Nigeria: Challenges of Defence Counsel in Corruption Prosecution

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Abstract: The primary purpose of this paper is to examine the multidimensional challenges inhibiting the fight against corruption in Nigeria. With emphasis on litigation as a tool for fighting corruption, the paper reveals factors that contribute to corruption in Nigeria and efforts being made to combat it. It evaluates the adequacy and effectiveness of the legal framework and prosecution of corruption cases in Nigeria. The paper argues that the failure of the Nigerian State to effectively combat corruption is not attributable to inadequate or lack of enabling legal framework. While recognizing the right of persons standing trial for corruption to a fair trial and meaningful day in court, it also highlights various challenges confronting defence counsel before and during trial of persons standing trial for corruption. Finally, the paper recommends how corruption can be controlled in Nigeria.

Keywords: corruption;

1. Introduction

Corruption has permeated every fabric of the Nigerian nation. Various governments have fought the crime for decades[3] with little success. Corruption has been acknowledged as the only steady growth Nigeria has experienced since her Independence. Corruption is a hydra-headed monster with the capacity to destroy every facet of life. The virus of corrupt practices is devastating on every aspect of

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[3] There are various laws enacted by different regimes in Nigeria to fight corruption. See The Criminal Code; Recovery of Public Property (Special Military Tribunals) Act; Civil Service Commission Act; Economic and Financial Crimes Commission (EFCC) Act 2004; Corrupt Practices and other Related Offences (ICPC) Act 2004); Code of Conduct Act 2004; Constitution of the Federal Republic of Nigeria 1999; Money Laundering (Prohibition) Act 2004; Advance Fee Fraud and other Related Offences Act 2006.

the economy[1]; it promotes authoritarian and oligarchic rule because it ensures that wealth and power are concentrated in the hands of a few to the detriment of the silent suffering majority. Corruption compromises the fortune of future generations of a corrupt nation. The effect of corruption was admirably summed up by a former Chairman of the Economic and Financial Commission Crime:

> The corruption endemic to our region is not just about bribery, but about mismanagement, incompetence, abuse of office, and the inability to establish justice and the rule of law. As resources are stolen, confidence not just in democratic governance but in the idea of just leadership ebbs away. As the lines of authority with the government erode, so too do traditional authority structures. In the worst cases, eventually, all that is left to hold society together is the idea that someday it may be your day to get yours. This does little to build credible, accountable institutions of governance or put the right policies in place.
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> The African Union has reported that corruption drains the region of some $140 Billion a year, which is about 25% of the continent's official GDP… between 1960 and 1999, Nigerian officials had stolen or wasted more than $440 billion. This is six times the Marshall plan, the total sum needed to rebuild a devastated Europe in the aftermath of the Second World War. When you look across a nation and a continent riddled with poverty and weak institutions, and you think of what this money could have done- only then can you truly understand the crime of corruption, and the almost inhuman indifference that is required by those who wield it for personal gain… I stand by the idea that corruption is responsible for as many deaths as the combined results of conflicts and HIV/AIDS on the African continent. (Ribadu, 2009)

[1] The UN's top anti-crime official, Antonio Costa, identifies Zaire and Nigeria as two of Africa"s hardest-hit states, having lost some $5 billion each in the last few years to graft, most of it spirited out of both countries. In Pakistan, an estimated 30 percent of the price of all public works projects is dedicated to kickbacks and bribes. In Bangladesh, corruption consumes a whopping 50 percent of foreign investment. As high as that price tag stands, there are even more alarming activities, what officials call the intermingling of terrorism, money laundering and corruption. "The routes for arms trafficking and drugs are usually lubricated by corruption," Costa said. He estimated that about one-quarter of the $2 billion in annual proceeds from Afghan heroin trade – a trade that couldn"t survive without graft – may be used to finance terrorism. Corruption also represents "a tax on the poor… it steals from the needy to enrich the wealthy," " Ashcroft told the convention in Merida, Mexico City. That is especially true in Africa and Asia, two regions which have never signed such a pact before, where embezzled money is usually sent abroad to a rich banking capital:" M. Stevenson, "UN Countries Reveal Costs of Corruption" (Johannesburg: Associated Press, 2003)

Corruption has also been associated with the destruction of the soul of the society; inequality in the society; and hindrance to effective legal system. Nigeria's former President Chief Olusegun Obasanjo has rightly observed: All of us know that the scourge of corruption has eaten so deeply in to the fabrics of public and private transactions in our country, that it had become impossible to contemplate and plan for our generation without first tackling it. It is not only illegal; it is bad because it corrupts the very soul of our community. It makes nonsense of all our inadequate resources. It breeds cynicism and promotes inequality. It renders it almost impossible for this administration to address the objectives of equity and justice in our society with any seriousness. And finally, it destroys the social fabric of our society leaving each individual on his own, to do only whatever, is best for himself.[1]

Corruption is the most devastating crime and a precursor of all other crimes (Adeyemi, 1998, p. 3). Corruption is not only anti-people; it targets the very vulnerable in the society. Corruption is pervasive in both the public and the private sectors and has indeed become a "cankerworm reaching the dimension of epidemic in our body politic (Adeyemi, 1998, p. 3)." A society that tolerates corruption will definitely be regressive and isolated from the comity of civilized countries (Osipitan & Oyewo, 1999, pp. 257-282). This explains why all hands must be on deck in the fight against corruption.

The objective of this paper is to examine the multidimensional challenges inhibiting the fight against corruption in Nigeria. It focuses on litigation as a tool for fighting corruption. The paper reveals factors that contribute to corruption in Nigeria and the efforts being made to combat it. It evaluates the adequacy and effectiveness of the legal framework for the prosecution of cases of corruption in Nigeria. It argues that the failure of the Nigerian state to effectively tackle corruption is not due to inadequate or lack of enabling legal framework but a combination of lack of political will, institutional failures, and institutional corruption that ubiquitously pervade the Nigerian State. The paper recognizes the rights of persons standing trial for corruption to a fair trial and meaningful day in court. Against this background, the paper examines the challenges confronting defence counsel before and during trial of persons standing trial for corruption. Finally, the paper recommends some measures to enhance the performance of the defence counsel.

[1] O. Obasanjo being a remark at the inauguration ceremony of the Independent Corrupt Practices and Other Related Offences Commission (ICPC) 2000.

This paper is divided into five parts. Part one is introductory. Part two defines relevant conceptual terms. Part three highlights the challenges of combating corruption in Nigeria. Part four x-rays the problems confronting defence counsel engaged by persons accused of corruption. Part five concludes with suggestions.

2. Conceptual Terms

2.1. Corruption

Under the *Independent Corrupt Practices and Other Related Offences Act 2000,*[1] "corruption" is defined to include "bribery, fraud and other related offences". Adeyemi describes corruption as "an offence which aims mainly at the conduct of public officials who take advantage of their positions within public administrations for the purpose of private gains (Adeyemi, 1998, p. 5). Bello gives a wider definition of corruption. He describes it as an "aspect of human endeavour, which is looked upon as obnoxious, mean, degrading, odious, and offensive to the higher norms of any respectable human society" (Bello, 1991). Adegbite describes corruption as moral deterioration, depravity and perversion of integrity by bribery or favour, in its widest sense. Therefore, corruption connotes the perversion of anything from its original state of purity, a kind of infection or infected condition. Corruption in this down-to-earth sense means acting or inducing an act with the intent of improperly securing advantage. (Adegbite, p. 213)

One of the reasons, for the under-development of Nigeria and the failure of public institutions is widespread corruption, and lack of accountability to the people. There is systemic corruption in both the public and the private sectors which have resulted in the total subversion of the system. It is no gainsaying that on account of the devastating effect of corruption and the negative impact on the people, "*all Nigerians except perhaps those who benefit from it are unhappy with the level of corruption in the country*". (Ogwuegbu, 2002, p. 67)

[1] Act No. 5 of 2004, s. 2.

2.2. Defence Counsel

A defence counsel would normally represent the accused at pre-trial, trial, and post-trial stages. If there is need to enter a plea bargain, the defence counsel would normally negotiate with the prosecution on behalf of the accused. The defence counsel owes the accused the duty to familiarize himself with various information or charge filed by the prosecutor against the accused person. The defence counsel should know what each count means and why it has been brought against the accused. He must build a case, and anticipate the argument the prosecution will use to convict the accused. He must then take each anticipated argument and effectively defend the accused person. Where briefed, the defence counsel represents the accused person at the pre-trial stage. He represents the accused person during interrogation by investigating officers and other persons investigating the offence. Where necessary, the defence counsel files application for the trial and post-trial bail on behalf of the accused person. Where bail is granted it is the defence counsel who makes recommendation to the court on the suitability of the sureties.

However, despite being briefed as the defence counsel, the defence counsel primarily remains an officer of the Court and a Minister in the Temple of Justice. Accordingly, his duty is principally to the court. As rightly observed by Flowers: all lawyers, no matter what area of law, have a responsibility that goes beyond merely advocating for the client. An attorney must act as an officer of the court, respecting the need for the truth and truth-seeking within the confines of the adversary system and as an active participant of a system that places justice as a core value. (Flowers, 2010, p. 647)

3. Challenges Of Combating Corruption

There is no doubt that the legal framework on corruption in Nigeria is robust and adequate (ibidem) However, there is lack of political will and effective enforcement mechanism. The fight against corruption requires full and open support of the Federal Government and other government institutions. A fight against corruption is a fight against few oligarchies with immense resources to fight back. The machinery for the enforcement of anti-corruption laws must therefore be potent. The battle against corruption must be continually sustained.

The Nigerian Police Force, the Economic and Financial Crimes Commission as well as the Independent Corrupt Practices and other Related Offences Commission are the agencies primarily responsible for the investigation and prosecution of corruption cases. We will inquire into the *modus operandi* of these three agencies below.

3.1. Corruption within the Nigerian Police Force

It is definitely true that the Nigerian Police Force (NPF) plays a vital role in criminal justice administration in Nigeria. The NPF is primarily responsible for the enforcement of laws in Nigeria. It is evidently not immune from the cancer of corruption which plagues the larger society. It is common knowledge that corruption within the NPF is endemic and institutional. The agency has been described as an army of corruption (Abati, 2001, p. 15). The flip side to this is that potential whistle-blowers are discouraged because of lack of confidence in the ability of the NPF to bring corrupt officials to justice. As appropriately observed by the ICPC, "the impact of this realization may further be compounded by the knowledge that corruption in the police can invert the goals of the organisation to the extent that police powers encourage and create crime, rather than deter it".[1] The NPF is perceived as brutal and unfriendly. As rightly noted by the ICPC: Where police deviance ends and corruption begins is sometimes difficult to determine. Brutality, discrimination, sexual harassment, intimidation and illicit use of weapons constitute deviant behaviour. If it is designed to achieve personal wants it also characterizes itself as corrupt. But corrupt behaviour as understood by the ordinary Nigerian probably consists of (i) pay-offs to the police by essentially law abiding citizens for infringements of statutes such as traffic laws, (ii) pay-off to the police by organized crime or individuals who habitually break the law to make money such as drug dealers or prostitutes, (iii) the receipt of money, favours or discounts for services rendered, (iv) pocketing recovered money from proceeds of crime, (v) giving false testimony to ensure dismissal of cases in court and (vi) the actual perpetration of criminal acts, to mention a few. The danger apparent is that in extreme cases, police are not just "protecting" criminals, but have become a complicit part in the planning and execution of crimes.

[1] ICPC, "Combating Corruption in the Nigerian Police Force" (being a paper presented by the Independent Corrupt Practices & other Related Offences Commission at the Police Service Commission Retreat in August 2008), p. 4, available online at: <http://www.psc.gov.ng/files/Combatting>

It is not surprising that the Police Force lacks a rich history of successful prosecution of top government officials for corruption (Alemeka, 1998, p. 161). The law enforcement agency has not only embraced corruption; a culture of corruption thrives within the Nigerian Police Force (Aremu, 2009). An institution such as the Nigerian Police Force that symbolises corruption cannot successfully combat corruption. Apart from embracing corruption, the agency lacks the requisite capacity to deal with 21st century challenges of investigating criminals and suspects (Odekunle, 1979, pp. 61-68).

The role of the police in the investigation and prosecution of crime is statutorily defined. S. 4 of the Police Act[1] provides that: The Police shall be employed for the prevention and detection of crime, the apprehension of offenders, the preservation of law and order, the protection of life and property and the due enforcement of all laws and regulation…

S. 23 of the *Police Act* provides that the police shall conduct investigations in criminal matters subject to the provisions of the Constitution. The prosecutorial powers of the Nigerian Police Force have been upheld by the Supreme Court in *Osahon* v. *Federal Republic of Nigeria*.[2]

The powers of the Nigerian Police Force to prosecute State and Federal Offences whether in the name of the State Commissioner of Police, Inspector General of Police or in the name of the Federal Republic of Nigeria in the State or Federal High Court was upheld in the above case. The only restriction in the prosecutorial powers of the Nigerian Police Force is the overriding powers of a State or Federal Attorney-General as the case may be, to take over or discontinue proceedings commenced by legal officers and prosecutors at the Nigerian Police Force.

3.2. The Economic and Financial Crimes Commission (EFCC)

The EFCC has wide powers. It has the power to investigate, arrest and prosecute any person accused of economic and financial crimes in public and private sectors. The EFCC Act places a bar on interlocutory appeals at the trial court[3]. The Act seems to have shifted the burden of proof in cases of the offence of unjust

[1] Cap. P19 Laws of the Federation of Nigeria 2004.
[2] (2006) 2 SCNJ 157.
[3] S. 40.

enrichment to the accused.[1] The Act also gives the EFCC the power to apply to court for interim restraint/forfeiture of properties suspected to have been acquired with proceeds of crime[2]. Consequently, the EFCC arraigned about 300 persons and had 92 convictions between 2003 and 2006.[3] It is noteworthy that the EFCC secured the conviction of a handful of senior government officials. Former public office holders like Diepreye Alamieyeseigha, Tafa Balogun, Lucky Igbinedion, Bode George and others have been found guilty and convicted of corrupt practices by competent courts. However, it is generally agreed that the EFCC enforcement and investigation officers are involved in high-handedness, arm-twisting, and forcing and inducing accused persons to plea-bargain.

A. However, successful prosecution of offenders for corruption at the instance of the EFCC is remarkable when compared with the failure rate of the Nigerian Police Force. The point must also be made that the success rate of EFCC and ICPC is traceable to the plea bargains of the convicts. With the exception of Lagos State,[4] none of the States of the Federation has expressly recognized plea bargaining in its criminal process. The former Chief Justice of Nigeria, Dahiru Musdaher, was recently reported[5] to have stated that plea bargain is illegal, fraudulent and not part of the Nigerian criminal process. This pronouncement is most unfortunate as it is likely to slow down the rate of successful prosecution and conviction of persons accused of corruption.***The Independent and Corrupt Practices Commission (ICPC)***

S. 6 of the *Corrupt Practices and Other Related Offences Act 2004 (the ICPC Act) 2004* authorises the ICPC to receive, investigate complaint, and prosecute anyone suspected of corrupt practices. The ICPC enjoys wide powers. As at October 2008, the number of corruption cases stood at 161.[6] The rate of conviction was however abysmally low. Only 22 convictions had been secured. This may not be unconnected with limited coverage of the ICPC Act. It provides that the ICPC can

[1] S. 19(2).
[2] Ss. 26-29.
[3] N. Ribadu, "Combating Money Laundering in Emerging Economies: Nigeria as a Case Study" (*Guest Lecture Series* Financial Institutions Training Centre/ Nigerian Institute of International Affairs, Lagos, 10 August 2006).
[4] Only the Lagos State Government has formally introduced plea bargaining into its criminal justice system. See the *Administration of Criminal Justice Law 2007, s. 75*. None of those prosecuted and convicted by the EFCC was convicted under this law.
[5] Justice Dahiru Musdapher, "Plea Bargaining has no Place in Our Laws," available online at: <http://www.punchng.com/index.php?option=com_k2&view=item&id=4789:plea-bargain-has-no-place-in-our-law-—-cjn&Itemid=542>
[6] ICPC Monitor, Vol. 1, Issue 5 (August - October 2008), p. 34.

only investigate corruption involving public officers. These corrupt acts must have also occurred after the inauguration of ICPC(Enweremadu, 2010, p. 8).

The ICPC team of investigating officers includes police specialists in the detection of crime, lawyers, accountants, financial experts, and other specially trained experts. This is commendable because investigation and successful prosecution of offences of corruption require expertise and experience of economic and financial complexities that are definitely beyond the capacities of police officers.

B. Common Issues with Enforcement Officers

The investigating pattern and operations of the three major anti-corruption enforcement bodies are highlighted below. The Nigerian Police Force, Independent Corrupt Practices and other Related Offences Commission (ICPC) and Economic and Financial Crime Commission (EFCC) are examined against the backdrop of determining the efficacy of their investigating techniques.

It is not uncommon for prosecutors to file charges which are completely unrelated to the proof of evidence. Mis-joinder of offences, mis-joinder of offenders, poor investigation techniques, inability to immediately secure and protect crime scene, harassment of the accused persons and their counsel and protracted pre-trial detentions are vices which are common to these three enforcement agencies. In some cases, arrests are made and charges are filed in court before conclusion of investigations. The result is that the trial of accused persons run concurrently with the investigation of the crimes in respect of which the accused persons are being tried. As rightly observed by Enweremadu:

> Evidently, there is a grave problem with the quality of investigations. The reasons include inadequacy in terms of quality of human resources and expertise available for investigations, as well as funding and necessary equipment. An overarching issue in the investigation of many of the high profile cases is itself indicative of weakness in the caliber of leadership of the police force and its lack of independence. (Enweremadu, 2010, p. 8)

Anti-corruption enforcement agencies need to develop effective crime prevention techniques through the use of technology, intelligence-led policing and community policing to combat corruption. It must be remembered that corruption is a well organized profession and pastime for its perpetrators. In most cases, they are ahead of investigators. Enforcement agencies must develop capacities to out-match their adversaries in the fight against corruption. A situation where accused persons are

better informed and well ahead of investigators in terms of human and material resources hinders the battle against corruption.

The fight against corruption requires huge material and human resources during investigations and trial stages. Investigators might need to travel within and outside the country to trace ill-gotten wealth. All hands must therefore be on deck to adequately equip the prosecutors and investigators. They must be trained and re-trained "in the area of (1) management of individual caseloads, (2) proper examination of the elements of crime, (3) drafting of charges, (4) prosecutorial tactics and strategy, (5) preparation and management of witnesses."[1]

Instructions to law enforcement agencies to prosecute and persecute perceived political opponents and instructions to law enforcement agencies not to arrest or prosecute friends of powerful and well connected government officials are examples of common problems with law enforcement agencies by government. As rightly observed:

More damaging to the anti-corruption effort of the Obasanjo administration was an observable tendency to employ these anti-corruption agencies, especially the EFCC, as a weapon of destroying political rivals. This became more noticeable as the second term of President Obasanjo drew to a close. The crusade against corruption, and anti-corruption agencies by extension, at one time even became an instrument for disqualifying unwanted political aspirants and paving the way for the smooth election of Obasanjo's chosen candidates into the various elective offices. The best known example was the widely criticized bid to prosecute Obasanjo's Vice President, Atiku Abubakar, and his close political and business associates over allegations of corruption. The political motives in the EFCC's case against Atiku Abubakar were underlined by the provisions of section 137 (1) (i) of the Nigerian Constitution which states that any person indicted for corruption cannot stand in any election in Nigeria, and of course the haste with which the EFCC's report indicting Atiku Abubakar was accepted and gazetted by Obasanjo was known to be strongly opposed to his participation in the 2007 presidential elections. This action was taken just few weeks to the election.

Happily, the Supreme Court rose to the occasion by holding in *Abubakar v. Attorney-General of Federation* [2] that the EFCC lacks the power to pronounce a

[1] National Judicial Institute, Communiqué on "Corruption Casework Policy Roundtable" (July 2010), Para 9.
[2] (2007) 8 NWLR (Pt 1035) 117 at 155.

citizen who has not been tried and found guilty of corruption by a court of competent jurisdiction as corrupt.

4. Challenges of Defending Accused Persons

4.1. Plea Bargaining

Plea bargaining is a criminal process that has the reputation of being a very potent tool in the fight against corruption. In some jurisdictions, plea bargaining has been used as a tool for quick and effective resolution of corruption cases. It is noteworthy that despite the use of plea bargaining by the EFCC, there is no express provision for plea bargaining in its enabling law. The provision relevant to plea bargaining is S.14 (2) of the EFCC Act which provides that: subject to the provisions of section 174 of the Constitution of the Federal Republic of Nigeria 1999 which relates to the power of the Attorney General of the Federation to institute, continue or discontinue criminal proceedings against any persons in any court of law, the Commission may compound any offence punishable under this Act by accepting such terms of money as it thinks fit, not exceeding the amount of the maximum fine to which that person would have been liable if he had been convicted of the offence.

Interestingly, the above provision does not give unfettered power to the EFCC to enter into plea bargaining with the accused person.[1]

A former Chief Justice of Nigeria recently disapproved of plea bargaining. He said, "*Plea bargain is a novel concept of dubious origin. It has no place in our law - substantive or procedural. It was invented to provide soft landing to high profile criminals who loot the treasury entrusted to them. It is an obstacle to our fight against corruption. It should never again be mentioned in our jurisprudence*" (Musdapher)[2] The use of plea bargain by the EFCC is coercive, arm-twisting and discriminatorily applied and restricted to the famous and the rich to the exclusion of the common criminal.[3] Professor Oyebode rightly notes: the expectations of some lawyers that plea bargaining would be cost-effective and help de-clog the

[1] *Tafa Balogun* v *Federal Republic of Nigeria* (2005) 4 NWLR (Pt. 324) 190.
[2] Available online at: <http://www.punchng.com/index.php?option=com_k2&view=item&id=4789:plea-bargain-has-no-place-in-our-law-–-cjn&Itemid=542> .
[3] Those who have benefitted from EFCC plea bargaining include Tafa Balogun, Diepreye Alamieyeseigha, and Lucky Igbinedion.

judicial system are apt to receive a hard hearing in a society where a common goat or yam thief goes to jail while the white or blue collar criminal is given a mere symbolic sentence, most of which is either served in pleasurable surroundings or offered the opportunity of fines in lieu of incarceration. Admittedly, popular perceptions and perspectives of justice hardly ever coincide with those of the ruling class, especially in a society comprising the haves and have-nots. Yet, there is a felt need for forging a commonality of moral values in relation to the iniquity of unjust enrichment, double standards of justice as well as selective enforcement of laws and regulations.

A society in which majority of the population are not sure of their daily bread would be hard put to justify plea bargaining in cases of the rich, powerful and the famous. It is for this reason that one cannot be overly optimistic about the fortunes of plea bargaining in Nigeria.[1]

Notwithstanding the discriminatory use of plea bargaining and the emerging criticisms, from the view point of quick dispensation of justice, avoidance of expenses of conducting criminal trials and decongestion of courts lists, there are reasons to support plea bargaining.

We, however, submit that plea bargaining should be well structured as an integral part of the criminal justice system, and made available to all, particularly the first offenders, irrespective of class, origin, sex, age, religion, and other extraneous considerations. This paper suggests that to be effective, plea bargaining should be statutorily regulated and proper procedure for its adoption stipulated. An example may be drawn from *S. 75* of the *Administration of Criminal Justice Law* of Lagos State which provides that: Notwithstanding anything in this Law or in any other law, the Attorney General of the state shall have power to consider and accept a plea bargain from a person charged with any offence where the Attorney General is of the view that the acceptance of such plea bargain is in the public interest, the interest of justice, and the need to prevent those of legal process.[2]

[1] A. Oyebode, "Plea Bargaining, Public Service Rules and Criminal Justice in Nigeria" (being a paper presented at the seminar organized by the Association of Senior Civil Servants at Banilux Events Place, Lagos on 9 December 2010).
[2] S. 76(1) provides elaborate procedure for plea and sentence agreements.

4.2. Pre-Trial and Trial Rights of Accused Persons

Nigeria has embraced the adversary criminal process. Unlike the inquisitorial trial process, the accused under the adversary trial process is presumed innocent.[1] Accordingly, it is the duty of the prosecution to prove the guilt of the accused person beyond reasonable doubt. But presumption of innocence is hardly reflected during pre-trial stage. Many inmates awaiting trial are effectively presumed guilty despite the fact that there is little evidence of their involvement in the crime which they are accused of committing. Nigerian government is simply not complying with its national and international obligations when it comes to criminal justice.[2] Pre-trial detention of suspects by the EFCC and the Nigerian Police Force has assumed an alarming proportion. Accused persons are forced to remain in overcrowded and unsanitary conditions in violation of their right to human dignity (Osinbajo, 2009).

The criminal justice system suffers huge credibility crises when politically exposed persons are arrested, detained, and handcuffed, bundled to detention for unreasonable length of time. This process is vulnerable to corrupt practices by the law enforcement agencies, because it involves less scrutiny and the exercise of huge discretion by officers at the lower level of the system.[3] The trauma of suspects is well captured by the UN special rapporteur on torture and other cruel, inhuman, or degrading treatment or punishment. According to the report, pre-trial detainees, "are held in overcrowded cells, lacking appropriate hygiene facilities, with insufficient places to sleep, inadequate and/or insufficient food, water, and medical care, let alone any opportunities for educational, leisure, or vocational training." (Wowak, 2007, p. 16)

A striking feature of the adversary process is the pre-trial and trial right of the accused person to remain silent even where his silence is inconsistent with his innocence. The 1999 Constitution of the Federal Republic of Nigeria specifically confirms the right of the accused person to remain silent until he has consulted with a legal practitioner or any other person of his choice.[4] The pre-trial rights of suspects to the guiding hands of counsel during interrogation by officials of the EFCC, ICPC and other agencies involved in the interrogation of suspects has

[1] S. 36 (5) of the 1999 Constitution.
[2] See ICCPR, art. 9 (1).
[3] Open Society Foundations, "The Socioeconomic Impact of Pre-trial Detention" (a Report by the Open Society Initiative and the UNDP, New York, 2007), p 16.
[4] S. 36 (6) (c).

remained utopian. Counsel are seldom allowed to witness interrogation of suspects. Where counsel are allowed to be present during the interrogation, they can only be seen and not heard. Counsel invariably are compelled to blow muted trumpet during interrogation of suspects. Suspects are in effect denied the guiding hands of counsel during interrogation. The inability of counsel to assist their clients at the pre-trial stage of interrogation is a major challenge confronting counsel who defend persons accused of corruption.

It is respectfully submitted that denial of access to or assistance of counsel during interrogation of suspects is a violation of the fundamental right of the accused person to counsel of his choice. Such denial, it is further submitted, should render the confessional statement made by a suspect during interrogation without the assistance of counsel or, where such is present but is disallowed by interrogators from assisting the accused person, inadmissible. It is now trite that confessional statements obtained as a result of threat, inducement or promise made to suspects or as a result of oppression of the suspects during their interrogation are generally inadmissible. However, the admissibility or inadmissibility of confessional statements obtained in violation of the constitutional right of the accused persons to remain silent until he has consulted with his counsel has not arisen for determination by our apex court. It is suggested that a confession made in violation of the right of the accused to the guiding hands of counsel of his choice during interrogation should be held as inadmissible.

4.3. Quashing of Charges and Information

Information and charges are the originating processes filed by the prosecution in criminal cases. These processes are expected to inform the accused person of the particulars of the allegations against him as well as the law allegedly breached by him or her. In cases of trials in the High courts where information are filed, the prosecution is expected to attach proof of evidence. Such proof frequently includes statements of witnesses the prosecution intends to call and documents which are to be tendered by the prosecution. An accused person served with such charge or information may challenge its validity or the jurisdiction of the court to try him or her. Alternatively, he may allege that the information is oppressive. Finally, the accused may contend that the proof of evidence, when read along with the information or charge, discloses no triable offences as to justify being put to trial.

Defence counsel who seek to quash or challenge the validity of a charge or information are faced with many challenges. Firstly, there is the problem of whether the accused person who has been served with criminal summons and who is challenging the jurisdiction of the court to try the charge is expected to physically appear in court notwithstanding his objection to the jurisdiction of the court. Secondly, where the accused so appears in court, there is the question whether when the case is mentioned, he must enter into the dock or decline to enter the dock on the ground that he is objecting to the jurisdiction of the court to try him. Where he enters the dock, there is also the question of whether the charge or information should be read to him, whether he is obliged to make a plea or his plea can be arrested. There is also the issue of whether the objection to the court's jurisdiction would first be argued and determined before the plea of the accused is taken. Finally, there is the issue of whether the accused, who, at objection stage, is not on trial, must still remain in the dock, during argument on the court's jurisdiction to try him or her.

A survey of case law and statutory provisions shows that the situation is unclear. While some statutes insist that objection to the jurisdiction of the court to try the accused should be taken before the plea, others prescribe that such objection should be taken after the plea[1]. Some statutes are silent on the issue of objection to the court's jurisdiction and the physical presence (in court) of an accused person who is challenging the jurisdiction of the court to try him or her. Other statutes simply focus on objection as to the form of a charge. For example, the *Administration of Criminal Justice Law* of Lagos State specifically provides that objection as to defects of the charge can only be taken after the prosecution has closed the case[2].

The golden question is, why subject the accused person to the rigours of trial where there are objections capable of terminating the charge *ab initio*? Precious judicial time, and those of prosecuting and defence counsel are wasted by the above provision which forecloses the possibility of challenging an Information or charge at the earliest opportunity. It is evident that where an information or charge is destined to failure, in any event, it seems reasonable that such information or charge be challenged and quashed at the earliest opportunity. From the view point of challenges of defence counsel, he is expected to examine the various options in

[1] See *Edet v State* (2008) 14 NWLR (Part 1106) 52 where the court held that the accused does not have to enter the dock before the plea. *Cf Criminal Procedure Act (CPA), ss. 67* and *215*; and *Okeke v. State* (2003) 15 NWLR (Part 842) 73-74 ("Any objection of a charge of any formal defect on the face thereof shall be taken immediately after the charge has been read over to the accused not later").
[2] S. 260 (2).

the process of objecting to the charge or the jurisdiction of the court in order to ensure that his client's interests are well protected. This must be done without compromising the integrity of the court, bearing in mind always that the (counsel) at all times is a minister in the temple of justice. There is the need to avoid Criminal trials where such trials are avoidable or unnecessary. There is however the need for uniformity of rules and principles on quashing information and charges.

4.4. Interlocutory Appeals and Stay of Proceedings

Appeals against final and interlocutory decisions of the courts are rights conferred and recognised by the Constitution. While appeals against final decisions of trial courts are exercisable as of right, appeals against interlocutory decisions are not usually as of right. In some interlocutory appeals, especially appeals against decisions on facts and mixed law and facts, leave of the trial court or of the Court of Appeal as the case may be must first be sought and obtained before the appellant can appeal.

Interlocutory appeals in criminal process can arise where there is a decision on an application to quash a charge or information on the ground of lack of jurisdiction of trial court to try the charge or on the ground of a formal defect in the charge or information. During trial, interlocutory appeals may arise where defence counsel takes the view that material evidence has been wrongly admitted or wrongly excluded. An interlocutory appeal may also arise where the trial court either outright refuses to grant bail to the accused person or grants bail to the accused person under harsh conditions. Finally, an interlocutory appeal may arise where defence counsel opines that trial judge wrongly overruled a no-case submission with the result that the accused is directed by the court to open his defence.

In cases where the need to file an interlocutory appeal arise, defence counsel are frequently confronted with the issue of whether to appeal as of right or seek the prior leave of the court before appealing. This has to be resolved against the backdrop of a proper knowledge of the constitutional provisions on appeals and decided cases. It is trite that where leave to appeal is required and it is not obtained prior to the appeal, the appeal is incompetent and liable to be struck out. Another challenge confronting defence counsel in a case where there is an interlocutory appeal is whether to allow the substantive case to proceed to trial or halt the trial through application to stay proceedings pending the determination of the appeal. It

is evident that where stay of proceedings is granted, trial is halted until the appeal is determined either by the Court of Appeal or the apex Court.

In view of the congestion in appellate courts, an interlocutory appeal may take 3-7 years before it is determined by the Court of Appeal and the Supreme Court. In the interim, the trial judge might have been elevated, retired or even transferred to another judicial division of the High Court. The prosecutors and prosecution witnesses may also have been transferred. In some cases, witnesses might have died. The delay which results from interlocutory appeal is self-evident. Little wonder, that defence counsel who apply for stay of proceedings are often accused by the court and prosecution of being clogs in the wheel of speedy determination of criminal cases. Therefore, Lagos State and the EFCC Act have demonstrated their disapproval of stay of proceedings in all criminal cases by outlawing stay of proceedings pending the determination of interlocutory appeals.[1]

The delay arising from interlocutory appeals and stay of proceedings is appreciated.[2] However, this should not justify a blanket prohibition of a stay of proceedings in deserving cases. An accused person who files an interlocutory appeal does so in exercise of his constitutional right of appeal. Neither he nor his counsel should be stigmatized and perceived as a clog in the wheel of speedy disposal of cases. There is need to balance speedy disposal of criminal cases against the preservation of rights of the accused persons especially the preservation

[1] *EFCC Act, s. 40*: Subject to the provisions of the constitution of the Federal Republic of Nigeria 1999, an application for stay of proceedings, in respect of any criminal matter brought by the commission before the High Court shall not be entertained until judgment is delivered by the High Court.

[2] See *EFCC Act, s. 42A*. The frustration of trials through spurious and frivolous interlocutory applications remains a major obstacle to criminal prosecution in Nigeria. Defence counsel often file such application to delay trials and hope that incriminating evidence would be lost or the prosecution might be unable to locate and call vital evidence as time goes by. The ploy also requires the defence counsel to ask for a stay of proceeding pending the outcome of the Appeal. It is gratifying to note however that the EFCC Act has addressed this problem by barring interlocutory appeals. In support of this provision Prof. Osinbajo argued that:
"Interlocutory appeals on practically any issue have remained a major hindrance to early disposition of cases especially as it almost always involves a stay of proceedings of the court appealed from. In criminal cases in Lagos State and under the EFCC laws, stay of proceedings in such circumstances is prevented by law. Constitutional amendments providing for the termination of interlocutory appeals at the Court of Appeal is much needed. There need also be clear and definitive intervention by the Supreme Court on notorious and recondite issues frequently deployed to delay trials. Issues of jurisdiction require one clear Supreme Court decision which lays down the principles and the law:" Y. Osinbajo, 2The Retreat of the Legal Process" (being a paper presented by Professor Yemi Osinbajo, SAN, at the 2011 Founder"s Day lecture of the Nigerian Institute of Advanced Legal Studies, 17 March 2011).

of the *res* of appeal and prevent the appeal being rendered nugatory due to trial of the case during the pendency of the appeal. There is also the need to avert avoidable criminal trials of accused persons against whom incompetent information have been filed by the prosecutor. A meaningful equilibrium should therefore be struck between speedy disposal of cases and preserving the *res* of the appeal. We respectfully submit that where the interlocutory appeal does not affect the merit of the substantive trial, for example, interlocutory appeals against refusal to grant bail, stay of proceedings should not be granted. However, where the interlocutory appeal is against refusal to quash the charge or appeal against overruling of a no-case submission, proceedings should be stayed and trial halted in order to prevent needless criminal trial.

4.5. Presumption of Guilt, Interim Attachment of Property and Forfeiture of Assets

As indicated above, the presumption of innocence enjoyed by accused persons and the burden imposed on the prosecution to prove the guilt of the accused beyond reasonable doubt are the twin pillars of the adversary criminal process. Under the adversary system, the accused is presumed innocent of the crime alleged against him. Consequently, it is the duty of the prosecution to prove the crime alleged against the accused beyond reasonable doubt. And if at the end of the case, there is doubt whether the accused committed the offence or not, such doubt must be resolved in his favour and he is in such a situation entitled to an acquittal.

The adversary trial process, undoubtedly, protects the accused persons at the expense of the state and victims of offences. It was against this backdrop, that proposals were made on shifting of the burden of proof in some cases to the accused persons. Some of the anti-corruption and anti-money laundering laws adopt these proposals.[51] For Example, where the assets of the accused person exceed his known legitimate income, the burden is on the accused to prove that the excess assets were not acquired corruptly or through economic and financial crimesWhere the prosecution establishes a prima facie evidence that funds in the account of a suspect or properties belonging him or her are purchased with the proceeds of financial crime, the court on the application of the prosecution is empowered to make interim order freezing the bank account into which funds suspected to be proceeds of financial crimes are paid pending the conclusion of

investigation or trial of such suspects.[1] The court is also empowered to make forfeiture order in respect of real properties suspected to have been acquired with the proceeds of economic or financial crime.

If at the end of the trial, the accused is adjudged liable, such funds and properties are liable to forfeiture order. The proceeds of such properties and funds if forfeited are transferred to the federation account. The underlying principle is to make financial crimes unprofitable to offenders. The strategy is to prevent convicts who have served their prison terms from returning back to the society and enjoy the proceeds of the crime. The above provisions of the EFCC Act and other similar provisions are definitely right steps in the right direction. They however pose challenges to defence counsel who defend accused persons whose assets are, to the knowledge of the public, subject of interim attachment Such defence counsel are usually perceived by the public as accomplices of accused persons who are already adjudged guilty of the crime charged by members of the public. In some cases, assets not belonging to the accused person are deliberately included by the prosecution in the list of assets which are to be affected by the forfeiture order. In other cases, the assets are deliberately over-valued by the prosecution in order to prejudice members of the public against such suspects. Such suspects are consequently condemned in the court of the public even before the commencement of trial. Incidentally, defence counsel engaged by accused persons involved in such corruption-related cases also share in the condemnation by members of the public. They are condemned for accepting the brief to defend such accused persons. In cases where bank accounts of accused persons have been frozen, defence counsel finds it virtually impossible to be paid their professional fees. It suffices to add that non-payment of counsel professional fees may hinder effective representation of the accused by his unpaid counsel.

4.6. Forfeiture of Assets to the Federal Government

An accused person can be convicted either solely on the strength of his confessional statements, plea bargaining or on the basis of the evidence adduced by the prosecution against him or her. A golden thread which is to be seen with convictions under the EFCC Act is that where assets and funds are proved by the prosecution to be proceeds of financial crimes, they are liable to be forfeited to the

[1] See e.g., *EFCC Act, s. 34 (1).*

Federal Government of Nigeria.[1] The provision on payment of proceeds of sale of forfeited assets into the Federation Account assumes that the federal government will at all times be the victim of economic and financial crimes. Therefore, on the principle of the prevention of unjust enrichment, the restitution to be made by accused persons must always be made to the Federal Government.

However, this is not necessarily true. It should be noted that the activities and prosecutorial powers of the EFCC also extend to properties and funds belonging to authorities and entities other than the Federal Government including state governments, local government councils, banks, and other financial institutions. From the view point of the defence counsel, the arrangement whereby funds which are proceeds of financial crimes are paid to the Federation Account, in cases where the federal government is neither the owner of the funds or a victim of the offence will generate discomfort.

Apart from unjustly enriching the Federal Government, the provision has the effect of robbing Peter to pay Paul. A defence counsel involved in advising a suspect on plea bargaining may find it difficult to do so when he realizes that the proceeds of financial crimes, if confiscated, will be paid into the Federation Account and not to the victim of the crime. Admittedly, the practice has been developed whereby arrangements are made by the federal government to return the properties to the victim of the offence. The arrangement is definitely commendable. It is however, an informal arrangement. Beneficiaries of funds in the Federation Account will perfectly be right to challenge the informal arrangement. What is required is a specific legislative intervention, authorizing the federal government to release such properties or funds to the victims of the crime.

5. Conclusions And Suggestions

It is evident from the foregoing that the battle against corruption has not progressed appreciably. Obviously, the considerable expansion of the frontiers of fighting the menace of corruption has yielded little results. As discussed above, there are multi-dimensional challenges inhibiting the fight against corruption in Nigeria. This can partly be ascribed to incompetence of enforcement officers; lack of political will on the part of government; and political interference with the work of enforcement agencies.

[1] See *EFCC Act, s. 21*.

The government should endeavour to provide more resources and operational equipment in support of investigators and prosecutors in order to match the ever-increasing case load of the investigators. This paper holds the view that the criminal justice system should be managed in such a way that it will reduce the effect of media/ public trial on the accused and the pressure it places on the prosecutor to secure conviction by all possible means. A system of case selection and evaluation should be put in place, involving very experienced prosecutors and senior advocates, in order to ensure that only very promising cases are charged to court. Efforts should also be made to observe and respect all the constitutionally guaranteed rights of accused persons.

The government at all levels should generate awareness aimed at arresting the prevailing culture of corruption in Nigeria. The masses need to be educated on the limitless, negative and devastating consequences of corruption.[1]

This paper has argued that plea bargaining has been used effectively in some countries, as a tool for quick and effective resolution of corruption cases. The paper also examined the argument in favour and against the continued use of plea bargaining in Nigeria. We wish to emphasize that for plea bargaining to have the desired effect, it must be properly incorporated and well structured within the Nigerian legal framework. The use of plea bargaining should be properly regulated by the National Assembly. It should be used only in deserving cases, in the public interest, and in the interest of justice. To prevent abuse, a committee should be set up under the supervision of the Attorney-General to consider the application of plea bargaining in deserving cases. It also must be applied in a non-discriminatory manner, irrespective of class, and status.

It is also important for the various tiers of government to deal with credibility crisis in the administration of criminal justice. It is unfair for government agencies to intimidate and harass politically exposed persons with criminal prosecution. This is always the case when suspects are arrested, detained, handcuffed, and numerous and unsubstantiated charges made against them, while the investigating bodies play to the public gallery. The suspect is detained for unreasonable length of time and his pre-trial rights taken away from him. This process is vulnerable to abuse, as it involves the exercise of huge discretion by low ranking officers.

[1] They include armed conflicts, civil strife, child trafficking, prostitution, capital flight, loss of investments, underdevelopment, medical tourism, loss of national culture etc.

For quick and effective dispensation of criminal justice in Nigeria, these are urgent issues the government must address. There is a need for uniformity of rules in quashing charges against suspects. It is only reasonable that where frivolous charges are brought against a suspect, his counsel should have the right to invite the court to quash the charges at the earliest opportunity.

It is also imperative that the issues concerning interlocutory appeals and stay of proceedings be addressed. A blanket prohibition of interlocutory appeals is not in the interest of justice. A balance must be struck between speedy trial and the protection of the constitutionally guaranteed right of suspects. Again, there should be a detailed procedure on the interim attachment and forfeiture of the assets of the accused. The accused is innocent until proven guilty. Hence, he must be allowed access, even if it is a restricted access, to his bank account and assets.

It is suggested that proceeds of confiscated assets should be forfeited to the victims of crime and not the federal government. The current position is that all funds which are proceeds of financial crimes are paid into the Federation Account. This amounts to unjust enrichment of the Federal Government.

Finally, government at all levels should join hands to fight corruption. Government should explore the idea of creating special corruption courts manned by fearless and incorruptible judges. The court should receive additional resources and protection; adjournment of cases should be discouraged at all cost.

It is hoped that the adoption of the above strategy would catalyse:

(i) more convictions on corruption cases, and consequently a reduction in corrupt practices.
(ii) transparency in the conduct of public business and national development in all ramifications.
(iii) the rethinking of the utility of plea bargaining procedure in the criminal justice system.

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