

# An Appraisal of the Police in Criminal Prosecution under the Nigerian Law

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## Abstract

Criminal prosecution is the exercise of sovereign power of the state to initiate prosecutorial proceedings. This sovereign power, a public power, is delegated officially to federal and state investigating agencies including the police for prosecution of criminal cases. This paper examined the legal framework and professional practices on criminal investigation and policing in Nigeria. These were with a view to understanding the conceptual meaning, nature and scope of criminal prosecution undertaken by the police in Nigeria. The study relied on primary and secondary sources of information. The primary source included unstructured interviews with relevant authorities, judicial decisions, state and federal laws governing criminal prosecution in Nigeria, which comprise the Nigerian Constitution, the police enabling law, the Nigeria Police Act, the Administration of Criminal Justice Act 2015, with other extant substantive and procedural penal laws. The secondary source of information consisted of books, journal articles, conference proceedings, newspaper publications and the internet. Data collected were subjected to content analysis. The study found that, although the Nigeria Police is a conferee of enormous prosecutorial powers donated by the Nigerian and other extant laws in Nigeria, the nature and extent of its power of criminal prosecution are limited by the law. It further found that, though the police are empowered to prosecute in all courts in Nigeria, for any police officer to exercise prosecutorial power at the superior courts, he or she must be a qualified legal practitioner in consonance with the provisions of the Nigerian Legal Practitioner Act. The paper, therefore, insisted that, unless the police authorities commence massive recruitment of trained lawyers into the Force, realising its noble objective in public prosecution, which is its cardinal constitutional role, may remain a mirage. This paper, therefore, recommended the increase of the admission quota at the Nigerian Law School for Police Academy, Wudil, Kano.

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## Keywords

Criminal Prosecution, Prosecutor, The Police, Public Prosecution, Police Prosecutorial Power

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## 1. Introduction

Until the enactment of the Nigeria Police Act 2020, [NPA 2020], criminal prosecution by the Nigeria Police was an exercise of power conferred, pursuant to the extant provisions of the Police Act.<sup>1</sup> Accordingly, Section 23 of the PA 2004 provides for the conduct of prosecution of criminal prosecution by the police. The section states as follows:

Subject to the provision of section 174 and 211 of the Constitution of the Federal Republic of Nigeria 1999 (which relates to the powers of Attorney-General of the Federation and of a State to institute, undertake, take over and continue criminal proceedings against any person before any court of law in Nigeria), any police officer may conduct in person all prosecution before any court whether or not the information or complaint is laid in his name. (Babalola, 2014: p. 314)

In the course of criminal prosecution, police officers exercise powers and discretions. Prosecutorial discretion is the prosecutor's power to choose from options available in a criminal case. These options include choices as to which offence should be preferred, court of arraignment, the charges, prosecuting or non-prosecuting, plea bargaining, and recommending the sentence. The prosecutorial power, however, will need to be exercised fairly and reasonably.

In the performance of their duty as investigator or prosecutor, the officers have the responsibility of due diligence. They undertake considerable caution to ensure that the investigation is not swayed by the desperation of the complainant who may be eager to fix the suspect, as the person who he/she (the complainant) saw at the scene of the crime, thereby attempting to compel an inference of circumstantial evidence. Even where the suspect is seen at the scene of crime without more to it, it is trite law that mere presence of a person at the scene of crime does not, as a matter of law, make the person guilty of the crime.<sup>2</sup> There must be some evidence to show that either prior to or at the time of the commission of the crime, the person present did or omitted to do any act, such as aiding or abetting to facilitate the offence.<sup>3</sup>

The burden of this paper is the evaluation of the nature and extent of police

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<sup>1</sup>See the defunct Police Act, Cap P 19. Laws of the Federation of Nigeria 2004 [PA 2004] at s 23, now substituted with the Nigeria Police Act 2020 [NPA 2020].

<sup>2</sup>See *Orji v The State* (2008) 7 SCM 116; see also *Adetokunbo Ogunlana v The State* (1995) SCNJ 189.

<sup>3</sup>Ibid at 132-133.

prosecutorial powers *vis a vis* its symbiotic relationship with the Attorney-General in Nigeria. The essay is divided into five segments, apart from the introductory which is the first segment. In its second segment, it examines the conceptual meaning and definitions of terms just as it considers, in its third segment, and appraisal of the police and how criminal prosecution is undertaken in Nigeria. In the fourth segment, the police prosecutorial discretions are considered while, in the fifth segment, as the concluding part of the paper, proffers some suggestions towards the effective reform of extant laws so as to promote effective engagement of police jurisdictions in Nigeria.

## 2. Conceptual Meaning and Definition of Terms

Understanding this discourse warrants conceptualising the main terms in unambiguous definitive manner because misuse of words is a common cause of misunderstanding.

### 2.1. Definition of “Prosecution”, “Criminal Prosecution” and Prosecutorial Power

Prosecution is defined by a derivative of the verb “to prosecute” which invariably, is delineated, according to the *New International Webster’s Comprehension Dictionary of English Language* (The New International Webster’s Comprehension Dictionary of English Language, 2004) as meaning to bring suit against someone for a redress of wrong or punishment of crime (The New International Webster’s Comprehension Dictionary of English Language, 2004: p. 1013) while the word “prosecution” is defined by same dictionary to mean the act or process of prosecuting; the institution or carrying forward of a judicial proceeding to obtain some right or redress and punish the wrong; or the institution and continuance of criminal proceeding (The New International Webster’s Comprehension Dictionary of English Language, 2004: p. 1013). This is accorded the same definition by *Webster’s Universal Dictionary and Thesaurus* (The Webster’s Universal Dictionary and Thesaurus (Geddes and Grossed), 2010: p. 383). According to *Black’s Law Dictionary* (Garner, 2015), it is a criminal proceeding in which an accused person is tried (Garner, 2015: p. 1416). The same word is defined in the *Oxford Advanced Learner’s Dictionary* (Hornby, 2020) to mean the process of trying to prove in court that somebody is guilty of crime (Hornby, 2020). It is, however, necessary to state that the process of proof informally commences long before the case is arraigned in court.<sup>4</sup> In all criminal prosecutions, the state is usually the prosecutor from whom the police derives its power to prosecute by virtue of enforcing the

<sup>4</sup>The determination of arraignment and the decision to prosecute take place, a great deal of time, earlier than when cases are eventually arraigned in court. Explaining this instructive path to justice, the West African Court of Appeal in *Albert Sogbamu v COP* (1945) 12 WACA affirmed that, the term administration of justice, whether in civil or criminal cases, does not begin in the court. In criminal cases with which we are here concerned, it indeed starts when the complaint is laid at the station to the charge room officer whose duty it is to receive same and, after receiving it, determines whether or not the suspect should be summoned or arrested.

law of the host state.

Though, investigatory power, according to *Black's Law Dictionary*, is the authority conferred on a governmental agency to inspect and compel the disclosure of fact germane to an investigation (Garner, 2015: p.1208), prosecutorial powers are conferred on institutions or persons saddled with the responsibility of carrying on the duty of prosecution to function appropriately; while public prosecutor is defined by *Oxford Advanced Learner's Dictionary* as a lawyer who works for government and strives to prove people guilty in court (Hornby, 2020: p. 1245). The *Cambridge Advanced Learner's Dictionary* defines same word as a lawyer who acts for the government against a criminal in court (Colin McIntosh Cambridge Advanced Learner's Dictionary, 2015: p. 1238) while the *Black Law Dictionary* uses the word "public prosecution" and "prosecutor" interchangeably to mean a legal officer who represents the state or federal government in criminal proceedings (Garner, 2015: p. 1416).

## 2.2. Definition of "Prosecutor"

The phrase, "the prosecutor", means a public officer who charges somebody officially with a crime and prosecutes that person in court (Hornby, 2020: p. 1238). He/she is a legal officer who represents the state or federal government (Garner, 2015: p. 1416). It includes every police officer who conducts a criminal prosecution whether the charge is laid in his/her name or not.<sup>5</sup> Though majority of police prosecutors are non-lawyers, they are familiar with legal rudiments. This is acquired during initial training and subsequent courses where they are taught some aspects of the law. Specialised courses are also run periodically for potential prosecutors at the Police Detective College, Enugu for junior officers and at Police Staff College, Jos for senior officers.

The investigating/prosecuting authorities should always exercise restraints even in situations where a suspect, in his confession, names other persons as accomplices. In a claim of criminal liability, it is the position of the law that the fact that a suspect specifically mentions other persons in his statement to the police does not necessarily mean that the persons so mentioned are, in fact, participants in the offence (guilty of the offence), or that the named person, should, as a matter of law be charged to court.<sup>6</sup> There is no law prescribing that, because other persons alleged to have committed an offence are not charged to court, then any person charged to court, should be discharged. It all depends on the state of police image at the time of the decision.

## 2.3. Definition of "the Police"

The word "police" was derived from the Greek word "polis", which means the part of non-ecclesiastical administration having to do with safety, health and order of the state. The Greek "politeira" means the act of governing and regulating security

<sup>5</sup>See PA 2004 (n 1) at s 23.

<sup>6</sup>See *Akpan v the State* (2008) 8 SCM 68 at 81.

needs and order of the city-state in the interest of the public (Ehindero, 1998: p. 1). The *Black's Law Dictionary* (Garner, 1999: p. 1344) defines “police” as the governmental department charged with the preservation of public order, promotion of public safety, and the prevention of crime (Garner, 1999: p. 1196). The same word, according to *Webster's Universal Dictionary* (The Webster's Universal Dictionary and Thesaurus, 2010: p. 370) is defined as government department responsible for keeping order, detecting crime, law enforcement and so on as well as members of such department or any similar organisation (The Webster's Universal Dictionary and Thesaurus, 2010: p. 370).

The word “Police” (also referred to as “the police” in plural form) is defined by *Oxford Advanced Learner's Dictionary* (Hornby, 2010) as officials of the organisation, whose job is to make people obey the law, and to prevent and solve problems of crime (Hornby, 2010: p. 1189).

In Nigeria, the phrase “the police”, when used in its restrictive sense, refers only to members of the Nigeria Police. In its broad sense, however, the phrase accommodates both the members of the police established by the Police Act<sup>7</sup> and the officers of any law enforcement agency established by Law or Act.<sup>8</sup> The phrase ‘police officer’ means any member of the Nigeria Police established by the Police Act and, where the context so admits, includes any officer of any law enforcement agency established by an of the National Assembly.<sup>9</sup> It is on this note that the aforementioned words are used in this discourse.

#### 2.4. Definition of “Prosecutorial Power”

The *Black's Law Dictionary*<sup>10</sup> defines prosecution, in relation to criminal cases, as a criminal proceeding in which an accused person is tried.<sup>11</sup> Criminal investigation and prosecution are dual concepts in policing which form the focus of modern policing. Investigation involves a collation of evidence for the later proof of criminal cases during prosecution in court. Proof may be attained from fact or combination of facts presented before the court. These facts may be gathered by the investigator directly or indirectly, through scientific model, whether analytical or otherwise. There is no doubt that, in all criminal allegations, investigation plays an important part and it will make or mar subsequent criminal proceedings at prosecution, but that does not qualify it as part and parcel of the “proceedings”.<sup>12</sup>

Though investigatory power, according to *Black's Law Dictionary*, is the authority conferred on a governmental agency to inspect and compel the disclosure

<sup>7</sup>PA 2004 (n 1). Under the Administration of Criminal Justice Act, 2015, the word “police” is defined to mean the Nigeria Police established by the Constitution or where the contest so admits, it includes any Law Enforcement Agency established by an Act of National Assembly.

<sup>8</sup>See section 371 of the Administration of Criminal Justice (Repeal and Re-enactment Law) Laws of Lagos State, 2011.

<sup>9</sup>See section 494 of the Administration of Criminal Justice Act, 2015.

<sup>10</sup>Garner Bryan A.: *Black's Law Dictionary* (1999), Eighth Edition, Minnesota: Thomson West.

<sup>11</sup>Ibid, p. 1258.

<sup>12</sup>*Gani Fawehinmi v IGP & Ors., (2002) 23 WRN at pp. 49-50.*

<sup>13</sup>Garner Bryan A.: *Black's Law Dictionary* (n 10), at p. 1208.

of fact germane to an investigation (*Garner, 2015: p. 1208*),<sup>13</sup> prosecutorial powers are conferred on institutions or persons saddled with the responsibility of discharging the duty of prosecution to function appropriately.

### 3. Police and Criminal Prosecution in Nigeria

The leading public institutions vested with the responsibility for instituting criminal prosecutions in Nigeria are the Nigeria Police and the office of the Attorney-General.<sup>14</sup> Though prosecution by the police has, for a long time, been restricted to the magistrate court, documentary evidence reveals that the police had, in the past, undertaken prosecution in the high court where superior police officers had, in the absence of a law officer or barrister appointed under fiat from the Attorney-General, been directed to take up, as a matter of Force policy, the prosecution of cases in the high court.<sup>15</sup> Such prosecutions, however, are limited to serious criminal cases which definition, in the same Force Order 21, seems to be left to the discretion of the individual police officers.

The criminal investigation's duty conferred on the Nigeria Police forms the foundational basis for the exercise of police prosecutorial power. The power to prosecute is now donated by NPA 2020 s 66 which provides that:

Subject to the provisions of sections 174 and 211 of the Constitution and section 106 of the Administration of Criminal Justice Act which relate to the powers of the Attorney-General of the Federation and of a state to institute, takeover and continue or discontinue criminal proceedings against any person before any court of law in Nigeria, a police officer who is a legal practitioner, may prosecute in person before any court, whether or not the information or complaint is laid in his name, [the underlined for emphasis].

The phrase "subject to" has been interpreted to mean liable, subservient, inferior to, governed by, affected by, provided, and answerable for (*Okaro, 2007: p. 110*).<sup>16</sup> The expression introduces a condition, limitation, or proviso. It subjugates the provision of the subject section to the section so empowered by reference. This is intended not to be diminished by the subject section (*Okaro, 2007: p. 111*). It implies that what is subject to a thing shall govern, control, or prevail over what follows in that subject section of the enactment so that it renders the provision, to which it is subjected, conditional to what is prescribed in the provision.<sup>17</sup> Undoubtedly, the police and the Attorney-General relate as mutually dependent on each other.

<sup>14</sup>Generally, in Nigeria, Law enforcement agencies whose enabling laws bestowed upon them, prosecutorial powers are allowed to prosecute criminal cases by virtue of their enabling laws subject to limitations placed under the provisions of the Administration of Criminal Justice Act, 2015 [ACJA 2015].

<sup>15</sup>See Force Order 21.

<sup>16</sup>See also *Itok v Udoyo* [2020] 8 SCM 40; *FRN v Osahon & Ors.* (2006) 5 NWLR (Pt. 973) 361.

<sup>17</sup> See *FRN v Osahon* *FRN v Osahon & Ors.* (n 16) at p. 361; see also *Labiya v Anretiola* (1992) 8 NWLR (Pt.258) 139 at 196-164.

### 3.1. Criminal Prosecution and the Relationship between the Police and Attorney-General

Assessing scope and impacts of police power of prosecution in the administration of criminal justice in Nigeria, Okaro opined that the power to institute criminal prosecution is not limited to the Attorney-General.<sup>18</sup> Following the *FRN v Osahon's* case,<sup>19</sup> he asserted that:

Given the present position of the law, it can be contended that except for the offences, the prosecution for which expressly requires the consent of the Attorney-General, it is not mandatory to refer police case to the Director of Public Prosecutions for vetting and legal advice as it is currently the practice; not with the array of lawyers now in-charge of virtually all the legal sections of the various (police) commands and formations including Force CID. (Okaro, 2007: pp. 110-111)

Okaro's conclusion above, relating the referral of cases to the Attorney-General's office for legal advice, has become too sweeping in the light of statutory wedge introduced at the passage of the ACJA 2015 which domiciles in the Attorney-General, the power to control the incident of criminal proceedings.<sup>20</sup> This is further strengthened by NPA s 66 which also subjects police prosecutorial power to the exercise of the Attorney-General's prosecutorial powers. The police, therefore, would need to continue relating with the Attorney-General for the realisation of its noble objectives in the overall interest of the public while exercising this constitutional powers. Both the Attorney-General's office with the office of the Director of Public Prosecutions and the police are symbiotically related. They will continue to depend on each other since some enactments are already imposing obligations on the police to forward the reports on all cases of crimes investigated within the state<sup>21</sup> and, more significantly, the referral of casefiles in respect of indictable offences to the office of the Attorney-General for legal advice.<sup>22</sup> The Act<sup>23</sup> places an obligation on the Commissioner of Police in each state to make periodic returns of all arrests effected in the states<sup>24</sup> to the Attorney-General of the state. It is noteworthy also that a major aspect of the reform introduced by the ACJA 2015 is the Attorney-General's control of the incidents of criminal investigation conducted by the police.<sup>25</sup>

<sup>18</sup> *NPF v Adekanye* (No. 1) (2002) 5 NWLR (Pt. 790) 318.

<sup>19</sup> *FRN v Osahon & Ors.* (n 16) 361.

<sup>20</sup> The provision of ACJA 2015 (n 7) is now vested in the Attorney-General, the power to control criminal proceedings as contained in Part II of the ACJA 2015 (n 7); much more, the forwarding of casefile has now been mandated by ACJA 2015 (n 7) s 376(1) in all indictable offences. The NPA 2020 (n 1) s 31 now creates an obligation on police authority to forward its finding on all police investigations to the Attorney General for legal advice.

<sup>21</sup> See NPA 2020 (n 1) s 31; see also the ACJA 2015 (n 7), s 29 and; the Administration of Criminal Justice Law of Oyo State 2016 [ACJL 2016], 17(4).

<sup>22</sup> See ACJA 2015 (n 7), s 376(1); see also ACJL 2016 (n 21), s 377; section 74 of the Administration of Criminal Justice (Repeal and Re-enactment Law) of Lagos State 2011; and The NPA 2020 (n 1) s 31.

<sup>23</sup> The ACJA (n 7).

<sup>24</sup> *Ibid* at section 29; see also ACJL 2016 (n 21), s 30 and the NPA 2020 (n 1), s 47.

<sup>25</sup> *Ibid* at s 105.

The power of police prosecution is derivable from statutes. It, nonetheless, has some attributes traceable to police powers of prosecution at common law which is a variant of the Attorney-General's powers of prosecution. Prosecution either conducted by the state or by any other body is governed by rules of court, the provisions of the ACJA 2015,<sup>26</sup> Criminal Procedure Law<sup>27</sup> and by necessary provisions of other enactments. Although it is held that the power wielded under police prosecution is not a delegated power from the Attorney-General,<sup>28</sup> by virtue of Section 211 & 174 of the Constitution,<sup>29</sup> the Attorney-General is constitutionally competent to control police prosecution<sup>30</sup> just as he or she controls the incidence of police investigation.<sup>31</sup> It is sufficient to emphasise here that the police powers of prosecution are not the same thing as the Attorney-General's powers of prosecution.

The above position is predicated upon the realisation that the police power of prosecution is narrowed to power to institute and undertake criminal action with such other powers that are reasonably necessary to give effect to the exercise of that power. Whereas the powers of the Attorney-General does not stop at the power to institute and undertake criminal proceeding, it extends to the power to take over and continue any such criminal proceeding that may have been instituted by any authority or person, and the power to discontinue at any stage, before judgment is delivered in any such criminal proceeding, that is instituted or undertaken by him or her or by any other authority.<sup>32</sup>

Although the Attorney-General's power of prosecution is quite extensive, the exercise of police powers to institute and undertake criminal proceeding is similar to those exercisable under the CFRN 1999, ss 174(1)(a) & 211(1)(a) of the Constitution. The Constitution lays some determinants<sup>33</sup> for the exercise of the powers of the Attorney-General as contained in Sections 174 & 211 of the Constitution. The powers include those similar to the ones wielded in the police prosecution; that is, power to institute and undertake criminal proceeding against any person. The major consideration or the determinant for instituting and undertaking criminal proceedings is that the Attorney-General is urged to take cognisance of general public interest, the interest of justice and the need to prevent abuse of legal process.<sup>34</sup> This consideration is similar to those for the exercise of same power under the common law.<sup>35</sup>

The test to be adopted in determining the above consideration, that is, the

<sup>26</sup>See section 1 (2) of the ACJA 2015 (n 7).

<sup>27</sup>Criminal Procedure Law for states which are yet to domesticate the provisions of ACJA 2015 as the state Law.

<sup>28</sup>*Olusemo v COP* (1995) 11 NWLR (Pt. 575) 547 at 565.

<sup>29</sup>Constitution of the Federal Republic of Nigeria, 1999 (as altered).

<sup>30</sup>See the ACJA 2015 (n 7) s 105(1)(2) & (3).

<sup>31</sup>*Ibid* at Part 11 ss 107 & 108.

<sup>32</sup>*Ibid*, section 174) (1) (a) & 211(1) (a).

<sup>33</sup>*Ibid*, section 174(3) & 211(3).

<sup>34</sup>*ibid*.

<sup>35</sup>*State v Ilori* (1983) 1 SCNLR 94 at 108 Ratio 2.

general public interest, interest of justice and the need to prevent abuse of legal process is a subjective one. That is, it is subject to the exercise of the discretion of the Attorney-General according to his or her own judgment.<sup>36</sup> The justice mentioned above includes substantial justice. In the same vein, when determining whether or not to institute and undertake a criminal proceeding against a person in a case being investigated by the police, in addition to the sufficiency of evidence and availability of willing and able witnesses, the police should have regard to general public interest on the matter, the interest of justice and the need to prevent the abuse of legal process. The test to be adopted in this consideration should also be subjective, that is, it is the exercise of the discretion of the individual officer according to his or her own judgment since he or she only swims the ocean and can tell how deep or shallow the water is. Expectedly, the police officer exercising the above discretion is a law to himself, a master of himself and not subject to any external control whatsoever in the course of the exercise of his supposedly unfettered discretion, just as not even the court can question why he or she thus so acted, so long as he or she acts in good faith.<sup>37</sup> He is, however, answerable to his appointor or to the office where he wields the power, and he is also answerable to adverse public opinion which may force his appointor to remove him.

We need also to point out that, though the court may not possess the power to order the arraignment of persons not charged pursuant to the exercise of the investigating/prosecuting authority's discretion, the court possesses advisory power by way of observations to advise the prosecution or the police to consider seriously, the arrest and bring the other mentioned accomplices and participants in crime to face the music as advised in the case of *Akpa v the State*.<sup>38</sup> The power to do this is derived from the inherent power of the court to do justice. Since justice is almost always a four-way traffic, namely justice to the prosecution, to the defence, to the state whose law is breached, and justice to the society whose land is desecrated. There is also the recent clamour for justice to the victims of crime, and victims' neighbours or of-springs whose survival is predicated on primary victim. This is a variant of intergenerational equity or justice.

It is settled in law that the power exercisable by the Commissioner of Police or the Inspector-General of Police, who is a major prosecuting body within the police, may be exercised by him or her or by his or her officers or his agent. It is also exercisable by the grant of fiat given under his or her hand to private legal practitioners to represent him or her.<sup>39</sup> Thus, in *Dariye v FRN*<sup>40</sup>, the Supreme Court, re-emphasising that the institution of proceeding against any person before any court in Nigeria other than a court martial is not the exclusive prerogative of the Attorney-General of the Federation and that of his or her counterpart in the state. The

<sup>36</sup>Ibid, Ratio 3.

<sup>37</sup>In the case of *Akpa v The State* (2008) 8 SCM 68 at 81, the Supreme Court held that the courts cannot ask the police why a person was not charged to the court.

<sup>38</sup>Ibid.

<sup>39</sup>*Okon Bassey Ebe v COP* (2008) 3 SCM 29 at 48.

<sup>40</sup>*Dariye vFRN* (2015) 2 SCM 48.

Supreme Court has, therefore, held that the respondent has the powers to prosecute the appellant directly or through an agent.<sup>41</sup>

While no fast rule may be laid for the exercise of police discretion in the decision whether or not to prosecute, it is sufficient to emphasise that the guideline for the exercise of his discretion are the national and force policy, the gravity of the offence, the circumstances of the incident and the alleged offender, the availability of resources and whether there exists a better alternative (especially with young offender) than evoking the judicial process. The reality of our present situation, however, is that about 91% of offences against the Criminal and Penal Codes and other laws that get to the prosecution stage are handled by the police majority (Alubo, 2015)<sup>42</sup> of which over 73% thereof usually suffer irredeemably, leading to the discharge of the accused persons. Less than 10% of criminal cases are prosecuted to sentence level (Osinbajo, 2008: p. 7). Professor Yemi Osinbajo, reviewing the dysfunctionality of the Criminal System using Lagos State as a case study, lamented the effect a dysfunctional criminal justice system would have on the social, political and economic landscapes of the nation (Osinbajo, 2008: p. 7). Consequently, a great deal of resources that should be directed at prosecution of relevant cases is expended on extraneous irrelevant prosecutions. This could be avoided if quality decisions are taken at stage of determination for arraignment's state.

### 3.2. The Imperative of the Reform on Requirement of Legal Practitioner on Criminal Prosecution

That the Nigeria Police Force has the highest number of lawyers in the establishment (Police Reacts to Removal of Prosecutorial Powers on Criminal Case, 2017) who are currently undertaking prosecution as provided in the Administration of Criminal Justice Act 2015 is no longer in any contention. However, the harsh prerequisite of prosecutors being legal practitioners may, undoubtedly, hinder effective prosecution of criminal cases by the police, considering the financial implication that will be involved, should the spirit of this law be enforced to the letter. Thus Professor Alphonsus Alubo of the University of Jos (Alubo, 2015) has urged that the police should retain the power to prosecute considering that 60% of all criminal cases in Nigeria are prosecuted by the police. While recommending the review of section 106 of the Administration of Criminal Justice Act, the learned professor accordingly stressed that:

Leaving the prosecution of criminal to only legal practitioner will be cumbersome and expensive. It will require hundreds of thousands of legal practitioners to prosecute in the area, magistrate and other lower courts. The

<sup>41</sup>Ibid at 68.

<sup>42</sup>Alphonsus Alubo, 'Revisiting the Administration of Criminal Justice Act (ACJA) 2015: Issues and recommendations', being a paper presented at the opening ceremony of a 3-day Workshop on Administration of Criminal Justice Act, 2015 with the theme: *Reforming the Administration of Criminal Justice Act, 2015* organised by National Institute for Legislative Studies (NILS) held in Abuja on Wednesday 8<sup>th</sup> March, 2017.

financial implication of such a move, needless to state, is humongous and gargantuan especially in era of deep economic morass... It is only appropriate that the police power be restored as one of the prosecutors, in the prosecutorial team, in the appropriate cases. (Alubo, 2015)

It appears that the insistence on police prosecutor being a legal practitioner may not be unconnected with the spate of incompetence often exhibited by police prosecutors, which is a major cause for congestion of courts' cause lists and the prisons. In a lecture delivered in 2017, Justice Marshall Umukoro, the Chief Judge of Delta State, advised that the police be stripped of the power to prosecute criminal cases,<sup>43</sup> stressing that the measure will reduce the number of accused persons awaiting trial as well as decongest prisons. He maintained that:

The police have the challenge of lack of technical know how to handle the job of prosecutors. Some police prosecutors, who are not lawyers and are new on the job, have no mastery of the game of prosecution. This situation put the magistrates in the position to play the role of assistants to the prosecutor. Some magistrates have, in the process, descended to the arena of conflict thereby hampering the justice of the case.<sup>44</sup>

No doubt, these strong contentions have always been there. Until the decision in *FRN v Osahon & Ors.*,<sup>45</sup> there were contentious arguments on police right of audience in the superior courts of record. Tracing through a thick line of cases on the struggle and resistance against police appearance, Ehindero (Ehindero, 2003)<sup>46</sup> explains the great deal of resentment exists against the Nigeria Police legal representation in the superior courts of record. We entirely agree with the views, expressed by Ehindero in his treatise that one's success or failure, in criminal prosecution, is not predicated on one's status as police officer, but on a good knowledge of the law, diligence, hard-work, perseverance and honesty (Ehindero, 2003). It is right to add also that, though the police power of prosecution as expressed statutorily under the NPA 2020,<sup>47</sup> is concomitant to police right of audience in court of law, it is clear that NPA 2020, s 66(3) cannot succeed in isolation.

Since police investigation and prosecution impugns on rights of the citizens, it demands a great deal of caution to ensure fairness and reasonableness in the administration of criminal justice.

Candidly, a successful investigation steers a good prosecution. Contrary to quantity affirmation by Okaro above, the quality of skill possessed and applied by

<sup>43</sup>Justice Marshall Umukoro in a lecture delivered at 2017 Aquinas Day Colloquium of Dominican Institute in Ibadan on Tuesday 31<sup>st</sup> of January, 2017.

<sup>44</sup>See *The Nation* publication of January 31, 2017, captioned "Stop police from prosecuting criminal cases—Chief Judge" <[https://thenationonline.net/stop-police-prosecuting-criminal-cases-chief-judge/#google\\_vignette](https://thenationonline.net/stop-police-prosecuting-criminal-cases-chief-judge/#google_vignette)> accessed on 10<sup>th</sup> March, 2017.

<sup>45</sup>*FRN v Osahon & Ors* (n 16).

<sup>46</sup>Recall that it was Ehindero S. G., even as the Inspector General of Police, handled with passion, most of the contentious prosecution of cases against the police right of audience in Nigeria. He authored the "*The Policeman as Prosecutor*".

<sup>47</sup>NPA 2020 (N 1).

the lawyers in the Nigeria Police Force is of greater importance than its numeric strength. The past spate of poor quality of investigative process is no longer desirable in the country. This was manifestly adumbrated in *Joseph Idowu v The State*,<sup>48</sup> when the Supreme Court re-emphasised the need for discreetness in the supervision of criminal investigation, and prosecution of cases. The court held that:

But before concluding this judgement, I wish to comment on the way and manner the prosecution conducted the investigation of this case. The method adopted left much to be desired. With the number of Police officers trained as lawyers in the police force, the quality of the police investigation, particularly in this case is far below the quality and standard one would expect in this age of technological developments. The Ministry of Justice which has the responsibility of supervising investigation of criminal cases, particularly those involving human lives are also not free from blame. Prosecution of cases are more often than not conducted in a loose and unsatisfactory manner resulting in acquittal of criminals who should have been convicted.

Earlier in the case of *Queen v the African Press Limited/L. K. Jakande*,<sup>49</sup> Taylor, J., had insisted on fairness and impartiality of police personnel which also are of paramount value in criminal investigation and prosecution, not only by the police alone but also by the office of the Attorney-General or the Director of Public Prosecutions. The learned judge held that:

The police force in any country are the guardians of the public and their property. They are the keeper of the peace. They are also a part and parcel of the administration of justice. They are and must always be impartial, and impartial to politics, and to personality. The Legal Department from the highest officer in the Region viz- the Attorney General to the subordinate officers of his department are a part and parcel of the administration of justice in the land. On them devolves the duty, inter alia, of prosecution of offenders. They too must be impartial in their dealings and actions.<sup>50</sup>

Fairness and justice are the police start-point for public service. The police owe the citizen an enviable obligation deserved from a people-oriented institution.

It is worthy of note that the case of *FRN v Osahon*<sup>51</sup> was a decision reached under the regime of PA 2004, conferring on all police officer, the power of prosecution of criminal cases whether the criminal complaint was laid in their names or not. Its application to NPA 2020 is limited and qualified by the statutory provisions that restricted police power of prosecution to officers possessing the

<sup>48</sup>*Joseph Idowu v The State* (2000) 2 NWLR (Pt. 680) 48.

<sup>49</sup>The *Queen v the African Press Limited/L K Jakande* quoted with approval on p. 354 of the book entitled "JIC Taylor Through the Cases" cited in J. O. Ige, *Cases and Material on Criminal Law and Procedure* (Crown Goldmine Communication Ltd, 2010).

<sup>50</sup>*Ibid* at 64.

<sup>51</sup>*FRN v Osahon* (n 16); see also *Olusemo v COP* (n 28) 11 NWLR (Pt. 575) 547.

qualification of being a legal practitioner. This qualification is essential under the NPA 2020.<sup>52</sup> It behoves, therefore that, the police power of prosecution under section 66 of the NPA 2020 is always active and until the Attorney-General decides to exercise his/her powers under the extant constitutional provisions for taking over, or discontinuing the prosecution in all cases handled by the police, whether the police officer so exercising this power is a legal practitioner or not. This is because the law, as presently constituted, concedes prosecutorial power to other police officers who are non-legal practitioners, though, this is subject to provisions of the relevant criminal procedure laws in force at the federal or state level. The combined effect or the community reading of the NPA 2020 s 66 with other criminal procedures is that a police officer can only prosecute in courts, if he or she is a legal practitioner,<sup>53</sup> except he or she is prosecuting offences which non-qualified legal practitioners are allowed to prosecute.<sup>54</sup> The status of lay prosecutor at the magistrate or other courts remains only affected by the various reforms introduced by the procedural law, to the extent that cases, under their prosecutorial powers, are those relating to offences which non-qualified legal practitioners can effectively prosecute.<sup>55</sup>

### 3.3. The Status of Non-Legal Practitioners' Prosecuting Police Officers on Basis of the New Reform

The above provisions in the NPA 2020, s 66(2) & (3) have a retrospective impact which needs a reflective analysis to ensure robust understanding of subsisting right of police officers to prosecution of criminal cases in courts. Applying the principle of construction in *Labiya v Anretiola*<sup>56</sup> and *FRN v Osahon & Ors.*,<sup>57</sup> the word 'subject to' in the NPA 2020 s 66(2) above, can be construed as connoting that the power of a non-lawyer police officer to prosecute those offences which non-qualified legal practitioners can prosecute [or have being prosecuting] before the courts can only be limited by provisions of the relevant criminal procedure laws, preventing criminal prosecution by police officers who are non-legal practitioners. There is no provision of law in the extant relevant criminal procedure laws in force at the federal or state level expressly barring police officers from prosecuting before the courts those offences which non-qualified legal practitioners can prosecute. Contestably, therefore, given the present position of the law, except for the offences, the prosecution for which is expressly required to be done by police officers who are legal practitioners, other police officers are not precluded from criminal prosecution. Expressly listed among those allowed the right

<sup>52</sup>See the NPA 2020 (n 1) at s 66(1).

<sup>53</sup>Ibid.

<sup>54</sup>Ibid at s 66(2) which provides that a police officer may, subject to the provisions of the relevant criminal procedure laws in force at the federation or state level, prosecute before any court those offences which non-qualified legal practitioner may prosecute.

<sup>55</sup>Ibid at s 66(2).

<sup>56</sup>*Labiya v Anretiola* (1992) 8 NWLR (Pt.258) 139.

<sup>57</sup>*FRN v Osahon* (n 16) at p. 361

of audience in some of the courts' laws having criminal jurisdiction<sup>58</sup> are police officers,<sup>59</sup> and any other authority or persons<sup>60</sup> both of which class are police officers who need not be legal practitioners.<sup>61</sup>

The new dimensions introduced to the exercise of prosecutorial powers in Nigeria, notwithstanding, there is nothing in the Nigerian law precluding police officers from undertaking criminal prosecution in any court of law,<sup>62</sup> more particularly, when such officer is a legal practitioner; thus, there exists a qualification on how the prosecutorial power would be exercised by them. For the avoidance of doubt, section 174, which is very identical with the much identical with section 211 of the CFRN 1999; and sections 106, 109 and 110 of the ACJA 2015 are worthy of discreet examination.

The above sections of law are now reproduced hereunder:

The CFRN 1999 s 174(1) provides that the Attorney-General of the Federation shall have power:

- a. To institute and undertake criminal proceedings against any person before any court of law in Nigeria, other than a court-martial, in respect of any offence created by or against any Act of the National Assembly;
- b. To take over and continue any such criminal proceedings that may have been instituted by any other authority or person;
- c. To discontinue at any stage before judgment is delivered any such criminal proceedings instituted or undertaken by him or other authority or person [underline mine].

Section 23 of the Police Act provides:

Subject to the provisions of Section 174 and Section 211 of the Constitution of the Federal Republic of Nigeria (which relates to the power of the Attorney General of the Federation and of the State to institute and undertake, takeover and continue or discontinue criminal proceedings against any person before any court of law in Nigeria) any police officer may conduct in person all prosecutions before any court whether or not the information or complaint is laid in his name.

NPA 2020 s 66 provides that:

(1) Subject to the provisions of sections 174 and 211 of the Constitution and section 106 of the Administration of Criminal Justice Act which relate to the powers of the Attorney-General of the Federation and of a state to institute, takeover and continue or discontinue criminal proceedings against any person before any court of law in Nigeria, a police officer who is a legal practitioner, may prosecute in person before any court, whether or not the information or complaint is laid in his name, [the underlined for emphasis].

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<sup>58</sup>See the proviso to the National Industrial Court Act, 2006 (as amended) at s 46.

<sup>59</sup>See the Federal High Court, Act, Laws of the Federation of Nigeria, 2004.

<sup>60</sup>Ibid at s 57(f).

<sup>61</sup>See *FRN v Osahon* (n 16) per Kutigi, JSC, at p. 54.

<sup>62</sup>Ibid.

(2) A police officer may, subject to the provisions of the relevant criminal procedure laws in force at the Federal or State level, prosecute before the courts those offences which non-qualified legal practitioners can prosecute [underline mine].

(3) There shall be assigned to every Police Division at least one police officer:

(a) who is qualified to practise as legal practitioner in accordance with the Legal Practitioners Act; and

(b) whose responsibility is to promote human rights compliance by officers of the Divisions.

ACJA 2015 s 106 provides that:

Subject to the provisions of the Constitution, relating to the powers of prosecution by the Attorney General of the Federation, **prosecution of all offences** in any court shall be undertaken by:

(a) The Attorney-General of the Federation or a law officer in his Ministry or Department.

(b) A legal practitioner authorised by the Attorney-General of the Federation; or a legal practitioner authorised to prosecute by this Act or any other Act of the National Assembly (*Emphasis mine*).

ACJA 2015 s 109 provides that:

Subject to the provisions of any other law, criminal proceedings may, in accordance with the provisions of this act be instituted:

(a) In a Magistrate court, by a charge or a complaint whether or not on oath or upon receiving a first information report;

(b) In high court, by information of the Attorney-General of the federation, subject to section 104 of this act;

(c) By information or charge filed in the court after the defendant has been summarily committed for perjury by a court under the provisions of this act;

(d) By information or charge filed in the court by any other prosecuting authority; or

(e) By information or charge filed by a private prosecutor subject to the provision of this act.

Concertedly, it has been held that the phrase “any other authority or person” in the CFRN 1999<sup>63</sup> is wide enough to accommodate police officers. In *FRN v Osahon*, having traced the historical tradition of the exercise police prosecutorial powers and practice in Nigeria since the colonial era, the Supreme Court asserted that:

*From colonial period up to date, police officers of various ranks have taken up prosecution of criminal cases in Magistrates and other courts of inferior jurisdiction. They derived their powers under Section 23 Police Act. But when it comes to superior courts of record, it is desirable though not compulsory that the prosecuting police officer, ought to be legally qualified. This is not deleting from the provisions of Section 174(1) of the constitution, rather it maintains age long practice of superior courts having counsel rather than non-lawyers prosecuting*

<sup>63</sup>See the Constitution of the Federal Republic of Nigeria [CFRN 1999] at s 174(2) & (3).

*matters.*

The court went further to hold that:

I hold that a police officer can prosecute by virtue of Section 23 Act, Section 56 (1) Federal High Court Act, and Section 174 (1) of the Constitution of the Federal Republic of Nigeria. Per Belgore JSC (PP. 50-51.)

A discreet contrast of the PA 2004 and NPA 2020 s 66(1) & (2), in the light of the portion of the Supreme Court holding in *FRN v Osahon* above, reveals a concordance in the common spirit of the two legislations which is that police offices can prosecute in Nigeria, in accordance with the provisions of the Constitution. It is safe to acknowledge that the provisions in PA 2004 is dichotomised or simplified and explained into the NPA 2020 s 66(1) & (2), demarcating the extent of exercised by two classes of prosecuting officers, constitutionally allowed to prosecute in the Nigerian courts. NPA 2020 s 66(1) relates to power exercisable only by police officers who are legal practitioners for prosecution of indictable or other serious offences at the superior courts of record while the NPA 2020 s 66(2) relates to prosecutorial powers available for prosecution of cases other than indictable or serious offences traditionally prosecutable by police officers who are non-legal practitioners at magistrate courts in Nigeria unless there is procedural law so limiting this power expressly.

The legislative reform introduced by the provisions of the ACJA 2015 s 105 and the NPA 2020 s 66(2), prescribing a requirement of the officer prosecuting the cases to be a legal practitioner, notwithstanding, the subjugation of these sections to the provisions of the CFRN 1999 s 174 and 211 which had earlier been construed as not diminishing in potency the exercise of police officers' prosecutorial powers in any court in Nigeria, though except the prosecuting officer is a legal practitioner, he cannot conduct criminal prosecution in superior court of record. However, a prosecuting police officer, who is not a lawyer, can safely prosecute, at magistrate court, offences which are not indictable or serious in nature except there is a law prohibiting that. Similarly, the use of "shall" in NPA 2004 s 106, though mandatory in form, could be construed as merely permissive, since strict construction would occasion a mischief.

The ACJA 2015 s109 contains provisions of law regarding the different methods of instituting criminal proceedings at the court as demanded from different categories of persons or prosecuting authorities in filing of a charge (First Information Report or information). Ostensibly, institution of criminal proceedings by other prosecuting authorities apart from the Attorney-General, majority of whose enabling laws limit their prosecutorial powers to officers that are legal practitioners. For instance, section 12 (2) of the Economic and Financial Crimes Commission (Establishment) Act<sup>64</sup> provides that the Legal and Prosecution Unit shall be charged with responsibility for prosecuting offenders under the Act.<sup>65</sup> Similarly,

<sup>64</sup>The Economic and Financial Crime Commission (Establishment) Act, Cap E 1, Laws of the Federation of Nigeria, 2004.

<sup>65</sup>Ibid.

section 180 (2) of the Customs and Excise Management Act,<sup>66</sup> provides that, as regards the conduct of proceeding under the said Act<sup>67</sup> (whether civil or criminal) in the Federal High Court, any reference to an officer shall be a reference to such officer who is a legal practitioner. However, the methods for instituting criminal proceedings by the police is contained in ACJA 2015 s 109(a) & (d) which section does not impose any qualification of being a legal practitioner in whatever form. Similarly, the ACJA 2015 s 110 provides for the mode of instituting criminal proceedings in the magistrate court and allows the signing of the FIR by police officers,<sup>68</sup> through the signing of a charge to a legal practitioner<sup>69</sup> of the prosecuting institution in accordance to the provisions of the ACJA 2015 s 106.<sup>70</sup>

Furthermore, the provisions for trials in the High Court on information are contained the ACJA 2015 s 348(1) which limits filing of information to legal officers of the prosecuting agency.<sup>71</sup> It is true that section 381(b) of the Administration of Criminal Justice Act, 2015 allows a public officer acting in his official capacity to file information, but then, the section does not in any way reduce the condition for a legal practitioner set out in section 106 of the Act.<sup>72</sup> Assuredly, it is with a view to promoting human rights compliance by officers of the divisions and supposed view to solving the trouble of getting a lawyer close by to sign criminal processes for instituting criminal processes at police formations, that NPA 2020 s 66(3) mandates the assigning to every police division, at least, one police officer who is qualified to practise as legal practitioner in accordance with the Legal Practitioners Act.<sup>73</sup>

In the final analysis, it is sufficient to state that the law, as it is today, subject to necessary conditions which the law may impose, empowers police officers to prosecute criminal cases in all courts in Nigeria.<sup>74</sup>

## 4. Police Prosecutorial Discretion

Prosecutorial discretion is the prosecutor's power to choose from the options available in a criminal case. These options include choices as regards the decision to arraign or the decision to prosecute. Each of these aspects of prosecutorial discretion carries certain requisite features. They, therefore, are examined in detail hereunder.

### 4.1. Prosecutorial Decision to Arraign

These options include choices as to which offence should be preferred, the court

<sup>66</sup>Customs and Excise Management Act, Cap C 45, Laws of the Federation of Nigeria, 2004.

<sup>67</sup>Ibid.

<sup>68</sup>See the ACJA 2015 (n 7), s 110(1)(b).

<sup>69</sup>Ibid at s 110(a).

<sup>70</sup>Ibid at s 106(c).

<sup>71</sup>Ibid at s 348(1)(b).

<sup>72</sup>See the ACJA 2015 (n 7).

<sup>73</sup>See the Legal Practitioners' Act, Cap L 11, Laws of the Federation of Nigeria 2004, s 7.

<sup>74</sup>Ibid at s 66; see also *FRN v Osahon* (n 16), and; *Olusemo v COP*, (n 28).

of arraignment, the charges to be preferred, the decision on whether to prosecute or not, to plea bargaining or not, and whether to recommend the sentence by calling the victim to recall the effect of consequence or impact of the defendant's act on him or her. The prosecutorial discretionary powers will, however, need to be exercised fairly and reasonably. Although exercise of prosecutorial powers and discretion by the police in criminal investigation and prosecution can be effectively undertaken, the compelling aspects of its exercise are the decision to prosecute and determination of arraignment. The decision to arraign a suspect in court, as in other investigatory powers, may arise from a variety of reasons or circumstances, particularly having regard to the nature of the offence and sufficiency of evidence against the suspect. This covers the extent of the availability of resources for the prosecution, the time and trouble involved in assembling evidence (for instance where the major witnesses are not likely to be available during trial or the evidence cannot be assembled at the court without undue expenses) and the end result. The exercise will involve balancing options as well as weighing what really is in the public interest.<sup>75</sup>

Other considerations, apart from the factors already mentioned above, include: the circumstance of every occasion, the best of the police ability in the prosecution, the image of the police force and the overall interest of the society.<sup>76</sup> It may be saddening to hear that, in practice, the major consideration is limited to the past image of the police. The notoriety of the battered image of the police in Nigeria so far is the bane behind timorous inaction in major decision-making by the police. Sentimental reasons are read into police decisions, thereby constraining the exercise of its discretion. Lamentably, this offers a painful explanation for the growing rate of congestion in our courts. The courts are congested with inundating cases that should, ordinarily, have no business in the court. Fola Arthur Worrey, in his book,<sup>77</sup> bemoans police investigating officers' recommendations contained in some of the police reports or minutes made in case files, received from the police when he was the Director of Public Prosecutions for Lagos State. In the words of the learned author, such recommendations include:

...investigation shows that the complainant is being funny but case should be charged to court to let the sleeping dogs lie; or "the suspect should be charged to court so as to allow the town to rest"; or "charge the suspect to court so as to avoid petition".<sup>78</sup>

In his mystification, Worrey realises that the culture of fear has taken root in the police force. He attributes this to the fear of trying to run away from ground that could be used to dismiss the police officer and make way for the promotion of his political rival rather than merit-based advancement of others. It appears that the reason for the fear is beyond that. It is, to our mind, the fear of not willing

<sup>75</sup> *JGP v Gani Fawehinmi (n 12) at 24.*

<sup>76</sup> *Ibid* at pp. 25-26.

<sup>77</sup> Fola Arthur Worrey, *The Prosecutor in Public Prosecution* (LSMJLRS 2000).

<sup>78</sup> *Ibid*, p. 43.

to attract the wrath of the society on whose score board the police image is at the lowest ebb. The decision, whether or not to prosecute, is not one that should casually be made. It ought not be a whimsical or arbitrary decision, or one made without a careful study of facts available for the proof of the case or tied to personal prejudice or mood of the appropriate individual officer.

Sentiment has been a bane to the exercise of discretion in criminal prosecution; actually, the decision to prosecute may be affected by sentiments. For the individual police officer about to exercise a decision not to prosecute, quite often, his decision is underlined by sentiment arising from the fear which the society may express due to loss of confidence in police legitimacy, efficiency and incorruptibility. The police officer may consider the effect which non-prosecution would have on the mind of the alleged victim, who believes (not versed in subtleness of the law) that he has been truly wronged and that the suspect deserves to suffer legal sanction for his act.<sup>79</sup> The effect on the public, which sees a conspiracy in every corner and has made up its mind from a mere gleaning of bare details from a news report or from idle third-hand gossips, when it hears later that the savage and dastardly criminal has been let off the hook, believing that “consideration has passed hands”, is incomprehensible (*The Illusory Truth Effect: We Believe Fake News, Conspiracy Theories, and Propaganda*, 2025). The impact the non-arraignment may have on police investigating team which has taken the trouble to assemble the “supposedly well woven” evidence which it may think is more than enough to nail the *bagger* may be too devastating (Fola Arthur Worrey, 2000: 22; *The Illusory Truth Effect: We Believe Fake News, Conspiracy Theories, and Propaganda*, 2025: p. 22; Stafford, 2019).

The police officer who allows himself to be riddled by the darts of fear of what the society, which is as suspicious and emotional as the officer is, may end up refusing to exercise any discretion. The discretion to prosecute ought to be primarily geared towards the benefit of the public in terms of protecting public norms and societal cohesion with the underlying principle of responsibility as a deterrent to other potential law breakers.<sup>80</sup> It is necessary, however, that in exercising the discretion on whether or not to prosecute, the individual police officer should consider the impact his or her decision will make on the public confidence reposed in his/her office. The public confidence may be sustained by invoking a high standard of transparency and openness for the parties. As a matter of necessity, where public confidence reposed in the police may be eroded should the policy on confidentiality of information be strictly adhered to, litigants may be obliged with any information regarding the quality of the evidence at police disposal which has influenced police decision (*The International Association of Chiefs of Police (IACP)*, 2009).

The above reluctance is, however, not limited to the police. Reluctance to exercise prosecutorial discretion also extends to the office of the Director of Public

<sup>79</sup>Ibid.

<sup>80</sup>Ibid at p. 24.

Prosecution or the Attorney-General when a fiat is required for prosecution.<sup>81</sup> In the analysis of Anthony Allott<sup>82</sup> the following have been identified as the reasons for police reluctance:

- i. where there is a low chance of conviction due to the unwillingness of jurists to convict for that type of offence or to accept police evidence relating to it;
- ii. where the police feel they will make themselves feel needlessly unpopular or in confrontation with a large, or important section of the community as a result of enforcing the law strictly;
- iii. where the duties involved in detecting or pursuing that type of crime are unattractive; and
- iv. where there is a conscious decision to make a better use of police time by pursuing other types of offences.

The above reasons enunciated by Allot are also common in the Nigerian situation. Having decided to arraign, how then does the officer determine the offence and court of arraignment?

#### 4.2. Prosecutorial Decision to Prosecute

One of the twin issues in the criminal prosecution is decision to initiate criminal proceedings against an accused person. Except in rare cases, the police officer exercises a great deal of discretion as to whether or not to charge a case to court. In exercising this discretion, he is however guarded by the outcome of his investigation. This is because, where the result of his investigation does not disclose a *prima facie* evidence supporting that the accused person committed the offence, he (the police officer) is under an obligation to discharge him or her except in rare sensitive cases, where public interest or public policy is involved, the case file is expected to be forwarded to the office of the Director of Public Prosecutions or the Command's Head of Legal Department for advice.

Both the ACJA 2015<sup>83</sup> and the Criminal Procedure Law respectively<sup>84</sup> provide that, when any person has been taken into custody without a warrant for an offence other than an offence punishable with death, the officer in-charge of the police station or other place for the reception of an arrested person to which such a person is brought, shall, if after the enquiry is completed, and he is satisfied that there is no sufficient reason to believe that the person has committed any offence, forthwith release such a person.<sup>85</sup> Even where the suspect is arrested with a warrant or for an offence punishable with death, nothing contained in any law demands that he or she must be arraigned before any court of law, where there is no sufficient reason to believe that the person has committed any offence.<sup>86</sup>

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<sup>81</sup>The reluctance by the DPP or the Attorney-General may be borne from the need to preserve the public confidence in the institution. Public confidence is a good factor to be considered in cases where publicity has occasioned public sentiments and concerns.

<sup>82</sup>Anthony Allot, *The Limits of the Law* (1980) Butterworths p. 93.

<sup>83</sup>See section 30 of the Administration of Criminal Justice Act, 2015.

<sup>84</sup>Criminal Procedure Law applicable the Southern part of Nigeria.

<sup>85</sup>*Ibid*, section 19.

<sup>86</sup>*Okere v Okorodudu* (1970) ANLR 1943.

The phrase “is satisfied that there is no sufficient reason to believe” leaves a great deal of discretion to the individual police officer. He alone decides the existence and extent of his satisfaction in addition to his discretion as to the determination of the sufficiency of the reason to believe. The former depicts the existence of an absolute discretion while the latter is guided by Element Factor Theory as regards the existence of facts supporting the elements to prove the particular offence. Where there are facts of the latter condition relating to the existence of sufficient reason to believe, usually grounded and supported by availability of sufficient facts to prove the elements of the particular offence, then the satisfaction of the individual officer is most probable to exist. The existence, however, would not impose a compulsion on the individual officer to charge the case to court.

It should be noted that the major duty of a prosecuting counsel is not to win, but to lay all the relevant facts before a court to enable it to decide a case on its merit. The prosecution should act impartially in the cases prosecuted by them. The manipulation of facts by a prosecuting counsel amounts to unethical conduct.<sup>87</sup>

## 5. Conclusion and Recommendations

The ACJA 2015 contained provisions of law regarding the different methods of instituting criminal proceedings at the court, as demanded by different categories of persons or prosecuting authorities in the filing of a charge, First Information Report or information. That the police remain a prosecuting agency is not in doubt. The contention has always been whether a police officer who is a non-legal practitioner is entitled to right of audience at the superior court which is settled in the Supreme Court decision in *FRN v Osahon*.<sup>88</sup> The peace occasioned by that decision, though relative, could not continue to triumph, due to enactment of ACJA 2015 which introduced the necessity for the prosecutor to be a legal practitioner, thereby affecting validity of lay prosecutors in the police. This remained a perturbing situation within the criminal justice system until the enactment of the NPA 2020, which though emphasised the requirement for a police prosecutor to be a lawyer, but preserves prosecution by non-lawyer police officers in cases where they are allowed to prosecute such non-serious cases.

Although there have been, in the past, police resistance to the Anthony-General’s control of incidence of police investigation and prosecution in Nigeria, such contentious resistance no longer hold sway under the Nigerian law. The police should pay hallowed respect to rule of law *moreso*, that they are instructed to make available to the Anthony-General, reports of all investigations undertaken by them.<sup>89</sup> This is similar to the control exercisable the Anthony-General in the United State.

To this end, it is now sufficient to state that the law in Nigeria, subject to

<sup>87</sup> *Dariye v The State* (2015) 2 SCM 48 at 68-69.

<sup>88</sup> *FRN v Osahon & Ors* (n 16).

<sup>89</sup> See NPA 2020 (n 1) s 31.

necessary conditions which the law may impose, accords police officers who are legal practitioners the right of audience before all courts in Nigeria, while other police officers are limited by the subsisting powers of the police institution in prosecuting criminal cases before the magistrate courts and other similar courts, which are courts where police officers who are non-lawyers are permitted to prosecute in Nigeria.<sup>90</sup>

## Conflicts of Interest

The authors declare no conflicts of interest regarding the publication of this paper.

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<sup>90</sup>Ibid at s 66(2) which provides that a police officer may, subject to the provisions of the relevant criminal procedure laws in force at the federation or state level, prosecute before any court those offences which non-qualified legal practitioner may prosecute.

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