AN APPRAISAL OF THE THEORIES OF CRIMINAL PUNISHMENT: TOWARDS PEACE AND SECURITY IN AFRICA

Abstract
The aim of criminal law in most of the African countries is premised on punishment of a convicted offender. This is because criminal offence is contrary to the common goal of the society and as such, it is regarded as a breach against the state. While this fact is true, the offender in most cases is equally a member of the same society which means he is working against the collaborative peace of the society, in which he lives, enjoys freedom and derives his sustenance. This presents a contradiction that is generally expressed in a Yoruba adage thus: “adiye ba lokun, ara ko r’okun, ara ko ro adiye”-meaning, when a hen jumps on a tied rope, both the rope and the hen will not experience peace as long as the hen remains on it.” This proverbial philosophy necessitates an appraisal of the theories of punishment in our criminal justice system in Africa. This paper is therefore poised to unearth the rationale behind each theory of criminal punishment through the use of doctrinal approach. It reviews available literatures on the subject matter and argues that the cause of commission of criminal offence must be examined and understood to be able to apportion appropriate punishment or sanction. The paper makes useful recommendations towards peace and security in Africa.

Keywords: Criminal Punishment, Peace, Security, Africa

1. Introduction
In any human society, conflict is bound to exist as far as the society comprises of people having similar or differential background, religion, values, believes, or origin1. To ensure peace and security of lives and properties, law is put in place to regulate excessiveness. Hence, the essence of law is to achieve justice and justice is synonymous to peace. Peace and Security are two indispensable fundamentals to a relatively smooth relationship between individual citizens of any nation state. In fact, no government can achieve much when it struggles to maintain peace and security. It is a diversion of effort, energy, resources and capable of limiting the rate of growth and development of all sectors of a nation state if not properly considered in the scheme of things and well catered for. The reason is simple. When there is no peace, there seem to be no dedication to other things. At the moment peace and security is lost, the search to regain it has just began at the detriment of other

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essentials for sustainable state. This underscores the need for peace building in nation building\(^2\) and economic development.

History explains that in a typical African setting before the colonial infiltration and domination, peace and security was a paramount issue in the agenda of the nations.\(^3\) Interestingly, peace and security in Africa as at that time was the business of members of the community rather than the leaders alone or state machineries. In other words, everybody has the responsibility of ensuring peace and security of his nation. Crime was therefore seen by all as an offence against the whole community. The commission of criminal offence is perceived as an abomination, a breach of human relationship and was treated as such.\(^4\) However, the humanness of most African communities underscores the uniqueness of how offenders were punished and treated. One can safely conclude that the theories of criminal punishment in any African pre-colonial setting include: exposition of evil and evil doers, cleansing of the land by way of punishment or reformation of the offender, reconciliation of assailant and victims as well as adequate compensation to victims of the criminal act among others.\(^5\)

The western theory of criminal punishment as propounded by most western scholars is also poised to cure the society of crime thereby ensuring a relative level of peace and security but with a different approach. These theories are currently the fulcrum of criminal punishment in most African states today which is already dwindling in the face of major threats against societal peace and security.\(^6\) Many scholars have been advocating for a reform of the criminal justice sector in view of this deterioration. The question that howbeit should be posed is that which theory should be adopted that will guarantee maximum peace and security considering the peculiarity of Africa as a continent? While this paper does not condemn the usefulness of the various theories of criminal punishment, it argues that most of the propounder never consider the uniqueness of African countries (which in itself is multi-dimensional) in the applicability of those theories.\(^7\)

Hence, there is the need to reconsider these theories, appraising its reasonability and failures in Africa. Flowing from this step, African countries may have to reconsider also, the nature of its pre-colonial criminal justice system as well as the current development in the criminal justice system regarding punishment and non-penal mechanisms of curbing crimes and achieving a sustainable

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peace and security in their domain. In this analysis, the criminal justice system of Nigeria will be used as a typical example of an African state.

2. Theories of Criminal Punishment
One of the ways in which law can be viewed as instrument of social control is that it prescribes punishment for offences. But many jurists, philosophers and theorists have argued differently on penal measures melted out on the offenders. This paper critically examines briefly some of these theories with a view to determining their capabilities to solve the issue of peace and security in Africa. This segment will briefly discuss the various theories that is currently being applied in most African courts ranges from retribution to deterrence, restraint doctrine and the theory of retribution or reformation but one wonders what is wrong with the application of more subtle theory.

Retribution
The theory of retribution is premised on revenge. The essence of the theory is to make the assailant suffer for the offence committed just like the Mosaic law of an eye for an eye. The theory punishes the assailant for choosing to commit the criminal act and to face the consequences. However, many scholars have criticized the theory especially by the Protagoras that punishment will not bring back the victim for instance in the case of murder. The theory of retribution does not contemplate forgiveness which is enshrined as a divine mandate in the Holy Bible and Quran. Retribution involves looking back at the injury caused by the offender. It is has an element of vengeance for paying back for what the offender has caused or done. In the view of Salmond, one may conclude that punishment is imposed in order to relieve the public’s indignant feelings, or to mark with what revulsion they regard the crime. In its application, a more severe punishment may be imposed for an offence with a view to pay the offender what he has caused to the victim and public at large. Thus, writers seem to have criticised this theory more than other but as mentioned by Okonkwo, ‘its importance should not be ignored, because it does form a substantial part of many people’s beliefs about punishment in respect of many “serious” crimes.

Retribution favours the principle of fair deserts. Thus, he condition for punishing an offender is when the state is convinced that he actually omitted the offence though determining fairness is

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8 A.O. Sanni, (ed.), *Introduction to Nigerian Legal Method*, 1999, p.34.
10 This is the Mosaic Law mentioned in the Holy Bible (Exodus Chapter 22 verse 24) when Moses was the leaders of the Israelites.
15 C O Okonkwo (n 14) 29
16 C O Okonkwo (n 14) 28
What must be borne in mind is that the offence for which the offender is tried must be written down in a law. Again, similar cases must be treated in the same way since there are different capabilities to commit crimes as well as exceptions of criminal responsibility applicable to offenders.

The notion of responsibility in the application of the retributory theory was enunciated by Okonkwo in the following expression:

Essential to this principle is the concept of responsibility or culpability, for a man merits punishment only to the degree that he was responsible for his criminal act. We do not hang a man who kills while insane. We may of course put him away in a safe place, but the purpose of that is not to pay him back for what he has done, but to protect ourselves from possible future attacks.

This expression actually underscores an aspect of African conception of why punishment is melted out on an offender but with due respect to the learned author, it seem contradictory to the theory of revenge which retribution stands for. African nation of punishment is not just because the society wishes to inflict injury but to protect the peace and security of the communities. The offenders is still very much part of the community, thus, he/she is corrected with a view to become reformed in mind and thought to redress his ways and redeem the lost glory of his family name.

**Deterrence**

This theory is based on the utilitarian principle propounded by Jeremy Benthan. According to him, a man is governed by two principles—pain and joy. Thus, deterrence is to have an eye for the future. Although the critics of this theory believe otherwise that deterrence does not really deter in the real sense especially when passion or psychology is involved. They believe deterrence is against justice even though the court of law could glaringly increase the punishment of an offender in order to deter people.
Deterrence may be general or special. A general deterrence is described as a goal of criminal law generally or of a specific conviction and sentence, to discourage people from committing crimes. On the other hand, special deterrence is where a specific conviction and sentence is used to dissuade the offender from committing crimes in the future.\(^{24}\) There is no doubt that what the theory of deterrence seeks to achieve is part of the researcher’s conception of African mode of criminal punishment in seeking peace and security. However, it is not all of deterrence. The perspective that is closely connected to it is the intention to dissuade the offender from committing crimes in the future.

**Restraint**

Restraint proposes that the best way to deal with an offender is to take him out of the society. Restraint emphasises confinement, abridgement or limitation of the offender from having access to commit the crime the second time.\(^{25}\) The idea is to remove an offender from society, making it physically impossible (or at least very difficult) for him or her to commit further crimes against the public while serving a sentence.\(^{26}\) Restraint works as long as the offenders remain locked up. There is no question that incapacitation reduces crime rates by some unknown degree. The problem is that it is very expensive. Restraint carries high costs not only in terms of building and operating prisons, but also in terms of disrupting families when family members are locked up.\(^{27}\)

**Rehabilitation or Reformation**

This theory emphasises the need to change the offender for better. It aims at re-orientating the attitude of the offender from further committing another offence. The school of thought urges the legislators to make laws that will make the prison system efficient for a proper rehabilitation and reformation. At the end of the process, the offender is better than when he/she was apprehended. Rehabilitation and reformation appears to be the only theory of criminal punishment that is western yet relevant to the African pre-colonial criminal justice system. Rehabilitation should involve education, re-orientation, reformation, redemption, forgiveness and transformation. Even where punishment is unavoidably imposed, the weight of such punishment should not be felt because of the way it is being measured. The accused should feel he is better at the end of the terms of sentencing.\(^{28}\)

From the brief analysis of these theories one would understand that the origin and rationale supporting them were majorly western. Besides, less emphasis are usually made on other relevant


\(^{25}\) (n 24) 1429.

\(^{26}\) ‘Theories of Punishment’, <http://www.cliffsnotes.com/study_guide/Theories-of-Punishment.topicArticleId-10065,articleId-10039.html> Accessed on 29th September 2015 08:06:44 GMT.


matters affecting criminal law such as theories as to causation of criminal behaviour, the measurement of crime, the treatment of offenders, and other related matters. Above all, it is the position of this paper that the best form of theory of criminal punishment is that which suits or is peculiar to a particular society that is under consideration. Hence, African mode of dealing with crime focuses on achieving peace and security right from the pre-colonial era. This paper argues that this mode should be explored, reverted to and applied.

3. Towards Sustainable Peace and Security in Africa
As earlier posited, there can hardly be sustainable peace and security in Africa where there is violence. Consequently, development process is jeopardized by the absence of peace and security. Following the clamours on the need for sustainable development, an International Symposium of Sustainable Development emphasised that there are related implications for world peace. Nigeria and many African nations are currently facing peace and security challenges, which already are diverting the attention of the governance away from other basic economic, social and cultural responsibilities towards the citizenry. Both conflict and underdevelopment now stare the countries in the face. Explaining the implication of this view, the following paragraph better put it right:

The evidence on this issue is unequivocal. The lack of peace, that is, a situation of war or conflict, drains away resources that otherwise might be applied (although not necessarily) to promote the well-being of a nation’s citizens. In addition, armed conflicts destroy natural resources, infrastructure, and human lives. The establishment of peace permits the recuperation of stable conditions for needed investments, although it does not ensure in and of itself that the resulting development will be sustainable.

Hence, it will be good for African states to strengthen themselves and cooperate in so many areas in resolving this security challenges. The Joint Africa EU Strategy Action Plan 2011-2013 can be

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29 For example Wotton, Social Science and Social Pathology, made a summary of some of the research and for criticisms of methodology.
30 See Radzinowicz in Modern Approach in Criminal Law, p. 174
31 C O Okonkwo (n 14) 42.
adopted as a guide but preferably among African states alone. In other words, it should be an African affair and such Partnership should focus on the following:

**Peace and Security**

African nations should partner together and seek strategic means to achieve peace and security. The partnership may welcome the progress achieved in the implementation of the African Peace and Security Architecture (APSA) and agreed to build upon the operationalisation of APSA to address peace and security challenges in the African continent. Further work will build on ongoing cooperation with the African regional organizations, the results of AU-conducted APSA assessment and the AU/RECs/RMs indicative APSA Road Map, which will, once finalized, serve as a reference document for future support to APSA by the EU and other partners. The partnership should be determined to stand united in the protection of civilians in armed conflict, including children and particular attention should also be paid to women, peace and security, ensuring the equal participation and full involvement of women in all efforts for the maintenance and promotion of peace and security, including peace building. Furthermore, the nations in Africa should agree to pursue cooperation with a view to building up local resilience capacities to address the transnational security threats posed *inter alia* by Climate Change, crime and terrorism in an integrated and comprehensive manner because the issues are interwoven.

**Democratic Governance and Human Rights**

The promotion of democratic governance and human rights constitutes a central objective of peace and security in every nations of Africa. In this respect, the newly established Platform for Dialogue on Governance and Human Rights should enable Africa state to jointly address key issues of common concern with a view to formulate shared governance agendas and recommendations and to enhance the Africa Partnership. This should include coordinated action in responding to political crises, support for the African Governance Architecture and economic governance. The partnership should be considered the joint determination to strengthen cooperation in the area of cultural goods and other areas of cultural cooperation.

**Regional Integration, Trade and Infrastructure**

Regional Integration, Trade and Investment are vectors of economic stability, peace and progress as well as inclusive and sustainable growth. Well integrated regional markets with efficient infrastructure will attract investment and facilitate business, enhance employment creation and

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35 Ibid. This is to re-state the Africa-EU partnership agreements on Peace and Security as it was reached in the 2011-2013 Joint Action Plan but with a view to making it an African affair only with little or no involvement of European countries and other continents.


37 Following up on 1674 and UNSC-R 1894.

38 Following up on UNSC-R 1325 and UNSC-R 1820.


40 Ibid.
revenues, and improve access to better and more goods and services.\textsuperscript{41} The Summit agreed to engage in political dialogue at the appropriate level with a view to finding solutions to common concerns on economic matters as it affects the peace and security of the country. It should witness exchange views and information on the development dimension and the impact on African economies of various Africa trade agreements.\textsuperscript{42} Recognising the crucial role of infrastructure development in regional integration, focus should be on areas such as energy, transport, agriculture health, water and ICT infrastructure development in Africa, reinforcing the necessary interconnections within Africa and between Africa and other nations of the world. There is a shared and clear commitment to strengthen the policy and regulatory dialogue in this domain, and enhance concrete cooperation, notably as regards the policy and regulatory framework to attract and to facilitate African and European private direct investment and the development of private-public-partnership (PPP) schemes.

**Millennium Development Goals (MDGs)**

Poverty which the MDGs goals seeks to eradicate or eliminate caused in no small measure the challenge of insecurity and crime committed in most sub-Saharan Africa. African States must therefore live up to the respective commitments taken at the UN High Level Event on the MDGs in September 2010 in New York to mobilize the necessary resources, actors and policies, with the aim to accelerate progress towards the attainment of all the MDGs in Africa even though the deadline is reached. They are all interlinked, mutually dependent and reinforcing and thus require a holistic, rights-based approach which addresses the impact of off-track MDGs on the achievement of progress in all areas. Priority was set to achieving the MDGs in promoting gender equality, health, food security, education and to accelerate progress on underlying policy and structures, including statistics. The implementation of the 2nd Action Plan will be instrumental in this regard, including its specific activities on maternal, newborn and child health, gender, primary and secondary education, land policy and sustainable development, access to water and sanitation and people with disabilities.\textsuperscript{43}

**Migration, Mobility and Employment**

This research observes the massive rural –urban migration in many African states as a precipitate cause of crime and insecurity. This is due to high rate of unemployment in the countries.\textsuperscript{44} The Joint Africa–EU Strategy Summit stressed the need to facilitate mobility and better manage legal migration in order to enhance the development impact of migration. It further emphasize that the importance of eradicating the trafficking in human beings was underlined. Particular emphasis was put on illegal or irregular migratory flows and the further reduction of them, including through application of existing readmission provisions. The need to ensure the human rights of migrants, and strengthen protection for asylum seekers and refugees was also underscored. The Summit confirmed the commitment of all partners to create more and better jobs through the promotion of

\textsuperscript{41} (n 40).

\textsuperscript{42} This includes the strengthening of the cooperation in the fields of internal markets and financial services, including the sharing of experiences.

\textsuperscript{43} ‘Joint Africa EU Strategy Action Plan 2011-2013’ Op. Cit.\textsuperscript{.}

sustainable and inclusive growth, acknowledging the role of all stakeholders, including social partners and the private sector. It agreed to further intensify dialogue and cooperation in this area, focusing in particular on questions related to the implementation of the Action Plan on Employment and Poverty Alleviation in Africa. The partnership should emphasize the need to strengthen the role of Diasporas in the African development process, and maximize the development benefits of remittances.

4. The Functionality of Law as Instrument of Peace and Security in Africa
Flowing from the above discussion, the role of law in the achievement of peace and security cannot be underestimated. For example, the Penal and Criminal laws in Nigeria provides for the nature of punishments that can be measured on an offenders. It ranges from death, imprisonment, caning, fine and forfeiture. While alternative punishments can be carried out instead of a more severe one, it is important to mention that the circumstance of each case will determine it. This means that the provision of the criminal laws in nations of Africa should reflect some aspects of restraint, rehabilitation or reformation other than deterrence and retribution theories. If the legislatures in many African nations can review the law to encompass restorative justice system, there is no doubt that peace and security will be achieved. The law needs reform. The role of law as an instrument of peace and security in African cannot be over emphasised, hence, criminal statutes can be made comprehensive such that a suitable mode of criminal punishment may be adopted depending on the nature of crime in question. It is also through the instrumentality of law that an African method of criminal punishment can be recognised, adopted and applied. Some believe and argued that restorative justice is intrinsically linked to African way of dealing with crime. This shall be examined presently so as to resolve whether a combination of modes of criminal punishment be adopted or not.

5. Restorative Justice and African Theory of Criminal Punishment
Restorative justice has been described as ‘an alternative delinquency sanction focused on preparing the harm done, meeting victim’s needs, and holding the offender responsible for his or her actions’. The aim of restorative justice is for the offender to make restitution, to perform community service, or to make amends in some other way that the court orders. According to Agaba:

To appreciate the idea of restorative justice, one must have at the back of his/her mind that crime is a conflict situation. Restorative justice programs are based on the assumption that parties to a conflict ought to be involved


45 (n 44).
46 Criminal Code Act, Cap. C38 LFN 2004, s. 17
48 Brian Garner, Black Law Dictionary, 5th Edition, p. 1428; Restorative justice sanctions the use of a balanced approach producing the least restrictive disposition while stressing the offender’s accountability and providing relief to the victim.
49 Sometimes, a victim may ask for restorative justice approach so as to make an offender realize how the crime has affected is/her life; find out information to help put the crime behind him/her or openly forgive the offender.
50 (n 49) .

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actively in resolving it with a view to mitigating its negative consequences. They are also based in some cases on the desire of the parties to return to local decision-making and community building.\textsuperscript{51}

This strategy is put in place so as to encourage peaceful expression of conflict, promoting tolerance and inclusiveness.\textsuperscript{52} It is very synonymous to Alternative Dispute Resolution (ADR) in civil litigation which has become the choice of most businessmen, companies, corporations, international organisation and institutions. Tracing the root again in the African philosophy of peace security is the proverbial saying in Yoruba Kingdom: “a kii to kotu de ka sore.”- meaning “we do not return from court as litigants and still be friends.” By implication, living as enemies as a result of court litigation suggest the absence of peace and possibility of crime commission in the future. It will be recalled that the United Nations Economic and Social Council considered and adopted the Basic Principles on the use of Restorative Justice Programmes in Criminal Matters in 2002.\textsuperscript{53} This emphasise its importance and emergence into the criminal justice system at the international plane. Certain procedural safeguards were put in place by the document just to guarantee fairness to the offender and the victim in the restorative justice process. For example, both the offender and the victim are entitled to consult a lawyer of their choice before engaging in the restorative process and in the course of same.\textsuperscript{54} The principles further provides that state need to put in place policies or legal framework to ensure that participation of a party particularly the offender is no evidence of guilt. That is, an admission of guilt made before a restorative process shall not be used as evidence of guilt in a court of la if the process eventually fails and there is a resort to the criminal litigation process.\textsuperscript{55} It further ensures that the agreements arising out of the restorative process should be voluntary and also that in apportioning obligations; same should be reasonable and proportionate.\textsuperscript{56} Coincidentally, this method of dealing with crimes and criminal approach were synonymous to the way African criminal justice system was before the colonization. It is not just based on punishment alone. It was an issue that borders on communal security and peaceful co-existence of everybody in the community including the offender. Even where punishment is melted out in form of fine, it is for the benefit of all not just to pay back or deter the offender or others. There is the sanctity of communal security that involves all. While referring to the traditional society in Kenya, Lambert noted that ‘the judicial system, of the European culture involves justice by decree and the granting of exclusive rights to an individual; the African involves justice by agreement and the maintenance of social equilibrium’.\textsuperscript{57} Thus, the traditional dispute resolution process essentially involves the

\textsuperscript{51} J. Agaba, Practical Approach to Criminal Litigation in Nigeria (Lawlords Publication Abuja 2011) (Chapter Twenty One on ‘Restorative Justice’) 843.
\textsuperscript{53} See United Nations Basic Principles on the use of Restorative Justice Programmes in Criminal Matters contained in Annex II to the handbook on Restorative Justice.
\textsuperscript{54} Paragraph 13, United Nations Basic Principles on the Use of Restorative Justice Programme in Criminal Matters.
\textsuperscript{55} Paragraph 8 thereof.
\textsuperscript{56} Paragraph 7 thereof.
promotion of ethical elements of the society through restoration of peace and harmony, defence of the course of justice and reverence for the ancestors who equivocally are part of the adjudicatory drama.\(^{58}\)

Similarly, restorative justice programme include all or any of the following programmes synonymous to what a typical African community once practised:

a) Victim/offender mediation;
b) Family group conferencing;
c) Sentencing circles;
d) Consensus-based decision-making on the sentence; and
e) Victim/offender reconciliation panels

Though, this paper will not discuss these programmes but it is apposite to mention that they are very significant to the realisation of internal peace and security that an ideal African state may desire. Hence, the need to restructure the criminal justice system and reform the theories of criminal punishment upon which most legislation is premised.

### 6. Conclusion

This paper has been able to examine the theories of criminal punishment as applicable to many African states. It discusses the strategies to achieving peace and development in Africa. If further relates the functionality of law as an instrument of peace and security in Africa. It point out the significance connection restorative justice has with African theory of criminal punishment. In all, the paper argues that the challenge of most African states is that we often rely on foreign knowledge, ideas and strategy to tackle African problem. This is like putting a square peg in a round hole. The right approach should be used to resolve the challenges of African states. An in-depth exposition of the nature of African criminal justice philosophy reveals that we can better solve the problem of crime by looking inwardly rather than outwardly. Peace and security of African states can only be achieved by the African people when they are ready to review their historical facts, harness resources and proffer autochthonous solution. For reference purpose, the website of Peace and Security, African in partnership with European Union reads thus:

Peace and security lie at the foundation of progress and sustainable development. The objective of the Joint Strategy is to cooperate in enhancing the capacity of Africa and EU to respond timely and adequately to security threats, and also to join efforts in addressing global challenges\(^{59}\).

While it is true that peace and security lie at the foundation of progress, growth and sustainable development, the researcher view that a joint strategy between EU and Africa would not resolve security challenges in Africa. On the contrary, it may escalate it in that the mixture of backgrounds where the effort is coming and consequent underlining economic, political and other interest

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\(^{58}\) Olaoba, *The Significance of Cross Examination in Yoruba Traditional Jurisprudence*, (John Archers Pub. Ltd, Ibadan, 2000) 4

involved differs. There is no doubt that the philosophy underlining the criminal punishment in African states call for a reformation, rehabilitation and restoration. Most especially the judiciary, the prison system and the legislation of criminal punishment must begin to incorporate new developments that will better enhance peace and security than escalate it. No state in Africa is bound to continue the colonial way of life. Interestingly, most colonial legislations that still regulate criminal punishment in Nigeria have long been abolished in United Kingdom and other civilised countries where we imported them. While few states in the federation have adjusted their criminal laws towards a more functional, realistic, peace-oriented legislation\(^\text{60}\), other states are still decades of years back. Conclusively, the people of African states will appreciate better when the peace and security system is all-involving. The people must have an input in the governance. The government must represent the interest of the people, not the interest of the few. Legitimacy of government should be seen by all as earned not masqueraded. When corruption that breeds conflict, aggression and violence is tackled by the organs of government and abhorred by the citizens, it is then that war against crime will be viewed by all as peoples’ responsibility and not state alone. When the victims and offenders in any criminal matter are given a platform to address some issues and both parties are well considered by law in the scheme of criminal justice system, then, peace and security is not farfetched. This will go a long way to sustain whatever scheme of peace and security is being put in place by the government.

\(^{60}\) Administration of Criminal Justice Act 2015; Lagos State the Criminal Justice Administration Law 2011 (as amended); Ondo State Administration of Criminal Justice Law 2015.