglected without any form of compensation even when the offender has been found guilty. The study agrees with

[455] Section 314 ACJA *Op. Cit.*

the position that the ACJA Act has addressed this ugly trend by broadening the powers of the court to award costs, compensation and damages in deserving cases, especially to victims of crime. It observes by the provisions of section 319 of the Act, court may order a convict to pay compensation to any person injured by the offence, irrespective of any other fine or other punishment that may be imposed or that is imposed on the defendant. In the context of political corruption the Nigerian society as a whole is the victim of these crimes and assuage would extend to measures of reparation to the respective local governments that exits shaping and funding constituency and local projects were they will tend to benefit from. The study goes further by accepting Max Siollun argument that the citizenry of Nigerian are simultaneously victims, accomplices, and active participants in their own corrupt downfall adding a further layer of complexity to the concept of victimhood here.[456]

It will therefore require of course an extension and broadening the provisions of section 319 of the ACJA Act. But beyond that there is the positing that a nation may adopt a process for restorative justice as a response in order to avoid the financial and political costs of criminal prosecution and to build foundations for future peace and community harmony.

The study draws from Albie Sachs[457] and Martha Minnow[458] arguments and posits that the sheer existence of a restorative process, an alternative to criminal prosecution, does not necessarily foreclose domestic criminal prosecution; indeed, she states there could be a plan to supplement the restorative process with criminal prosecution and vice versa. The particular design of the public process—its intended purpose and its actual operation—would matter in assessing whether it is compatible with a domestic

[456] Max Siollun, *Op. Cit*., (2013)184.
[457] Albie Sachs, *Op. Cit.,* (1999) (52)(4)1563.
[458]Martha Minow, *Op. Cit.* (2019*)*23.

criminal process. The process is relevant to justice conceived both domestically and internationally, if international human rights violations are at issue. The examples of South Africa's Truth and Reconciliation Commission ("TRC") and conditional amnesty and Rwanda's Gacaca process sharpen the questions about when an alternative justice process should be viewed as an alternative to criminal justice in response to gross violations of human rights.[459]

The South Africa model decided to say no to amnesia and yes to remembrance; to say no to full-scale prosecutions and yes to forgiveness and therefore reconciliation.[460] Those who had committed violations of human rights, were, if they applied for amnesty, in most instances, granted reprieve from prosecution and its attendant consequences. It is noteworthy that the South African TRC alternative model was not a substitution for, but rather an option to extend the effectiveness of the traditional criminal justice system.[461]

The study adopts Kevin Nwosu assertion of the true state of affairs in Nigeria:

> With the poor state of criminal justice administration there is the need for the adoption of mechanisms and practices that will help reduce the caseload. ADR processes in the form of new measures like fast track trials; non-custodial options; plea bargains and restorative justice, if fully mainstreamed can provide the necessary relief. The role of ADR in the criminal justice system cover areas such as crime prevention and management; prosecutorial discretion; defence options; judicial discretion; plea bargaining and restorative justice. However, in order for the present and future potentials of ADR in criminal justice administration to be fully maximized, there is the need for a comprehensive, systematic and structured programme of training and capacity building on the emerging trends and practices for all stakeholders.

In the Nigerian context the study suggests that through the TRC model, a form of

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[459] *Ibid.*
[460] Alex Boraine. justice in cataclysm: criminal tribunals in the wake of mass violence: alternatives and adjuncts to criminal prosecutions" (1996).,< http://www.truth.org.za/reading/speech01.htm> accessed on 14 April 2005].
[461] Albie Sachs, *Op. Cit.* (2016).

ADR we would be adopting a process, which unlocks the stalemate in the war against corruption and it should be considered, however, the traditional mode of administration of penal system process could continue to apply to those who abuse the provisions of amnesty and if perpetrators of corruption refused to apply for amnesty they could still face be open to prosecution. In other words we could establish that the core elements of outcome for a traditional judicial system can still maintained even if a TRC model is utilised as alternative penal justice system for addressing corruption. Section 315 of the ACJA, however, already anticipates this under Non Custodial sentences[462] and the ACJA in sections 453, 460 and 468 attempted to address the problem of excessive use of imprisonment as a disposal method by introducing some alternatives to imprisonment. These include the introduction of suspended sentence, community service, parole and probation. It also provides that the court, in exercising its power shall have regard to the need to:

> (a) reduce congestion in prisons;
> (b) rehabilitate prisoners by making them to undertake productive work; and
> (c) prevent convict who commit simple offences from mixing with hardened criminals.
> By virtue of section 467 of the Act, a court may sentence a defendant to serve the sentence at a Rehabilitation and Correctional Centre established by the Federal Government in lieu of imprisonment

This study suggests for the adaptation of the TRC model to achieve the desired effect of addressing crimes of corruption in Nigeria with a number of recommendations, which are proffered below.

First is the need to expand legislation to institutionalise the application of the process, enabling it with all the necessary characteristics that will allow the attainment of the

[462] Section 314 *Op. Cit.* ACJA

desired effects, such as powers of subpoena, arrest, seizure and so on. It sees value in expanding Section 16 of the ACJA, which covers provisions for the Police Central Criminal Registry to include one that focuses on crimes of Political Corruption and incorporating it in a new TRC model.[463]

Secondly, to ensure the awareness and acceptance of the Nigerian populace, sensitisation on a large scale will be required. National and State Assemblies, public and private institutions, traditional rulers and even schools will have outreaches to inform them that the individually accumulated wealth from corruption is actually a direct deprivation of the peoples and should not be allowed to go unreported and forfeited. The study also argues that a nexus can be created between the TRC model and restorative justice, which allows the construction of a national system of ethics which is clear on what constitutes corruption, challenges old frontiers and scouts for new restorative justice practices which could be implemented in the fight against corruption, leading offenders towards responsibility, rehabilitation and then restoration.[464]

Thirdly, to ensure that the TRC mode of alternative penal justice system is free from abuse and not taken as a carte blanche for repetitive commission of corruption offences, it is recommended that it be legislated that the process is only available and applicable to first time offenders who are prepared to make an open breast of their corrupt practices account for it and refund a substantial part of their loot to the Nigerian state who will in turn be obliged to direct it to their respective local government or constituency while recurring offenders or those who refused to subject

[463] Section 16 *Op. Cit.* ACJA
[464] Chris H. Van Zyl and Jacques Pretorius *Reconnaissance of South African standards and values in the fight against corruption: Building capacity through the integration of restorative justice practices* Paper presented at "New Frontiers in Restorative Justice: Advancing Theory and Practice", (Centre for Justice and Peace Development, Massey University at Albany, New Zealand, 2004).

themselves to these terms will have no option but be subjected to the traditional criminal justice system. The paragraphs below repeats and expands in succinct terms the further recommendations for the future it will adopt:

To achieve this adaptability a new TRC process will to an extent be independent of government control and have a remit that allows it to revisit historic issues in political corruption stemming from independence era. This occurrence will only be achieved with a wide acceptance of Tutu's hypothesis that the entire society is an aggregation of individuals.[465] Therefore the main remit of any such Truth Commission should be to explore the possibility of the communication and establishment of shared ideals, which include unity and reconciliation in a spirit of understanding, which transcends the conflicts and divisions of the past.

These could mean that traumatic events that occurred during the recent era are uncovered, ancient myths unravelled, hidden truths exposed. But such a model will not escape from the fact that it has to accomplish the following:

(1) To establish as complete a picture as possible of gross violations related to corrupt practices perpetrated between 1960 to the present say by conducting investigations and hearings; (2) facilitate granting of amnesty in exchange for full disclosure of truth for acts with a political objective within guidelines of an Act and on condition in the cases of corruption that appropriate restitution is made to their respective local government areas; (3) make known the fate of victims and restore their human and civil dignity, and allow them to give accounts and recommend reparations; (4) make a report of findings and recommendations to prevent future violations. (5) make

[465] Tutu, D.M. *Op. Cit.* (1976)

provision to exclude all those who have admitted to violations and corrupt practices from any future political dispensation in return for their amnesty and on condition that appropriate restitution is made. It should report to a convocation of the Nigerian peoples. These could mean that traumatic events that occurred during the recent era are uncovered, ancient myths unravelled, hidden truths exposed.

Such a process will also assume that the perpetrators of political corruption are able to tell their stories and air their grievances, reinforcing the position that has occurred in South Africa, (Truth and Reconciliation Commission of South Africa Report 1998), a critical decision will have to be made relating to the hearings of any such Commission established, generally in terms of human rights violations and the narratives of victims, as well as the amnesty hearings. This will require consideration despite the risk and additional complications, to make hearings transparent to the media and to the public. It will place an heavy burden on any such process. But on the other hand, to the wide advantage of the Nigerian people as participants in the hearings and the work of any such Commission will enable transparency and also a strong illustrative opportunity so that healing and reconciliation will be extended beyond a small group and made available to all in society.

In practical terms, however, it is argued that the application of any transitional justice mechanisms in Nigeria requires that both individual and national restoration are clearly defined and understood.[466]

[466] Eirin Mobekk, E . Transitional Justice in Post-Conflict Societies – Approaches to Reconciliation Transitional Justice in Post-Conflict Societies - in After Intervention: Public Security Management in Post-Conflict Societies - From Intervention to Sustainable Local Ownership, eds. Ebnother, A and Fluri, P., Geneva Centre for the Democratic Control of Armed Forces (DCAF, Geneva 2005).

Furthermore the study accepts[467] the factors it considers pertinent in the application of transitional justice in the context of post conflictual societies are that:

> Local ownership must be assured. Needs assessments must be conducted prior to establishing or recommending the types of mechanisms. The international community should make several options available that can be implemented in a complementary manner.

Finally if Nigeria proceeds as suggested by this study with further reforms of the its penal system by setting up a TRC side by side within the existing criminal justice system we will be injecting a reconcilable paradigm rather than a competing one into the penal justice administration system as far as resolving crimes of corruption are concerned.

[467] Eirin Mobekk, E . *Op. Cit.* (2005).

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