

DETERMINING THE SUITABILITY OF NON-ADJUDICATORY METHODS OVER THE PROSECUTION OF SMUGGLING OF GOODS IN NIGERIA

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Abstract

Smuggling which involves the illegal importation or exportation of goods either to evade the correct payment of duty or to undermine government policy on existing prohibition regulations, can lead to the arrest and prosecution of offenders as provided under the Nigeria Customs Service (NCS) Act. The punishment provided therein ranges from terms of imprisonment to fines and at times confiscation of the goods. This paper discusses the various forms of resolving smuggling cases in Nigeria in order to ascertain the suitability of non-adjudicatory methods, it adopts the doctrinal approach of methodology by relying on relevant statutes, judicial decisions and literature. It points out the challenges inherent in the prosecution of smuggling offences which make the application of non-adjudicatory methods imperative. It finds that forfeiture and condemnation proceedings as well as out of court settlement are non-conviction methods that can minimize the often protracted adversarial court system. While plea bargain essentially entails court trial and possible conviction, this paper prefers compounding of smuggling offences in form of negotiation resulting to an agreement in lieu of prosecution. It recommends the adoption of express regulation guiding compounding of smuggling offences that will promote revenue generation without undermining security and other public policy concerns.

1. Introduction

The Nigeria Custom Service Act 2023¹ is the principal enactment that seeks to combat the crime of smuggling in Nigeria. The danger of smuggling to the economy of a nation cannot be overemphasized. Smuggling is not only a conduit pipe for revenue loss, it undermines government fiscal policy by allowing prohibited items with serious security implications. It can also expose locally manufacturing industries to undue competition with imported goods.

The NCS Act is empowered to collect custom duties and enforce import and export regulations. Custom offenses involves violations of import/export regulations, duty evasions, smuggling, and illicit trading, shifting focus from just revenue to trade facilitation, with penalties ranging from seizures to criminal prosecution for things like false declaration, valuation fraud and possessing prohibited items handled by the NCS.

Due to prolonged delay arising from the litigation and reliance on undue technicalities to frustrate the course of justice, alternative dispute resolution mechanism such as arbitration, conciliation or mediation, negotiation and other non-adjudicatory processes have evolved while arbitration is an alternative adjudicatory process administered by a third party that has power to

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¹ Hereafter (NCS) Act, 2023.

make an award conciliation or mediation on the other hand are non-adjudicatory processes involving one or more third parties that facilitates a settlement agreement between the parties. Negotiation however is a non-adjudicatory process that promotes an agreement between the parties without the intervention of a third party and forms the focus of this article, despite the advantages of non-adjudicatory processes such as speedy disposal of cases and the need to generate revenue while maintaining cordial relationship between the states and the offenders who are essentially business managers, there is a limit to which non adjudicatory processes can be used to resolve smuggling cases due to public policy considerations. The aim of this article is to ascertain the extent to which non adjudicatory processes can be employed in order to determine its suitability and resolve smuggling cases in Nigeria.

The paper adopts the doctrinal approach to methodology by relying on relevant statutes, judicial decisions and literature. It is divided into seven parts part 1 contains this introductory remarks, Part 2 points out the challenges inherent in the prosecution of smuggling cases, and Part 3 discusses the efficiency of forfeiture and condemnation proceedings as well as out of court settlement, non-conviction methods. Part 4 distinguishes the concept of plea bargain with compounding or smuggling offences, and Part 5 examines the scope and application of the Impact of Regulation 5 and 6 of the Asset Tracing, Recovery and Management Regulations 2019. Part 6 considers the suitability of non-adjudicatory processes for the resolution of smuggling offences in Nigeria, while Part 7 contains the concluding remarks and recommendation.

2. Prosecution of Smuggling Offences

Subject to the powers of the Attorney General of the Federation under Section 174 of the Constitution of the Federal Republic of Nigeria 1999 to institute, continue or discontinue criminal proceeding in Nigeria, the Nigeria Custom Service board can institute the prosecution of smuggling offences in Nigeria at the Federal High Court by virtue of Section 258 of the 1999 Constitution.

Where there is allegation of commission of any smuggling offence committed in contravention of any existing prohibition order or any act done contrary to the express provision of the Nigeria Custom Act, the Federal High Court has the original jurisdiction to entertain civil and criminal proceedings brought before it. This is usually after the apprehension of the suspect, detention or seizure of the goods or property concerned with the commission of offence, it is the duty to investigate, extract an informed legal advice on the propriety of possible prosecution as well as reserve evidence and call witnesses necessary for the diligent prosecution of such smuggling cases.

A typical example of the express provisions of the NCS Act that creates smuggling Offences are Section 233 & 234 thereof as stated below:

233.— (1) Where a person —

(a) lands, or unloads in the customs territory, or removes from their place of importation or from any approved wharf, airport, examination station, customs station or customs area —

(i) any goods imported contrary to any prohibition, or

(ii) assists or is otherwise concerned in such landing, unloading or removal, or

(b) imports or is concerned in importing any goods contrary to any prohibition, whether or not the goods are landed or unloaded, with intent to evade any prohibition commits an offence and on conviction, liable to imprisonment for a term of five years without the option of a fine if the goods are subject to an absolute prohibition or imprisonment for a term of three years and forfeiture in case of a prohibition for trade.

(2) Any person who —

(a) imports or causes to be imported any goods concealed in a container holding goods of a different description, or

(b) directly or indirectly imports or causes to be imported or entered any goods found, whether before or after delivery, not to correspond with the entry delivered on the goods, commits an offence and is liable on conviction, if the goods are chargeable with duty, excise Customs duties or other Customs duties to imprisonment for a term of three years and to a fine of six times the true value of revenue lost and forfeiture of the item smuggled.

234.— (1) Where a person is found anywhere in Nigeria in possession of any goods to which this section applies, the person commits an offence unless he proves—

(a) that the goods were lawfully imported to Nigeria or as the case may be, that the duty chargeable on the goods have been paid; or

(b) in the case of any person other than a seller of those goods, that he had no reason to suspect that the goods were unlawfully imported or that the duty chargeable on the goods had not been paid.

(2) This section applies to any goods, not being goods manufactured or otherwise produced in Nigeria —

(a) the importation of which is prohibited under this Act or any other enforcement; or

(b) which have been imported into Nigeria without the duty chargeable on the goods having been paid

(3) Any person who commits an offence under this section is liable on conviction to fine of six times the value of the lost revenue or imprisonment for a term of one year.

(4) The Service shall for the purpose of subsection (1) issue regulations providing the cases where the purchasers of imported goods have a duty to verify that imported duties and Customs duties have been paid.

An agreement to make restitution for financial impropriety can also act as a bar to prosecution. In a decision of a Federal High Court in Abuja in the case of *Abdullahi Dikko Inde v. The Attorney General of the Federation & Ors*,² the court held inter alia that the 1st defendant in the performance of his official duties, can direct a person alleged to have committed financial

² Suit No FHC/ABJ/CS/587/18 delivered by Justice Nnamdi Dimgba on 25 November 2019, Agency Report "Court stops EFCC from prosecuting ex-Customs boss, Dikko; cites deal with govt", <https://www.premiumtimesng.com/news/top-news/365164-court-stops-efcc-from-prosecuting-ex-customs-boss-dikko-cites-deal-with-govt.html> last accessed 13 November 2025. See section 17 federal High Court Act cap F 12 Laws of the Federation of Nigeria (LFN) 2004; which encourages reconciliation among parties to facilitate amicable settlement in civil and criminal cases.

impropriety/offence to make restitution to the Federal Government in respect of the said allegation so that the person so alleged would be free from harassment, including prosecution for the allegations. It is important to also point out some instances where prosecution of smuggling offences is most desirable for example where a smuggler in the course of smuggling causes injury to an officer of the Nigeria Custom Service he can be prosecuted and punished especially where death results by virtue of Section 238 and 239 of the NCS Act;

238.— (1) Any person —

(a) who, while concerned in the commission of any offence against the customs and excise laws, is armed with any weapon; and

(b) so armed, found in Nigeria in possession of any goods liable to forfeiture under the customs laws, commits an offence and is liable on conviction to imprisonment for a term of 21 years.

(2) Any person who threatens an officer with a weapon or threatens to physically strike an officer either by body or weapon, commits an offence and is liable on conviction to imprisonment for a term of at least 10 years.

(3) Who intimidates, harasses or threatens an officer by any means other than the use of a weapon, commits an offence and is liable on conviction to imprisonment for a term of five years.

239.— (1) Any person who threatens an officer with a weapon or threatens to strike an officer with a weapon or threatens to inflict bodily harm on an officer commits an offence and is liable on conviction to imprisonment for a term of 10 years.

(2) Any person who strikes an officer with a weapon or by assault causes bodily injury to an officer commits an offence and is liable on conviction to imprisonment for a term of 20 years.

(3) Where death to an officer occurs as a result of the offences under subsections (1) and (2), the accused person shall be proceeded against as provided under the Administration of Criminal Justice Act.

Therefore, where the injury caused to the officer under section 328 or 239 (1) & (2) did not cause the death of an officer, it can be argued that this can be settled outside the court notwithstanding the involvement of the use of threat, intimidation, or force provided the injury caused to the officer can be quantifiable or compensated with monetary terms. It will be a different situation where death results under section 239 (3) where greater consideration will be given to the theory of deterrence and retributive justice which are for obvious reasons better handled under the court system.

More so where death results during the course of prosecuting an unlawful purpose it is murder contrary to section 316 (3) of the Criminal code and culpable homicide punishable with death under section 221 of the penal code.

3. Forfeiture and Condemnation Proceedings

Under the NCS Act section 233 provides for the forfeiture of goods improperly imported as prohibition for trade. The implication here is that for mere improper importation even without any prosecution leading to a conviction, the goods stand forfeited. There seems to be no dividing line between condemnation proceedings and forfeiture proceedings. This is hinged on the

wordings “condemned as forfeited” used in paragraph 5 of the schedule to the NCS Act. It is against this background that the Nigeria Customs Service (NCS) even where there is no notice of claim go to the court by *ex parte motion* in a condemnation proceeding, wherein the goods are declared forfeited. This we submit is unnecessary in view of the provisions of paragraph 5 that automatically makes the goods duly condemned and forfeited where there is no notice of claim.

It is our contention therefore that forfeiture proceedings only becomes relevant where notice of claim is duly given as provided in paragraph 6 of the schedule and the Service is not satisfied with the notice of claim. The court shall consider in the circumstance whether the thing seized is liable to forfeiture. If it is, then it shall condemn it as forfeited. This is further amplified by the provision of section 245 of the NCS Act to the effect that any officer or any other person authorized in that behalf by the Service, may at any time seize or detain anything liable to forfeiture under the customs and excise laws or which such officer, or other person has reasonable grounds to believe is liable to forfeiture.

If the words “deemed to have been duly condemned as forfeiture” used in paragraph 5 of the schedule is construed conjunctive then the outright forfeiture will be in order, save for where there is a notice of claim. In jurisdiction like Ireland, the difference between forfeiture and condemnation seems also not to be there.

From the foregoing, and as provided by section 233, paragraph 5 to the schedule of the NCS Act, goods can stand forfeited even where no conviction is secured. Another issue that needs consideration is the effect of a conviction on things liable to forfeiture. This contemplates where there is a prosecution and conviction is secured but no order is made as to the things liable to forfeiture. The question is, does one need a further order to make the goods forfeited? Under section 233 and 234 of the NCS Act, the use of the word ‘and’ before ‘forfeiture’ seems to suggest that the forfeiture of the improperly imported goods is automatic, requiring no further order of court. If we rely only on this section, what then happens to the improperly imported goods? The practice tends to be conviction and then further order is made as to the forfeiture. We submit however, that there is the need for an express provision as in the case of Kenya. Section 201 of the Kenyan Act³ therefore provides:

‘Where a person is prosecuted for an offence effect of under this Act (SIC) and anything is liable to forfeiture by reason of the commission of that offence, the conviction of that person of that offence shall, without further order, have effect as the condemnation of that thing.’

The position in New Zealand in this regard relates to that of Kenya but raises a controversial situation. The lacunae in the Nigeria Customs and Excise Management Act 1958(CEMA) as to whether forfeiture is a bar to other punishment of imprisonment is cured in Sections 233 and 234 of the NCS Act that makes express provision for forfeiture and other punishment simultaneously. If the good stands forfeited and as is the practice in the seizure of goods, where it is disposed can the NCS still exercise a right of prosecuting the offender. The act of disposing the goods we

³ Customs and Excise Act Cap 472 laws of Kenya, 2000.

submit is a kind of compounding the offence, and more so the exhibit the goods which are often tendered in court are no longer there, so prosecution can therefore not ensure.

In the case of *US. v. Hosepkrikor Bajakajin*⁴ the issue was considered differently. It was held that the penalty which is embodied in the organized crime control Act of 1970 differs from other existing forfeiture provisions under the federal statutes where the proceedings in *rem* against the property and the thing which is declared unlawful under the statute, or which is used for an unlawful purpose, or in connection with the prohibited property or transaction, is considered the offender, and forfeiture is no part of the punishment for the criminal offence.⁵

Instances of forfeiture ordered by court arising from prosecution may not be a common trend under the Act, as most forfeiture occur before trial and also *via* condemnation order by the courts, which are often in cases of the seized goods. By the nature of the customs offences and the various provisions, of the NCS Act, which includes sections 233, 245 and paragraph 5 of the schedule that provides for forfeiture even before prosecution, makes the non-conviction forfeiture prominent under the NCS Act than those made by order of court. The condemnation proceeding which is an order of a court, directing forfeiture of anything liable to seizure therein is another arm of non-conviction forfeiture. This ought to be undertaken where there is a notice of claim as provided under paragraph 6 of the schedule. It provides:

‘Where the Service is not satisfied with the notice of claim, the Service shall take proceedings for the condemnation of that thing to court and if the court finds that the thing was at the time of the seizure liable to forfeiture, the court shall condemn it as forfeited’.

In practice however, where no such notice of claim is given the NCS still goes to court by way of *ex parte motion* to get the goods condemned. In both instances the order of condemnation is made by the court is non-conviction as there was no prosecution of the defendant. The intention here is to disrupt criminal activities by confiscating the smuggled goods, that potentially could have been beneficial to the smuggler. This, it has been submitted could also occur independently of any criminal proceedings and is directed at the property itself, and the conviction of the property owner is not relevant.⁶ It is also referred to as administrative confiscation and often seen in the field of customs enforcement at borders (e.g., bulk cash, drug or weapon seizures)

In all the above stated forfeiture one common denominator is the fact that there is no conviction, the concern from the onset is not to prosecute but to eagerly want to recover the proceed of the alleged corrupt practice. This could be a good development if the recovered monies are applied appropriately as contended by the government. The fear however is that let the recovering agency not itself become another subject of corruption, by misappropriating the funds.

4. Plea bargain and Compounding of Offences

⁴ US 1998,524 U.S. 321 see also *Autin v. US* 509 US.

⁵ See those contained in the Customs Narcotics, and Revenue laws, S. Rep, No. 91-617, p.79 (1969).

⁶ FATF, 2017; Mccaw, 2011; Ramaswamy, 2013 refered in module 10: sentencing and confiscation in organized crime; <https://www.unode.ord/44j/en/organized-crime/module-101key-issues/confiscation>

A plea bargain, is a negotiated arrangement between the prosecution and the accused, where the accused pleads guilty to a lesser charge or accepts responsibility in exchange for a lighter penalty.

The administration of criminal justice Act (ACJA), 2015 provides for plea bargaining which allows the defendant to plead guilty to lesser offences than the offences charged, so as to achieve quick dispensation of justice. Section 270(1) provides two ways a plea bargain may be undertaken, either as an offer made by the prosecutor or by the defendant. The plea is taken during or after the presentation of the evidence of the prosecution, but before the presentation of the evidence of the defense. Section 270(2) provides for the conditions to be satisfied before plea can be taken as follow:

The evidence of the prosecution is insufficient to prove the offence charged beyond reasonable doubt.

Where the defendant has agreed to return the proceeds of the crime or make restitution to the victim or his representative, or

Where the defendant in a case of conspiracy has fully cooperated with the investigation and prosecution of the crime by providing relevant information for the successful prosecution of other offenders:

Under the NCS Act there is no express provision in relation to plea bargaining, but a similar provision is section 264 which is *pari materia* to the section 14(2) of the Economic and Financial Crimes Commission (EFCC) Act 2004. Plea bargaining therefore has not been applied largely in customs cases.

It is doubtful if where compounding of customs offences, or collection of duty/penalty from detained/seized goods especially vehicles, in view of prosecution can be described as a limb of plea bargaining. It may not be safe to so assume because the action at this stage is not before any court proceeding. The prospect however is that, as a revenue agency if applying the plea bargaining in a proper manner will lead to recovery of the substantial amount of the duty evaded, it will be better for the economic gain of the nation. The former is the decision not to prosecute for one reason or the other.⁷ It has been viewed as taking bribe to ignore crime⁸

Compounding of Smuggling Offences is different from plea bargain. It was explained that plea bargain has to do with negotiation of sentence during a trial, with the prosecutors offering the consideration, the defense accepting the consideration in exchange for pleading guilty.⁹ Compounding on the other hand is the exercise of the power by the relevant enforcement agency, to drop a charge against the defendant upon terms as agreed. Terms may include payment of money, in lieu of other liability. The intention in compounding could be to promote friendliness between the parties so that peace is restored. It should also be noted that compounding is stigma free, whereas plea bargaining has some-taint of guilt, and lesser punishment awarded for not

⁷ Section 243 of the NCS Act, 2023 referred to it as “concessionary settlement and mitigation of penalties “wherein the service may remit or mitigate Administrative penalties”, section 264 in the same vein provides for power of the service to compound offences.

⁸ Encarta Encyclopedia, 2004.

⁹ A. S. Akinpelu, ‘Plea Bargaining In Criminal Prosecution’; lecturer, Dept of Public Law, Faculty of Law, Adeleke University, Ede, Osun State Nigeria.

fully contesting the case. In some jurisdiction however, like Kenya¹⁰ there is a requirement of consent to be given in writing by the suspect before a customs offence can be compounded. This we submit is a confirmation of the guilt of the suspect, hence can be related to the taint of guilt, as expressed in the case of plea bargain.

Under the ordinary criminal law there are compoundable and non-compoundable offences. Compoundable are those that can be compromised and the complainant can agree to take back the charges levied against the accused. Non-compoundable are the more serious offences in which the parties cannot compromise. There are also instances where compounding can take place without the permission of the court, and in others court permission is required. In *Bhagyan Das vs. The State of Uttarakhand & Anr*,¹¹ the supreme court observed that a court has discretion to reject a plea to compound an offence having social impact, even if the offence is compoundable.

Also, in *Giansingh v. State of Punjab*,¹² the constitution bench observed that compounding powers should be exercised by the court considering the social impact of the crime in question *vis-à-vis* its individual impact, as decisive criterion for quashing power in such cases.

Under the common law of England compounding a felony was an offence as such was classified a misdemeanor.¹³ Criminal liability for compounding is pervasive in American law, at least in theory.¹⁴ In forty-five states therefore, the compounding of a crime may be prosecuted as a statutory offence, in two others it apparently may be prosecuted as a common law offence.¹⁵ Compounding has been abolished in England and Wales, northern Ireland, Republic of Ireland and in New South Wales.¹⁶

It seems that the need to protect the innocent and at the same time speed up the process of justice delivery, could be a reason for compounding offences.¹⁷ Be that as it may, and even though compounding has some similarities with plea bargaining, it seems that not all jurisdictions encourage or apply compounding. In jurisdictions where it is applied, it is not permitted in all cases. The broad principle therefore that forms the basis of its application in those jurisdictions is, if the offence is essentially of a private nature and relatively not serious, it is compoundable.¹⁸ Under the customs law, it seems the classification of compoundable and non-compoundable of smuggling offence is not there as in the general criminal law. In relation to customs either due to its nature of revenue collection, “compounding” is encouraged and Datey¹⁹ explains it thus:

¹⁰ Kenya Customs Act, Cap 472 Laws of Kenya, s. 214.

¹¹ CRR No. 465 of 2019 – *Law Times Ayushi Tripathi Journal*. In/compounding-of-offences accessed on 12/11/25.

¹² (2012) 10 SCC 303.

¹³ Boyce & Perkins, *Criminal Law*, 3rd ed.(1992) at S 78.

¹⁴ CRR No. 465 of 2019 Ibid, (n. 11).

¹⁵ Saheed, A. A. (2020). Towards an Effective Regime of the Application of Condonation, Compounding of Offences and Plea Bargaining as Veritable Alternative Dispute Resolution (ADR) Mechanisms. *ABUAD Law Journal (ALJ)*, 8(1). <https://journals.abuad.edu.ng/index.php/alj/article/download/222/176/1077>.

¹⁶ Above (n 15).

¹⁷ “Compounding of Offences: Origin and Rationale for this Practice; <https://www.cimplyfive.com/compounding-of-offences-origin-and-rationale-for-thispractice> accessed 12-12-2019.

¹⁸ Eze, T. C., & Eze, A. G., ‘A Critical Appraisal of the Concept of Plea Bargaining in Criminal Justice Delivery in Nigeria’, *Global Journal of Politics and Law Research*, (2015) 3(4), 31–43.

¹⁹ V. S. Datel., *Indirect Taxes Law and Practice*, Taxmann Publication, New Delhi, (2012) at pp 625-6 referred in “Detailed study on civil and criminal penalties under the customs Act, prosecution and compounding of offences” by

“Compounding” means that the accused and the complainant have come to terms and the dispute between the parties has been settled amicably or adjusted by agreement and the complainant agrees not to prosecute the accused. If the case is pending, the accused and the complainant then make a joint application to the court that the parties have come to terms and the case may not be proceeded with”

It means that compounding can be done either before or after the institution of prosecution, as opposed to settlement, which can be done only before and after the institution of prosecution, and upon payment of the composition amount, prosecution will not be launched, in case it has been launched, it will be withdrawn²⁰ under section 137(3) customs Act 1962, India any offence under the Act can be compounded by chief commissioner of customs, on payment of ‘compounding amount to the Central Government except in some cases.’²¹

The procedure for compounding is elaborately provided in the customs (compounding of offences/rule, 2005,²² and where there are demonstrable contradictions or inconsistencies or incompleteness in the case of the applicant, then the application for compounding cannot be entertained.²³

The above provisions and procedure as examined is a clear demonstration of how developed, the subject of compounding is in India we submit that it is a system that encourages settlement thereby preventing litigation. Under the NCS Act the NCS is empowered to compound offences. Section 264 to this end provides:

The Service may:

- (a) Without prejudice to the provision of section 174 of the constitution of the Federal Republic of Nigeria 1999, and subject to such directions whether general or special, as may be given by the Attorney General of the federation, stay or compound any proceedings for an offence or for the condemnation of anything forfeited under the customs and excise law, or other provisions of this Act
- (b) Without prejudice to and subject to such directions, whether general or special as may be given by the Board, restore anything forfeited or seized under the customs and excise law.

The section restricts the penalty to the forfeiture of the thing liable to forfeiture. The advantages here is that being an economic crime the emphasis tend to be on the gain/revenue from the items so forfeited. The problem however, is that after forfeiture and the subsequent allocation which

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²⁰ Above (n 19).

²¹ Circular No. 54/2005-customs, dated 30-12-2005 classified offences for the purpose of compounding as: (I) technical offences, and (II) substantive or non-technical offences for the purpose of compounding technical offences are those that can be compounded more than once and would be accorded a more liberal treatment. However substantive or non-technical offences are offences, where it has been decided not to allow compounding for the second time. In this context substantive or non-technical offence would mean offences covered under section 135 and 135A of the customs Act “Technical offences” would mean offences covered under section 132, 133 and 134 of the Customs Act. Accordingly compounding for substantive offence shall be allowed only once.

²² Circular No. 54/2005 – cus dated 30.12.2005 (superseded by circular No. 29/2009. Cus); circular No. 20/2008-cus dated 2.12.2008 – customs (NT) dated 12.11.2008 circular No. 29/2009 – cus dated 15.10.2009

²³ Principle of disclosure in circular No. 29/2009. Cus dated 15.10.2009, which reiterated the decision of supreme court in union of India v. Anil Chanana; (2008) (222) ELT 481 SC.

often the amount paid is nothing compared to the value of the goods, makes the advantage a ruse. It is advocated that the emphasis after forfeiture, should be appraisal for the maximum Demand Notice, so as to gain the full, advantage. EFCC Act considered earlier comes to fore, as contended that it is more of compounding section than plea bargain as often being relied upon by the commission.

Compounding of customs offences if not abused, and if developed as in the case of India, is in line with civilized criminal justice and should be practiced. It is important to consider the effect of the provisions of the Criminal Code (CC)²⁴ in relation to compounding of offences. It seems that section 127, 128 and 130 CC seems to be in agreement with the jurisdiction, where compounding felonies is an offence.²⁵

5. Impact of Regulation 5 and 6 of the Asset Tracing, Recovery and Management Regulations 2019

Apart from the general powers of the Attorney-General of the federation (AGF) as the law officer therein, that oversees all legal matters of government, which by extension covers the NCS, there is no specific supervisory role played of the AGF on the customs. Perhaps the only role which is still under the general power, is in relation to the appointment of a legal adviser and his assistants to work in the legal unit of the NCS. This is further affirmed in section 264 of the NCS Act that deals with the powers of the NCS to compound proceedings, but which is subject to the powers of the AGF in that regard. The point here is that the supervisory powers of the AGF on NCS, is not like that of the minister of Finance whose ministry is in fact referred to, as a supervisory ministry to the NCS. This background is of essence in view of the Asset Tracing, Recovery and Management Regulations, 2019 made by the AGF.²⁶ The objective of the regulation as stated in section 1 therein, is to prescribe procedures for all Law Enforcement Agencies (LEAs) and anti-corruption Agencies (ACAs), on how to ensure an effective co-ordination *inter alia* in the seizure and disposal of assets and proceeds of crime where such asset or proceeds of crime have been provided to be subject to forfeiture under an enabling Act. The effect of the regulation on the power of the NCS, in the exercise of its role in administering seized goods becomes an issue for consideration. Section 5 and 6 of the regulation provides:

- 5 (1) All non-conviction based forfeiture shall be conducted by the officer of the Attorney-General of the federation
- (2) Where a non-conviction based forfeiture procedure arises, the LEAs and ACAs shall transfer the matter to the office of the Attorney –General of the Federation
- 6 (1) All seized assets shall be registered by all MDAs, LEAs and ACAs on the database in the office of the Attorney-general of Federation.
- (2) The seized assets that are susceptible to deterioration may be disposed of by the recovery agency following due clearance from the Attorney-General of the federation and report submitted within 30 days.

These provisions seem to have whittled down the powers of the NCS as provided in sections 233, 245 and the schedule to the NCS Act with regard to management of seized goods. The

²⁴ C.38 LFN 2004.

²⁵ Forty-five States in America, England and Wales Northern Ireland, Republic of Ireland and New South Wales.

²⁶ Nigeria official Gazette vol. 106, No. 163, dated October 29, 2019.

provisions of the regulation were all hitherto been undertaken internally by the NCS. This is why the NCS could seize smuggled goods and in administering it, can collect additional duty on it, or auctioned as deemed fit. The records are kept right from the various commands to the central statistics, in the office of the Deputy comptroller General in charge of Enforcement investigation and inspection at the NCS headquarters, Abuja.

The question is, will the regulation extend to the foretasted operations of the NCS? Is seizure and forfeiture of smuggled goods within the contemplation of the regulation? The regulation may not be referring to those of smuggled goods but for other recoverable assets from proceeds of crime, as undertaken by the EFCC and the independent corrupt practices other related offences commission (ICPC), and other related security agencies but certainly not the NCS. This is because in section 10 of the regulation where even though it is not limited to those mentioned, but all relevant LEAs to the exclusion of the NCS, where expressly mentioned as part of the structure to manage all the final forfeited assets. Anchoring on this submission, we state further that if the regulation contemplates seizure and forfeiture as administer under the NCS Act, it will have impact on the operations of the NCS in relation to the management of the seized goods. To subject that power to the AGF will affect the hitherto quick response by the NCS, to raise DN in some deserving cases which has impacted positively on the revenue profile. It is therefore desirable for the regulation not to contemplate the provision of the NCS Act in relation to seizure and forfeiture of goods.

It is however possible that out of a customs offence an overlapping may occur into other LEAs. Operation. An instance is the seizure of the 661-pump action, which was handed over to the Department of State Service (DSS), and which the AGF is undertaking the prosecution. Any further seizure of asset from the defendants upon conviction, and traceable to this crime of illegal importation, can come within the AGF regulation.

From the explanation given by the AGF on the Establishment of the regulation, it can be safe to observe that seizure and forfeiture under the NCS Act is not within the contemplation of the regulation. He explained that the regulation was informed by the need to regulate the procedures for the tracing, recovery, management and disposal of illegally acquired assets as required under various extant legislation such as the EFCC Act, 2004, the ICPC Act, 2000, the money laundering (prohibition) Act 2011 as amended in 2012, the terrorism (prevention) Act, 2011 as amended in 2013, the Nigerian financial Intelligence Agency Act, 2018 as well as the mutual assistance in criminal matters Act, 2019.²⁷ It is observed that the NCS Act was not mentioned, and it is instructive to note that these Acts as mentioned, for example of EFCC Act, in section 31(4) has provisions that the AGF may make rules or regulations for the disposal or sale of any property or assets forfeited pursuant to the Act.²⁸ This by necessary implication means that the AGF by issuing the regulation is merely complying with the provisions of the law, and that is why in section 4 of the regulation, the extant laws of the LEAs and ACAs as it relates to asset recovery still remains in force. The NCS Act has no such corresponding provision of the EFCC Act, that the AGF may make rules or regulations for seizure or forfeiture or disposal pursuant to the NCS Act. It behooves therefore that the regulation does not affect forfeiture under the NCS

²⁷Ibekaku-Mwagwu, "There's Nothing Arbitrary With New Assets Management Regulation" <https://www.pressreader.com> accessed 17-12-19. This day 14 Nov. 2019

²⁸ Ibid.

Act. The move by the National assembly to enact a law establishing a centralized body to be known as Assets Recovery Agency²⁹ is viewed as a duplication of the role being exercised by the AGF under the Asset tracing, recovery and management regulations 2019.

6. Suitability of Non-adjudicatory Method for the Settlement of Smuggling of Goods Offences Related Matters

The discussion here is against the backdrop of the need to quickly dispense with offences, as created under the NCS Act so as to gain the desired result of generating revenue for the government of Nigeria. It is against this background that the concepts of plea bargain and compounding of offences as elaborately discussed in this paper is a welcome development. It seems the legislature were conscious of this fact, hence the introduction of compounding offences into the NCS Act. The inherent problems in the prosecution of smuggling offences right from when the offence is committed, detention made, arrest effected, preparation of case file, investigation and even most times the problem of proof of ownership does not guarantee the success of the trials at the court.

Even where proceedings are instituted, the reality is that the lack of funds will affect the prosecution. A simple example can be found in situations where officers made seizures in one command like in Lagos. The offenders may be arraigned and the officer who are witnesses in line with the nature of the job are transferred to another location like Kaduna. Experience has shown that to get the officers to always come down to attend court duties has posed challenges. Such cases risk striking out on grounds of non-diligent prosecution as referred to in the case of *Customs Service Board v. P. Eleke & 2 others*.³⁰ It is for this reason that alternative dispute resolution mechanism such as negotiation and mediation aimed at divestment of property, rather than conviction of the smuggler is a step in the right direction. Section 233 NCS Act to this end, and not fraught with any challenge instantly provides for the forfeiture of any good improperly imported.

The practice in India where the emphasis is on generating revenue than sending the offender to prison is commendable. To this end, in section 112 of the India customs Act, for any improper importation punishment is confiscation and a fine not exceeding the value of the goods or five thousand rupees,³¹ whichever is greater. There is no provision for imprisonment, which presupposes the emphasis is on generating more revenue for the government instead of increasing the financial burden of the state in maintaining the convict in prison custody.

Another innovation under the Indian Act³² is the introduction of the commissioner appeals and the appellate tribunal where all matters relating to customs offences are disposed before, if necessary, the regular courts. The appellant tribunal which is called the customs, excise appellate tribunal consists of judicial and technical members who sees to the quick dispensation of the matters on fair and equitable grounds. In New Zealand³³ it provides for establishment of customs appeal authorities in the vein of the Indian provision. These are all attempts at avoiding the

²⁹ Abuja, S. O., 'Senate Moves to Create Asset Recovery Agency', The Nation Newspaper, 2025, May 20. <https://thenationonlineng.net/senate-moves-to-create-asset-recovery-agency/>

³⁰ Unreported Suit No. FHC/PHC/9C/2005.

³¹ Rupees is the India national currency.

³² Customs - Acts 1962, ss. 128^A and 129; Chapter- XV, Appeals and Revision.

³³ New Zealand customs Act Customs Appeal Authority (RKC Guidelines General Annex 10), s. 244

challenges often associated with the regular courts. It is flowing from these two provisions that section 243 and 264 of the NCS Act, 2023 is a welcome development. It encourages out of courts settlement which it referred to as “concession settlement and compounding” of offences wherein there is an agreement to wave prosecution, upon an undertaking by the persons charged. The undertaking may include paying all the duty due and possible penalty.

7. Conclusion

This study examined the concepts of compounding offences and the plea bargain, which are considered as non-adjudicatory methods for the settlement of offences generally, and specifically in our case smuggling of goods and other related matters. We found that the inherent advantages in the concepts and especially in the case of compounding offences, which has been provided for under section 264 of the NCS Act is a good development, and quite suitable as a non-adjudicatory method over the prosecution of smuggling offences in Nigeria.

The study further reveals that section 5 and 6 of the Asset, tracing, recovery and management regulations, 2019 made by the AGF, does not cover seizure and forfeiture as provided under the NCS Act. It submits that the making of the regulation satisfies the relevant provisions of the extant laws of the LEAs and ACAs as it relates to assets recovery and management. This paper recommends the Indian and New Zealand model of commissioner appeals, appellate tribunal the customs appeals authorities respectively, which are geared towards quick disposition of smuggling offences. This we conclude will further boost the revenue drive of the NCS, especially in the face of the dwindling revenue from the oil sector. In contrast, plea bargaining operates within the framework of the criminal justice system, requiring the involvement of judicial officers and the formal consent of the prosecution and defense. While non-adjudicatory processes may not require a formal admission of guilt, plea bargaining necessitates such an admission as a precondition for a reduced sentence or penalty. Both reflect a restorative approach to justice, prioritizing correction and restitution over punitive measures.