Crime Reduction in Nigeria: the Pertinent Roles of the Judiciary In ensuring an Effective Criminal Justice Administration

Dr. Adekunbi Imosemi & Mr. Adewale Kupoluyi

1 Senior lecturer, Department of Jurisprudence and Public Law, School of Law and Security Studies, Babcock University, Ilishan-Remo, Ogun State, Nigeria.
   E-mail: imosemia@babcock.edu.ng

2 Department of Political Science and Public Administration, Veronica Adeleke School of Social Sciences, Babcock University, Ilishan-Remo, Ogun State, Nigeria.
   E-mail: adewalekupoluyi@yahoo.co.uk

ABSTRACT
The importance of the judiciary, as an important arm of government cannot be over-stated, as provided for in the 1999 Constitution of the Federal Republic of Nigeria (As amended). The paper has examined the role of the Nigerian judiciary in adherence to the rule of law in providing a safer criminal Justice administration. Making recourse to several judicial sources, it has reviewed the prosecutorial process such as filing of process, first appearance, arraignment, issuing of arrest warrants, judge’s visit to locus in quo and sentencing, among others. The paper concludes that the place of the judiciary is important in the administration of criminal justice and recommends measures that could further strengthen it. These include adequate funding, granting autonomy to the bench and the need for all actors to play their role properly in the administration of criminal justice in Nigeria.

Keywords: Courts, Criminal Justice Administration, Nigerian Judiciary, Prosecution, Rule of Law.

1.0 INTRODUCTION
Naturally, human beings interact directly or indirectly with each other as well as things that are found in the environment. Due to the constant nature of human interaction, there are bound to be disputes arising from these dealings. Therefore, for the society to enjoy peace and stability there is the need for all to live harmoniously, in order for individuals to promote communal interaction. This coincides with the position of Karibi-Whyte (JSC) that argues that “contrary to the suppositions of early anthropologists, no society, however backward, elementary or primitive desires to live in a state of anarchy or chaos”1. The implication of this statement is that every society needs an institution to adjudicate on disputes in which laws would be applied.2

The societal desire for social harmony and tranquillity has prompted the clarion for an institution, which would not only settle the disputes when they arise, but would also ensure the dispensation of justice. In

realising this, most nations conceive and arrange governmental duties into three main arms of government; the executive, the legislature, and the judiciary.\(^3\) Hence, administration of justice has become the primary responsibility of the judiciary, or the judicature, which constitutes the court system and judicial personnel, which administer justice in the courts of law.\(^4\) The court, per Muntaka-Comassie (JCA), in the decided case of **Zekevi v. Alhassan**,\(^5\) has given the relevance of the judiciary by stating that:

“In a democratic society as ours, where the rule of law prevails, the court is the hope of the common man. It plays an important role in the interpretation of the Constitution, protects the rights of citizens from encroachment by any organ of the government, and generally has the inherent jurisdiction to determine court cases between persons and persons and persons and government”

In the Supreme Court of Nigeria’s judgment in the case of **Akintokun v. LPDC**,\(^6\) the court held that the sole responsibility of courts is to “interpret and apply laws, whatever name called, including Acts, or laws of the National Assembly or State Assembly”\(^7\). Furthermore, **Section 6(6) b of the 1999 Constitution of the Federal Republic of Nigeria (As amended)**\(^8\) aligns with the above statement, as it vests the judiciary with powers which extend to “… all matters between persons, or between government and authority and to any person in Nigeria …” According to Mowoe,\(^9\) this provision relates to the rights of an accused person in criminal matters, as seen in **Onuoha v. The State**\(^10\) and **Ozulonye v. The State**\(^11\).

Strong judicial leadership is indispensable to building a sustainable, credible court,\(^12\) as only a criminal justice system with functional and effective court system can actually promote justice, as these courts are essentially the wheels upon which justice is set in motion\(^13\). A learned jurist of the Realist School of Thought, Oliver Wendell Holmes, supports the approach, while asserting that the most pertinent matter of interest to an offender (or a ‘bad man’ in his words) is not what the law is per se, but what the courts, in their elements of interpretation.\(^14\) In other words, the average man on the streets perceives the law as what the courts will say or do. Consequently, it is ingrained that the courts are the most essentials tools for criminal justice administration and such; it owes the duty of honour and must be done with utmost sincerity, fairness and impartiality.\(^15\) This position was evidently supported by the *obiter dictum* in the case of **Mbanengen Shande v. The State**\(^16\), where it was actively supported that the 1999 Constitution of the Federal Republic of Nigeria (as amended in 2011)\(^17\), made it an established principle that the court has the sole and originating obligation to scrutinise, in the advent of arriving at a justifiable decision on the matter placed before it.

A judge is ‘a public officer, authorised to hear and decide cases in a court of law; a magistrate charged with the administration of justice.’\(^18\) A judge should perform his duties creditably, but in ensuring this,

---


\(^6\) Akintokun v. LPDC (2014) 13 NWLR (Pt 1423) pp. 74–75.

\(^7\) Ibid.


\(^13\) *NSIFF v. Iyen* (2014) 9 N.W.L.R (Pt 1412) 323, p. 361, paragraphs D-F.


there should be adequate pay packet for judges and other court personnel because poor remuneration invariably leads to poor motivation and the level of commitments of these officials. On the other hand, prosecution refers to ‘legal proceedings in which a person accused of a criminal offense is tried in court by the government (state) appointed by the public prosecutor called a district attorney in the United States.’ The Oxford Dictionary also defines prosecution as ‘the pursuit of legal proceedings, particularly, criminal proceedings.’ Most prosecutions are instituted and controlled by the state. The police and public law officers have this responsibility by wielding considerable amount of discretion in the prosecution of criminal offences.

The term ‘crime’ in modern criminal law parlance does not have a universally-accepted definition per se. In simply means an unlawful act or omission punishable by a state or other authority. While discussing crime, the dictum of *Nulla crimen sine lege* (there is no crime without law), comes in, which is a moral principle in domestic and international criminal law that prescribes that a person shall not be made to face criminal punishment, except in instances where the act has been criminalised by law before the alleged offender performed the act or omission. Okonkwo and Naish stated that ‘crimes are those breaches of the law resulting in special accusatorial procedure controlled by the state, and liable to sanction over and above compensation and costs. In *Coneybarea v. London School Board*, Day J. stated that a crime is ‘an offence against the crown for which an indictment will lie’. In the decided case of *R v. Tyler*, a crime was defined as an act committed or omitted in violation of public law, by either forbidding or commanding it. The paper seeks to examine the role of the Nigerian judiciary, adherence to the rule of law in providing a safer nation.

2.0 THE PROSECUTORIAL PROCESS

The prosecutorial process is synonymous with the term ‘prosecution’, as defined above. However, prosecutorial process can be enumerated as follows:

1. **Filing the Complaint**: After an alleged offender has been arrested and a decision is made to charge the arrestee with a crime, the prosecution begins by filing a complaint. If the crime is a misdemeanor, the complaint basically remains the ‘charging instrument’. At this stage, the arrestee becomes an accused, but on the other hand, if the crime is a felony, either the information provided or an indictment will serve as complaint, as the charging instrument, at a subsequent stage.

2. **The First Appearance**: The defendant has the right, under the law, to be taken ‘promptly’ to a hearing before a court after filing of the process by the complainant. The court will then inform the accused of the nature of the charge, and will ask an indigent accused if he wishes to receive an appointed counsel, especially for criminal cases. The court also will inform a defendant of other constitutional rights. The court may also determine the conditions for bail, if there are any; a

---

23 *Ibid*. p. 2.5
24 Comment by Naanzem, B. (Babcock University School of Law and Security Studies Iperu-Remo, 2017).
27 *Coneybarea v. London School Board* (1891) 1 QB 118
28 *R v Tyler* (1891) 2 QB 594
30 *Ibid*.
defendant may be required to post a bond in order to obtain release from jail. If the defendant is arrested without a warrant, the court may be required to determine whether the probable cause standard was met for that particular arrest.  

3. Arraignment: At the arraignment, the defendant appears before a trial court, having been informed of the charge against him, and he is asked to enter either a plea of guilty, not guilty. An indigent defendant is entitled to an appointed counsel during the arraignment. The defendant’s absence of a plea or a failure to give same will render the whole trial a nullity. Where there is a ‘plea of not guilty’ however, the trial begins and when it is a prosecution involving a capital offence, the defendant is expected by the court to ‘plead not guilty’ because it is presumed that the defendant does not understand the charges before him.

4. If the accused then pleads guilty or is found guilty during trial after the prosecution has successfully pleaded its case beyond reasonable doubt, the judge will set the case for sentencing.

5. A person who is convicted is entitled to a first appeal “as of right.” For a state defendant, this appeal lies in an intermediate state appellate court; if no such state court exists, then the first appeal of right lies in the State Supreme Court. A conviction becomes “final” when the appellate process is exhausted by a state defendant’s unsuccessful appeal to the last appellate court responsible for direct review of the conviction, which in Nigeria, is the Supreme Court.

3.0 ROLES OF THE JUDICIARY IN THE PROSECUTORIAL PROCESS IN NIGERIA

The adversarial system, as it is being practiced in Nigeria, is traceable to the British colonial system and an offshoot of common law. An adversarial system is one in which the role of the court is essentially similar to an impartial referee between the prosecution and the defence. Under this system, the two opposing sides; the prosecution and the defence appear before an independent, impartial court and attempt to prove their allegations. Hence, the role of the judge in an adversarial system can be generally described as passive.

For emphasis, there is the need to state that when a case is brought before a court, one of the primary issues that it needs to look into, whether raised or not by either party to the suit (in this case, a criminal proceeding), is whether or not the court has jurisdiction. Thus, before the judiciary (the judge, justice or the magistrate) can play any role in a prosecutorial process, the court must possess jurisdiction. Jurisdiction has been defined by the court in *Bronik Motors v. Wema Bank (1983) 6 SC 158* as ‘the power of a court to hear or try a case …’

---

31 Ibid.
34 Ibid. p.319.
35 Court of Appeal Act, Cap. C36 1993, No. 65, LFN 2004
36 Supreme Court of Nigeria (Supreme Court Act, Cap 424. Laws of the Federation of Nigeria, 1990)
38 Ibid.
Criminal prosecution is targeted at the conviction of the accused or the defendant. The conviction goes with sentencing of the offender to some form of punishment or sanction pronounced by the court. Such sanctions could take any, or a combination of many forms such as (including but not limited to) prison, caution, fine, caning, haadi lashing, corporal or capital punishment, banishment, and forfeiture.\(^{41}\) The prosecutorial process is carried out in courts of competent jurisdiction, and the superior courts of record are listed in Section 6(5) of the 1999 Constitution of the Federal Republic of Nigeria (as amended in 2011), viz:

(a.) The Supreme Court (which has appellate jurisdiction in criminal proceedings with respect to questions of law alone, or the interpretation of the Constitution, but is forbidden by the Constitution from being vested by the National Assembly with original jurisdiction in criminal proceedings)\(^{43}\)

(b.) The Court of Appeal (which wields appellate jurisdiction in decisions from either the High Court or the Federal High Court in respect of criminal proceedings)\(^{44}\)

(c.) The Federal High Court (which is vested with original and exclusive jurisdiction in criminal proceedings relating to certain matters specified by the Constitution)\(^{45}\)

(d.) The High Court of the Federal Capital Territory, Abuja (which possesses jurisdiction similar to the High Court of a State, but can only be exercised within the Federal Capital Territory)

(e.) The High Court of a State (which possesses original, supervisory, and appellate jurisdiction in criminal proceedings.)\(^{46}\)

The Magistrate Court is also courts of inferior record, which has jurisdiction in criminal matters.\(^{47}\) Hence, a role that the judiciary can play which is auxiliary to the issue of jurisdiction is the authority to raise the issue of jurisdiction suo motu even when neither party does so nor it is apparent that the issue is essential to the matter at hand.\(^{49}\)

### 3.1 ISSUING OF ARREST WARRANTS

The use of summons has been deemed to be one of the most common means of compelling the appearance of persons suspected to have committed offences in court.\(^{50}\) According to Egwummuo,\(^{51}\) it is not always that true those that are summoned respond to them by entering an appearance and thus, other methods such as a warrant of arrest have been adopted to remedy the issue. A warrant is an authority in writing issued by a magistrate or judge of the High Court to the police (or in exceptional cases, private persons) to arrest the person named, specified or described in the warrant, and bring him to the court to answer the allegations or charges made against him.\(^{52}\) A warrant of arrest, which is quite similar to a summons, is a document addressed to a police officer or in rare circumstances, to any other person authorising the officer or such other person to arrest a person, often an accused, or a person suspected of committing an offence, requiring him to appear before a court of law in order to respond to, or answer the offences with which he is charged.

---


\(^{42}\) See Section 233(2) a, b, of the 1999 Constitution of the Federal Republic of Nigeria (as amended in 2011).


\(^{44}\) See Section 241(1) a-e of the 1999 Constitution of the Federal Republic of Nigeria (as amended in 2011).


\(^{48}\) Latin word for ‘of its own volition’.


\(^{51}\) Ibid.

\(^{52}\) Ibid.
It is signed by a magistrate or judge of a High Court. The judge, justice, or magistrate has the power to issue arrest warrants. Where an accused is suspected to have been committed an offence or crime, and it is such with respect to which an arrest may not be made without a warrant, the police are still required to obtain such warrant from a court or justice of the peace.

As the warrant of arrest is in the nature of an order of court, a person arrested in accordance with it must be taken or made to appear before the court which issued it and no other court. In addition, the practice of charging before a Magistrate or Judge without jurisdiction has been held to be illegal and unconstitutional in the cases of Anaekwe v. COP, Ukatu v. COP. In the decided case of Ikonne v. Commissioner of Police, the Supreme Court held that a warrant of arrest had been improperly issued as it emanated from a trial judge in his capacity as a chairman of a Judicial Commission for Inquiry. A warrant of arrest must be in writing, bear the date of issue, state concisely the offence for which issued, name or describe the offender, order someone to whom it is directed to arrest the alleged offender; and bring him to court to answer the complaint; and be signed by the magistrate or judge issuing it. Additionally, a warrant remains in force until it is cancelled by the judge or magistrate issuing it. In the decided case of R v. Akinyanju, the court held that the subsequent execution of a warrant of arrest that had been earlier executed was illegal. A judge or magistrate may as well arrest any person who commits an offence in his presence within the judicial division or magistrate district to which he is assigned, provided he could have lawfully ordered the arrest of the person if the same facts were presented before him.

3.2 JUDGE'S VISIT TO THE ‘LOCUS IN QUO’

The term ‘locus in quo’ is a Latin term meaning 'the scene of the event’. In a legal context, it is used to refer to where the cause of action arose. It is also similar to locus delicti, which is a Latin term meaning the ‘scene of the crime’. It is the place where the tort, offence, or injury was committed or the place where the last event necessary to make the actor liable occurred.

In light of the adversarial system of fact-finding and law, which is obtainable in Nigeria, the idea of the judge visiting the scene of a crime seems ludicrous at first glance, and contrary to what the adversarial system of fact-finding entails, as the judge plays a highly passive role in the proceedings. In justification of this long-standing principle, the court in Yuill v. Yuill comments that ‘if a judge descends into the arena, he is liable to have his vision clouded by the dust of the conflict’. However, the basis for the judge visiting the locus in quo is to view the scene of the crime or where the issues that led to the criminal case before the court arose, in order to inspect things. It is also for the determination of certain issues in the case before the court in the interest of justice and the visit to the locus in quo may be done or made at any time

---

before judgment is delivered. However, the courts have held that it is better for trial judges to visit the *locus in quo* as early as possible in the case, and preferably in the course of the evidence for the prosecution as held in *Aremu v. Attorney-General Western Nigeria*. On the judge’s visit to the locus in quo, *Section 243 of the Criminal Procedure Code* provides that:

‘whenever in the course of any judicial proceeding under this Criminal Procedure Code the court thinks it advisable to view the place where the offence is alleged to have been committed or any other place, the court may either adjourn the court to that place and there continue the proceedings or adjourn the court to that place and there continue the proceedings or adjourn the case and proceed to view the place concerned …’

The procedural rules for the judge’s visit to the *locus in quo* are additionally provided for under *Section 207(1) of the Criminal Procedure Act* and *Section 205 of the Administration of Criminal Justice Act*, where the Supreme Court laid down the guiding principles in respect of the judge’s visit to the *locus in quo* and these include, that there is no rule of law which determines at what stage in a trial a visit of inspection must be made. However, the courts have held that it is better for such visit to be made early in the case. Secondly, a court should undertake a visit to the *locus in quo* where such a visit will clear a doubt as to the accuracy of any evidence adduced when such evidence is in contradiction with any other evidence. Thirdly, where a trial judge makes a visit to the *locus in quo*, it is not appropriate for him to treat his perception at the scene as a finding of fact when evidence of such perception has not been given by a witness either at the *locus in quo* or later in court after the visit. The Supreme Court also opined that on a visit to a *locus in quo*, it is highly necessary for the trial judge to make a record in the course of the proceedings of what transpired at the scene. If the trial judge however failed to do so but made statement in his judgment about the visit, such statement would be taken as an appropriate and accurate account of what happened and therefore final, unless the contrary can be successfully established by the party that impugns the record. Lastly, where a visit is made to a *locus in quo*, the evidence of witnesses can be received at the scene or later in court. In that case however, the parties must be given the opportunity of hearing the evidence of the witnesses and where necessary, offered the opportunity of cross-examining them and commenting on the evidence. The *locus in quo* may be inspected by the judge in two different ways and they could be either of those provided below:

The court may adjourn the case to the *locus in quo* and continue the proceedings there until it reconvenes in the court subsequently. In *Commissioner of Police v. Olaopa*, the accused was charged with malicious damage to property. At the conclusion of the prosecution’s case, the court moved to the *locus in quo*, to view the place where the offence was alleged to have been committed where certain witnesses showed certain spots and proceedings at the locus were recorded. Counsel were invited to question the witnesses, but they

---

67 *Aremu v. Attorney-General of Western Nigeria*.
70 Ejadike & Ors v. Obiora (1951) 13 WACA 270, at 273.
71 *Aremu v. Attorney General Western Nigeria* (supra).
72 Seismograph Services (Nig) Ltd v. Ogbeni (1974) 6 S.C 119; (1974) 1 All NLR (Pt. 1) 104.
73 Seismograph Service Ltd. v. Onokpasa (1974) 6 S.C 119; (1974) 1 All NLR (Pt. 1) 104.
76 *Commissioner of Police v. Olaopa* (1959) WRNLR, 22.
did not do so. After visiting the locus, the court adjourned to its original place of sitting, the trial continued, and the accused was convicted of the offence. On appeal, it was argued that since the witnesses were not cross-examined when the court reconvened at its original place of sitting, the appropriate procedure was not followed. The court held that the procedure adopted in the instant case was to be distinguished from that, as adopted in *R v. Dogbe*77, where the court moved to the locus; therefore, the witnesses were not required to be cross-examined again in court and the appeal was dismissed.

Secondly, the court may also make an inspection of the locus, and evidence of what transpired at the locus would be subsequently given in court afterwards. This procedure was laid down in *R v. Dogbe (supra)*. In *Aremu v. Attorney-General of Western Nigeria*78, the accused was charged with murder. After the close of the defence case, the trial judge visited the *locus in quo* and made recordings of what occurred at the locus. When the court reconvened, the witnesses were not called upon to give their evidence on oath. On appeal against conviction, it was held that in accordance with the procedure laid down in *R. v. Dogbe (supra)* that the witnesses ought to have been put in the witness box to give evidence of what transpired at the locus and since the irregularity did not amount to miscarriage of justice, the appeal was dismissed by the Court of Appeal but if the proper procedure was not followed in viewing the *locus in quo* and the accused suffered injustice or there is a miscarriage of justice, the conviction would be set aside as it happened in *Arutu v. R*79. However, non-compliance with the rules will not render a trial a nullity, if it led to no substantial miscarriage of justice as seen in *COP v. Olaopa & Ors.*80; *Bello & Ors. v. COP*81; and *Alamu & Ors. v. COP*82.

Section 207(2) of the Criminal Procedure Act states that “the accused shall be present at the view”. This is also made available in Section 243 of the Criminal Procedure Code as well as Proviso (ii) to Section 76 of the Evidence Act. If a visit of the locus is undertaken, and the accused is absent, it will amount to an irregularity. If the accused person suffered miscarriage of justice as a result of such, an appeal court will set aside a conviction. In *Adunfe v. Inspector General of Police 2 FSC 21*, one hundred and twenty-five (125) accused persons were charged with rioting. The magistrate adjourned the trial and proceeded to view the locus in the absence of the accused persons and the accused persons were convicted. On appeal against conviction, the appellate court held that it was clearly irregular for the trial magistrate to view the locus in the absence of the accused. However, since the accused did not suffer any injustice as a result of the irregularity that occurred and the appeal was dismissed.

### 3.3 SENTENCING

Criminal prosecution is aimed at the conviction of either the accused or the defendant. The conviction goes with sentencing of the offender to some form of punishment or sanction as may be pronounced by the court. Such sanctions could take any or a combination of many forms such as prison, caution, fine, caning, haadi lashing, corporal or capital punishment, banishment, and forfeiture83.

The word ‘sentencing’ refers to the process of passing a sentence. According to the Oxford Dictionary of Law,84 a sentence is ‘any order made by a court when dealing with an offender in respect of his offence, including imprisonment that may be in the form of a concurrent or suspended sentence, a fine, a

---

77 *R v. Dogbe* 12 WACA. 184.
79 *Arutu v. R* 4 FSC 66.
80 *COP v. Olaopa & Ors* (1959) WRNLR 22.
81 *Bello & Ors. v. COP* (1959) WRNLR 124.
82 *Alamu & Ors. v. COP* (1959) WRNLR 103.
community order, or either an absolute or conditional discharge. It is the stage of a criminal proceeding in which the defendant is informed of the punishment or sentence of his offence or charges and it often occurs at a later stage in a trial.  

Sentencing is the manner by which the various principles and guidelines concerning punishment are applied to individual cases; and although sentencing has a greater connection with the law of criminal procedure, it also is intimately related to substantive criminal law. As the thrust of this paper deals with the prosecution of crimes which is largely procedural, sentencing, which is a responsibility of the judge that is hinged on procedure, is relevant. Section 36(12) of the 1999 Constitution of the Federal Republic of Nigeria provides that the punishment for an offence be prescribed in a written law, as enacted by the National Assembly. In actual fact, this is not applicable strictu sensu as a large area of discretion is left with the courts to decide what the exact nature and extent of a sentence will be, provided they do not go beyond the maximum punishment prescribed or the limits to their own powers and jurisdiction. However, certain sentences are declared as mandatory by the law and leave no discretion to the courts as it is in the case of the death penalty for which it has been specified as the punishment for all offences under the sentence.  

The practice of judges having a duty to pass sentences gained prominence and acceptance from history and continuous practice, as judges were primarily involved in the determination of guilt; it was deemed by many that they should as well be principal determiners of the sentence that would follow suit. The procedure of passing sentences is a highly rational one that requires that the sentence should be passed with a particular principle in mind. The principle to be given and the sentence that is applicable may well vary according to the needs of each case. The courts are faced with what Okonkwo and Naish describe as ‘grave decisions’ of policy at two stages of the sentencing process. The first step to be taken is that the courts have to decide what principle of punishment to be applied to the case and afterwards, what type and quantum of sentence will be accorded with it. The procedure of sentencing is however not an easy task by no means and as ‘the selection of the appropriate penalty is no easy matter, for the courts must bear in mind the implication of the penalty, both on the offender as well as the community. To forecast what this effect will be requires detailed knowledge and consideration of both the general deterrent effects of different kinds of punishment and the reformatory results that follow, on different kinds of offenders …’. There are some basic guidelines which govern sentencing. They include: separate offences which are charged together shall each attract a separate sentence. If they however constitute a portion of the same criminal action, the sentence will be concurrent. Also, a sentence of a fine must not be too heavy for the criminal to pay, and where separate fines are imposed for separate charges or counts at the same trial, the aggregate must be within the court’s jurisdiction. Where a sentence of imprisonment is passed due to a

---

91. Ibid.
92. Ibid.
default of fine, both sentences cannot run concurrently or at the same time.\textsuperscript{96} Lastly, factors such as the fact of previous conviction, the seriousness of the offence, the adverse effect of the offence on the victim, \textit{inter alia} are capable of causing a sentence to be increased.\textsuperscript{97}

As a result, the responsibility of sentencing, which is borne by the judiciary is a small task by no means and involves in-depth sociological, legal, and psychological analysis. It is an aspect of prosecution that is so vital and material to the process of criminal justice administration that the prosecutorial process would be highly incomplete without it, if the accused is not acquitted or discharged by the court.\textsuperscript{98} After all, a key distinguishing factor between criminal and civil law lies in the punishment of those found guilty of the commission of offences.\textsuperscript{99}

4.0 DO JUDGES HAVE A ROLE TO MAKE LAWS WHILE PROSECUTING CRIMES IN NIGERIA?

Case laws, which are the body of laws set out by judges when making judicial decisions\textsuperscript{100}, are principal sources of laws in the Nigerian legal system.\textsuperscript{101} Although, the doctrine of separation of powers, which has been adopted by Nigeria, leaves the responsibility of law-making to the legislature, the judge may in either of two instances ‘make law’. One, he may in the course of interpreting the law, broaden or restrict the statute’s scope relevantly or contextually. The second instance is where there is no existing legislation on a matter and the judge propounds a novel principle in order to resolve the case.\textsuperscript{102} In the words of Niki Tobi (JSC), ‘that principle is an innovation, and so the judge is said to have made that law.’\textsuperscript{103}

In the light of this, an issue arises in the scope of criminal law. The question now is: do judges have a role to make case law when deciding criminal cases? \textit{Section 36(12) of the 1999 Constitution} answers this question when it provides that, a man can only be said to have committed an offence if such is said to be an offence at the time he committed it by an \textit{enactment of the National Assembly}. A man cannot be convicted of an unwritten offence,\textsuperscript{104} and this of course extends to case law. Furthermore, if for example, an accused is charged to court for the offence of conspiracy and perhaps, murder as well, the charge sheet must contain the counts of both.\textsuperscript{105} In other words, the count of the offence a person is alleged to have committed must be included in a charge sheet in order for a person to even be tried for the offence in the first place.

However, a considerable level of discretion has been left to the judges in respect of judicial interpretation. This is because the British common law recognises that in criminal law, it is impossible for the legislature to enact precise, cut and dried rules. There must be some flexibility in order that a man be judged by the existing standards of his day.\textsuperscript{106} This is evident for instance in the rule that in provocation, the standard by which the accused is adjudged is that of a reasonable man in the accused’s standing.\textsuperscript{107}

\textsuperscript{96} Section 389, \textit{Criminal Procedure Act} and Section 73 of the Penal Code.


\textsuperscript{100} Oxford Dictionary of Law (Oxford: Oxford University Press, 2006).

\textsuperscript{101} Asein, J. \textit{Introduction to Nigerian Legal System} (Lagos, Ababa Press, 2005), p. 22.

\textsuperscript{102} Tobi, N. \textit{Sources of Nigerian Law} (Lagos, MIJ Professional Publishers Ltd,1996), p. 79

\textsuperscript{103} \textit{Ibid.}


\textsuperscript{106} \textit{Ibid.}

\textsuperscript{107} \textit{R v. Adekanni} (1944) 17 NLR 99
5.0 CONCLUSION
In conclusion, the Nigerian judiciary, have important roles to play in the administration of criminal justice system, based on the adversarial system that is being practiced in the country, which requires the judiciary to serve as only referees in the prosecution of an accused. Judges’ unbiased umpire responsibility is crucial. They should be made to carry out their functions diligently in order to ensure the progress of the criminal justice system in Nigeria without fear of favour. On assessment, it could be reasonably concluded that the judiciary has largely, exercised its legal duties satisfactorily, even though, there is much room for improvement.

6.0 RECOMMENDATIONS
Judges should ensure that they dispense justice whenever they are given any role to play. Judges should keep in mind that the primary aim of prosecutorial process, besides punishment, is the dispensation of justice, which is a three-way traffic-justice for the appellant, accused for the heinous crime of murder, justice for the murdered man, the deceased, whose blood is crying to heaven, for vengeance, and finally justice for the society at large, the society whose social norms and values have been desecrated and broken by the criminal act complained of.108
Furthermore, the adversarial system of litigation has been subject to a lot of criticism because many have deemed it unsuitable for the Nigerian situation. This system, which is bordered on the antiquated principle, ensures that judges must be passive and not descend into the arena, causing many suits to be unduly elongated. Due to the judge’s passive status, he cannot address such issue unless such will be deemed as an infringement of the right to fair hearing.109 This monopolistic hold that counsels and litigants have in the adversarial system should be addressed, and given a facelift in order to meet Nigerian needs and issues in the modern society in ensuring that judges have a greater role to play in the prosecution of crimes.110 Finally, judges should be well protected, remunerated and given independence to discharge their duties creditably.

110 Ibid.