The Act, the Plea Bargain, the Administration of Criminal Justice 2015

MAY AGBAMUCHE-MBU

LEGAL EAGLE

may.mbu@thisdaylive.com

As legal practitioners prepare for the new legal year we look with great expectation towards a better and more fulfilling new beginning. So very much is expected of the judiciary and lawyers, especially at this point in time as the nation comes together collectively to fight corruption in every facet of our day-to-day life. President Muhammadu Buhari at the just concluded Nigerian Bar Association Annual General Conference has set his agenda and in his opening speech said 'as you all know by now, this administration has taken on the challenge of improving security, fighting corruption and revamping the economy, among many others. Security obviously depends on law and order. It also depends on the entire justice system working efficiently to ensure compliance with laws and appropriate safeguards for human rights.'

One therefore does not need to be a soothsayer to know that the spotlight will certainly be on the legal profession most especially in this dispensation as we are expected to handle, with the utmost professionalism, the barrage of corruption cases lurking in all corners waiting to explode. One Act that has generated a lot of debate in recent times and has been wholeheartedly welcomed is the Administration of Criminal Justice Act 2015, which took almost a decade to be enacted into law. On May 26th 2015 the former Attorney-General and Commissioner for Justice Mohammed Adoke SAN made a public presentation of the Administration of Criminal Justice Act (ACJA) and the Cybercrime Act. Stakeholders were particularly pleased with the enactment of the Administration of Justice Act because it will guarantee more humane treatment for suspects and reduce the delay in criminal justice delivery.

The proposals for the reform of the administration of criminal justice were advanced in 2005 by the National Working Group on the Reform of Criminal Justice in Nigeria. The Group, which was established by the then Attorney-General of the Federation Chief Akin Olujinmi, SAN and later retained by Chief Bayo Ojo, SAN consisted of stakeholders drawn from all parts of the criminal justice sector. The immediate past Attorney- General of the Federation, Mohammed Bello Adoke, SAN upon assumption of office established the Panel on Implementation of Justice Reform (PIJR) in 2011 to implement the proposals for reform produced by the National Working Group under the earlier administrations. The Panel conducted a thorough review of the proposals, updated them and adopted an improved version.

The Administration of Criminal Justice proposals combined the provisions of the two principal legislations, the Criminal Procedure Act and the Criminal Procedure Code into one principal federal Act which is intended to apply to all federal courts across the entire Federation.

Some key changes introduced by the Administration of Justice Act are namely: S.5 No unnecessary restraint - handcuffs, shackles or other types of restraints are not to be used anymore where it is not necessary to prevent violence, an attempt to escape or a Court Order to use them. This was present in previous laws concerning restraint but it is now expressly stated that no restraint be used where these conditions do not arise. S.7 A person shall not be arrested in place of a suspect - the arrest of friends, neighbours, or relatives in the absence of a suspect is prohibited. S. 9(1)(a) Search of arrested person - to be carried out with 'reasonable force' necessary for such purpose. Again the concept of 'reasonable force' is not novel but its clear and express restatement in the power to search signifies a shift away from rough and rugged justice to a more curtailed execution of police powers and duties. S.14 (1)&(2) An arrested suspect is to be taken to a police station or other place of reception, informed promptly of the allegation against them and be given reasonable facilities for obtaining legal advice, to furnish bail and otherwise make arrangements for their defence or release. (3) Any such communication and legal advice (though) must be done in presence of an officer. Subsection (3) then would seem to compromise the right to legal advice and privileged communication by requiring that all such be conducted in the presence of an officer. S.15 deals with the timely and detailed recording of arrests of whom, by whom and in what circumstances whilst S.16 establishes a Central Criminal Records Registry by the Nigeria Police Force for storage and central collection of information on arrests, suspects, offences committed etc. Such a centralised system of recording offences, arrests, and descriptions of suspects is the basic foundation of any investigation. The fact that such a registry has been absent till now is an indictment of the approach to criminal investigations in Nigeria. Accordingly the establishment is a welcome, albeit overdue, innovation.

S.32 (1) Where a suspect taken into custody in respect of a non-capital offence is not released on bail after 24 hours, a court may be notified by application on behalf of the suspect. (2) The court shall order the production of the suspect detained and inquire into the circumstances constituting the grounds of the detention and where it deems fit, admit the suspect detained to bail. It is common practice in Western Europe and North America to have a standard holding period of between 24-48 hours pre-charge. After such periods the Police are mandated to charge or release a suspect, which often serves as the benchmark for the existence of the rule of law and protection of private liberties in such a nation. This inclusion in the ACJA, the ability to apply to the applicable Court when a person has been held for 24 hours without charge is a welcome counterbalance to the ingrained abuse of powers of remand of suspects.

S.34 (1) Chief Magistrate to visit Police remand facilities other than prisons once a month. This section is clearly designed to enable the operating mechanism and hierarchy of authority to enable Magistrates visit and carry out their new oversight responsibilities at police/other authorised agencies' remand centres. In doing that it creates a misconduct offence for failing to provide the Magistrates with requisite information or other facility to exercise their oversight powers.

S. 306 states that 'An application for stay of proceedings in respect of a criminal matter before the court shall not be entertained.' With the introduction of this most welcome provision we sincerely hope the era of criminal matters hanging for close to 10 years will be put firmly behind us. Section.396 (2) states that 'After the plea has been taken, the defendant may raise any objection to the validity of the charge or the information at any time before judgment provided that such objection shall only be considered along with the substantive issues and a ruling thereon made at the time of delivery of judgment.' Subsections (3), (4), (5), and (6) all make stipulations regarding the day-to-day proceedings of criminal prosecutions, the limitation of party instituted adjournments, and the award for costs for delays. S.396 (7) specifically relates to High Court Judges elevated to the Court of Appeal. Previously all criminal proceedings being handled by such a Judge so elevated would cease and begin de novo with a new High Court Judge, however (7) now stipulates that the new Justice of the Court of Appeal will take all pending criminal proceedings before him to the Court of Appeal to be concluded within a reasonable time.

With all the innovations in the ACJA 2015, one section will play a particularly significant role in the fight against corruption and that is S.270 on Plea Bargaining. The section confirms the controversial practice of Plea Bargaining as a possible means of obtaining a conviction and/or securing the proceeds of criminal activity for the State. It sets out the guidelines for the acceptance of a plea bargain. 'Under the provision, where the Prosecutor is of the view that the offer or acceptance of a plea bargain is in the interest of justice, the public interest, public policy and the need to prevent abuse of legal process, he may offer or accept the plea bargain.' S. 270(2) 'The prosecution may enter into plea bargaining with the defendant, with the consent of the victim or his representative during or after the presentation of the evidence of the prosecution, but before the presentation of the evidence of the defence.'

The concept of plea bargaining is a popular phenomenon in the United States where it has been reported that over 95% of criminal cases have been resolved by such means. Considering the incredible number of prosecutions carried out in the US justice system every year, a Texas District Court Judge Michael McSpadden remarked that if every prosecution went to trial they would be seeing 10 years of delayed trials. The situation in the United Kingdom is markedly different from the US. Recently, plea bargaining has received renewed attention in the UK in various policies, case law and academic research. Negotiated plea agreements introduced by the Attorney General in 2009 for cases of serious or complex fraud was an attempt to openly regulate and formalise the nature of plea bargaining in England and Wales. Following this regulation some high profile corruption cases have involved the use of these plea agreements, most notably **R v. INNOSPEC**, **R v BAE SYSTEMS PLC** and **R v DOUGALL** (all 2010). The public perception in the UK is that plea bargaining is used by defendants to escape punishments they deserve under the law and sentencing discounts allow defendants 'get away' with their crimes. Such sentiments were contained in the 1993 Royal Commission on Criminal Justice, the 2001 Auld Report and the Justice for All White Paper, published in 2002.

On the home front we have had plea bargaining applied in a number of high profile corruption cases such as those against former governors Diepreye Alamieyeseigha (Bayelsa) and Lucky Igbinedion (Edo) to name but two amongst a host of other former governors. In the 2005 case involving former Inspector General of Police Tafa Balogun. He did plead guilty to corrupt enrichment and was accordingly sentenced to six (6) months imprisonment and ordered to forfeit all his assets totaling 150 million US dollars. In 2010 yet another case where plea bargaining was applied was the case of Mrs. Cecilia Ibru, the former Chief Executive of Oceanic Bank. Upon conviction for fraud she was made to forfeit assets valued at N191 billion and sentenced to eighteen (18) months imprisonment but ended up serving a jail term of six (6) months.

Plea bargain was also applied in the recent pension fraud case F**RN v ESAI DANGABAR & 5 OTHERS**. The High Court Judge Talba had directed one of the defendants to pay a fine of just N750, 000, shortly after the accused who was a former deputy director in the Pension office, admitted that he conspired with others to steal some N23 billion from the Police Pension Fund. This 'bargain' led to the judge's suspension by the National Judicial Council.

There was a hue and cry here over the judgment as the accused were seemingly patted on the hand, told to steal no more and asked to pay a pittance. Till date Nigerians are utterly perplexed by the disproportionate level of 'punishment' meted out for grievous crimes against the State. Some have advocated for the death penalty, comparing the above cases with what transpires in China. In 2014, Zhang Shuguang, a former deputy chief engineer of China's dissolved Railways Ministry was given a suspended death sentence for corruption. He was found guilty by a court in Beijing of taking bribes of more than 47m yuan ($7.7m) over 11 years. Zhang had previously been sacked from his position in 2011 and was also deprived of his political rights for life as well as having all his landed property confiscated. His deputy Su Shunhu was equally found guilty of taking bribes worth more than 24m yuan and promptly jailed for life.

There is a strong argument that plea bargains end up being less effective or less commensurate to the offence when employed in criminal prosecutions than when employed in civil suits because whereas civil loss can be readily calculated in monetary terms, sentencing in criminal prosecutions is fixed not to the probability of guilt but rather to deterrence and the punitive nature of dissuading crime. This in turn gives way to lazy prosecutions where rather than investigate crimes as thoroughly as possible/following best practice, the police and prosecuting counsel simply negotiate with defendants and enter into shoddy plea bargains.

Some have also argued that plea bargains may deny defendants fundamental human rights under Chapter IV of our Constitution in that it denies a defendant the right to a fair trial, especially in conditions where they are poorly or not represented at all. Notwithstanding these strong arguments, in the US at least the Supreme Court in Brady v. United States (1970) has upheld the legitimacy of the use of plea bargains where the voluntary nature of the defendant's plea is not impinged.

For plea bargains to be effective in the fight against corruption in Nigeria our laws need to be amended to provide for far stiffer mandatory custodial sentences alongside the fines as Nigerians are unanimous in their desire to fight the scourge of high profile corruption to a standstill. Prosecutors have a case to answer in the way and manner in which they have negotiated the plea bargain in some of these controversial corruption cases and it seems all too obvious that experienced and effective prosecutors should be enlisted to tackle such corruption cases. With the new Inspector General of Police Solomon Arase being a lawyer himself, he is surely in no doubt that he has his work cut out as the Police Force will require comprehensive training on the ACJA and all other fundamental rights as contained in Part IV of the Constitution. The same certainly also applies to all our other law enforcement agencies.