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Perspectives of Innovative Reforms in the Nigerian Criminal and Procedural Law

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ABSTRACT

Criminal law as accepted by all legal scholars and practitioners deals with wrongs against society, their proper investigation, prosecution, litigation and the defense of the person accused. It is a body of rules and statutes that defines conduct prohibited by the government because it threatens and harms public safety and welfare and it establishes punishment to be imposed for the commission of such acts. Others state that it is the body of law that defines conduct prohibited by the state (because the state thinks such conduct is socially injurious) and sets the penalties for such conduct. For an effective implementation of modern criminal laws in Nigeria, it becomes necessary for a modern criminal procedural law to be enacted as a body of law that accompanies the accused hence in common law countries the justice system is adversarial in nature. This system of justice is where the accused is presumed innocent until proven guilty and so certain safeguards have to be met such as (among others) hearing the other party out, making sure that the judge does not have a stake in the case, and that the legal process is conducted in a proper manner so as not to prejudice the accused. This writer presents the development of the Nigerian criminal law in consonant with the innovations in the criminal procedure law enacted under the Administration of Criminal Justice (ACJ Act 2015).

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Introduction

The fundamentals about the theory of Nigerian Criminal Law relating to legality, and retroactivity, which is a fundamental part of the Criminal Code, have been given full expression and support by specific provisions in the Nigerian Constitution.¹ It is clear from the provisions of the Criminal Codes that the theory of Nigerian Criminal Law can only be gathered from the Criminal and Penal Codes.² The Codes alone contain the body of doctrines, and the principles of criminal law which apply to all the positive rules governing offences in the criminal law. Herein lies, the doctrine of exhaustiveness of the Codes.³

The Criminal Codes have not departed significantly from the Common Law, and has therefore adopted the concepts of responsibility for crime based on volition of the offender and his awareness of the offence with which he was being charged. The Codes have however departed from the common law concept of rigid adherence to the concept of *mens rea*, and have taken cognizance of states of mind not approximating *mens rea* in certain offences, accepting negligent conduct as a factor in determining responsibility for criminal conduct.⁴

It is therefore correct to say that the Nigerian Criminal Law has not adopted the common law concept of *mens rea* with servile docility. The Nigerian Criminal Law has avoided the invidious situation where a single concept tends to represent various states of mind and conduct, and behavior resulting in varying degrees of impression not nearly approximating to the guilt necessary for the commission of the offence.⁵

The Nigerian Criminal Law in thus conforming to the adoption of the classical theory of *mens rea*, was at the same time adapting the concept to conform to the states of mind regarded as sufficient to establish guilt in respect of the offence created in the criminal Codes. Since the logical consequence of a finding of guilt is appropriate punishment, the philosophy of the criminal law in Nigeria is that no such punishment ought normally to be imposed without the certainty prescribed by the rules that the person concerned ought to be so dealt with in the interest of justice.⁶

An important factor in the theory of Nigerian Criminal Law is the inflexible adherence to the principles of legality.⁷ The principle of legality, which requires that no conduct shall constitute an offence unless as prescribed by law, the equality

¹Sections 4(9), 33(5), 33(8), Cap. 42 Criminal Codes 1958.

²Wallace Johnson v. R (1940) AC 231; Ogbuagu v. Police (1953) 20 NLR 139.

³Ogbuagu v. Police (1953) 20 NLR 139.

⁴Section 24 Criminal Code, Cap. 42, Sections 196, 197, 208, 221-222 of the Penal Code.

⁵Section 24 Criminal Code, Cap. 42, Section 1 Penal Code Chapter 1.

⁶Sections 32, 33 Constitution of the Federal Republic of Nigeria 1999 (as amended).

⁷Sections 2, 4 Criminal Code Act, Cap. 42, Section 28 Penal Code; Section 33(12) Constitution of the Federal Republic of Nigeria 1999 (as amended).

of every normal person in respect of offences created under the criminal law and the certainty of the legal process, is accepted as the very foundation of the Nigerian Criminal Law.⁸

Criminal Procedure in Nigeria in the other hand was governed by two main legislations which were handed down to us by the British Colonial Administration, namely: the Criminal Procedure Act (CPA)⁹ and the Criminal Procedure Code (CPC)¹⁰. Each state in Nigeria adopted the CPA or the CPC. These laws have been applied for many decades without significant improvement. As a result, the criminal justice system has lost its capacity to respond quickly to the needs of the society: To check the rising waves of crime, speedily bringing criminals to book and protect the victims of crime. The ACJA puts in place a new criminal procedure law that responds to Nigeria's dire need of a new legislation which will transform the criminal justice system to reflect the true intents of the Constitution and the demands of a democratic society and to eliminate unacceptable delays in disposing of criminal cases and improve the efficiency of criminal justice administration in the country.

The ACJA merges the main provisions of the two principal legislations, CPA and CPC into one principal federal Act which is intended to apply uniformly in all federal courts across the entire Federation. Substantially, it preserves the existing criminal procedure systems. But it introduces innovative provisions that could enhance the efficiency of the justice system. In order words, the ACJA 2015 builds upon the existing framework of criminal justice administration in the country. However, it fills the gaps observed in these laws over the course of several decades.

Purposes of the ACJA

The main purposes of the ACJA include the following: To promote efficient management of criminal justice institutions and speedy dispensation of justice, protect the society from crime, and protect the rights and interests of defendants and victims.¹¹ It is submitted that these indicate a deliberate shift from punishment as the goal of criminal justice to restorative justice which pays attention to the needs of society, the victims, vulnerable persons and human dignity. The general provisions of ACJA apply to criminal trials in court except where express provision is made in the Act or in any other law in respect of any particular court or form of trial. The Act also provides that its provision shall not apply to a Court Martial.¹²

Unlawful Arrests

Unlawful arrest is one of the major problems of the Nigerian criminal process. It is one of the reasons why police stations and prisons are overcrowded. Arrests are sometimes made on allegations that are purely civil in nature or on a frivolous ground. In the old CPA, the police could arrest without a warrant, any person who has no ostensible means of sustenance and who cannot give a satisfactory account of himself.¹³ This particular provision has been greatly abused by the police who use it as a ground to arrest people indiscriminately. The ACJA has deleted this provision.

There were several instances where the police arrested relations or friends or close associates of a crime suspect to compel the suspect to give himself up even though that person was not linked in any way to the crime alleged against the suspect. The ACJA specifically prohibits arrest in lieu.¹⁴ Apart from the police, other agencies vested with power of arrest e.g. the Economic and Financial Crimes Commission (EFCC), National Drug Law Enforcement Agency (NDLEA), National Agency for Food and Drug Administration and Control (NAFDAC), etc. had abused this power to arrest and detain relatives and close associates of criminal suspect in lieu of the suspects where they had challenges in apprehending the suspects.¹⁵ Section 7 of the ACJA has curtailed this kind of abuses by providing that it is an illegal act, an offence and a violation of the fundamental rights of a citizen to be arrested in place of a suspect simply because he/she is related to the suspect.

Notification of Cause of Arrest

Relative sections of the CPA¹⁶ and CPC¹⁷ provide that a police officer or a person making an arrest is to inform the arrested person of the reason for the arrest, except where he is being arrested in course of the commission of the offence or escaped from lawful custody. It has been argued that this provision falls short of contemporary requirement.¹⁸ The ACJA retains this provision. However, there is a proviso which mandates the police officer or any other person to inform the suspect of his right to: remain silent or avoid answering any question until after consultation with a legal practitioner or any other person of his own choice; consult a legal practitioner of his choice before making, endorsing or writing any statement or answering any question put to him after arrest; free legal representation by the Legal Aid Council of Nigeria where applicable.¹⁹

This provision re-affirms the Constitution of the Federal Republic of Nigeria,²⁰ which provides that any person who is arrested or detained shall have the right to remain silent or answering any question until after consultation with a legal practitioner or any other person of his choice. It is necessary for this writer to state here that the proviso in section 6(2) is quite laudable since the suspect will have the benefit of not only being informed of the offence he/she has committed but also an additional advantage of counsel assisting in securing his immediate release on bail and ensuring expeditious trial. This would in turn prevent prolonged detention of suspects and hopefully bring about decongestion of the prisons.

Humane Treatment of an Arrested Person and Prohibition of Arrest on Civil Cases

The ACJA reiterates the constitutional provision of the right to dignity of person. The Act provides that: a suspect shall-be accorded humane treatment, having regard to his/her

¹⁴ACJA 2015 Section 7

¹⁵The Guardian Newspaper (2016)Unlawful detention of a Monarch for 8 months by the police in Lagos, Sahara Reporters (2013) Manhandling and unlawful detention of a Togolese national by the police in Lagos, Nigeria Police watch (2011): Unlawful detention of Pastor Emeka Ebuta by the police in Abuja.

¹⁶CPA 2004 Section 5

¹⁷CPC 1960 Section 38

¹⁸Ani,C.C, 2011,„Reforms in the Nigerian Criminal Procedure Laws, Nigerian Institute of Advanced Legal Studies“. 24.

¹⁹ACJA 2015 Section 6.

²⁰Section 35(2) 1999 Constitution of the Federal Republic of Nigeria

⁸Sections 2, 4 Criminal Code Act, Cap. 42, Section 28 Penal Code.

⁹Cap. C41 LFN 2004.

¹⁰Cap. C42 LFN 1959.

¹¹ACJA 2015 Section 1

¹² ACJA 2015 Section 2

¹³CPA 2004 Section 10(1)

right to the dignity of his person; shall not be subjected to any form of torture, cruel, inhuman or degrading treatment.²¹ The Act also deals with the long standing problem whereby people employ the machinery of criminal justice wrongly for civil matters. It is not uncommon for people to maliciously instigate the arrest and detention of others for a breach of contract, failure to pay debt owed or for other civil wrongs. This provision that “a suspect shall not be arrested merely on a civil wrong or breach of contract”²², is a laudable one. It is submitted that it would check arbitrary arrest of persons by law enforcement and security agencies.

Mandatory Inventory of Property

In order to encourage accountability and transparency, the ACJA introduced a provision which states that a police officer making an arrest or to whom a private person hands over a suspect, shall take an inventory of all items or properties recovered from the suspect.²³ The inventory must be duly signed by the police officer and the suspect. However, where the suspect refuses to sign, it shall not invalidate the inventory. This provision also directs that a copy of the inventory shall be given to the suspect, his legal practitioner, or such other person as the suspect may direct. This provision permits the police to release such property upon request by either the owner of the property or parties having interest in the property pending the arraignment of the suspect before a Court. Where a police officer refuses to release the property to the owner or any person having interest in the property, the police officer shall make a report to the Court of the fact of the property taken from the arrested suspect and the particulars of the property.

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It is now entirely for the court to decide whether to release the property or any portion of it in the interest of justice to the safe custody of the owner or person having interest in the property. This provision further provides that where any property has been taken from a suspect under section 10 of the ACJA, and the suspect is not charged before a court but is released on the ground that there is no sufficient reason to believe that he has committed an offence, the property taken from the suspect shall be returned to him, provided that the property is neither connected to nor a proceed of crime.

Recording of Arrest

The ACJA makes provisions for mandatory record of personal data of an arrested person. Such personal data of the arrested person shall include: the alleged offence(s); the date and circumstances of the arrest; name, occupation and residential address of the suspect; and the suspect's identification which include his height, photograph, fingerprint impressions, or such other means of identification.²⁵ The Act further provides that the process of recording shall be concluded within a reasonable time, not exceeding forty-eight hours. This is intended to check prolong pre-trial detention in the guise of recording the personal data of arrested persons.²⁶

Establishment of a Police Central Criminal Records Registry (CCRR)

The ACJA makes provision for the establishment, within the Nigerian Police, a Central Criminal Records Registry (CCCR). It also provides that there shall be established at every state police command, a CCR which shall keep and transmit all such records to the Central Criminal Records Registry (CCRR).²⁷ The Act further mandates the Chief Registrar of the courts to transmit the decisions of the court in all criminal trials to the CCRR within thirty-days after delivery of judgment. Where there is default by the Chief Registrar to transmit records within thirty days after judgment, he shall be liable to disciplinary measures by the Federal Judicial Service Commission for misconduct.²⁸ The establishment of CCRR will ensure that all arrest and judgments are well documented. This is intended to avoid a repeat of what happened in the case of *Agbi v. Ibori*,²⁹ where the ex-governor of Delta State, Nigeria, the “real” James Onanefe Ibori (“the Oddidigborigbo of Africa”) and an upright and decent citizen of Nigeria, shared a name with a common criminal.

Electronic Recording of Confessional Statement

The ACJA provides that where a person arrested with or without a warrant of arrest volunteers to make a confessional statement, the police officer shall record the statement in writing or may record the making of the confessional statement electronically on a retrievable video compact disc or such other audio visual means.³⁰ The Act further provides that notwithstanding the provision of subsection (4) of section 6, an oral confession of arrested suspect shall be admissible in evidence. This provision of the ACJ Act conforms to the position of the law as contained in the Evidence Act.

The electronic recording of confessional statement was aimed at ensuring that police officers do not use torture and other involuntary means to extract confessional statements from suspects. But it was observed that most police stations in the country do not have electronic recording machines.³¹ Even if such machines were provided, a suspect could be taken into a room where there are no recording equipment and tortured there. The suspect could therefore be taken to another room with recording equipment to make a confessional statement as if he/she has not been tortured. It was further observed that practical problems of implementation as these are already being experienced in

²⁵ ACJA 2015 Section 15.

²⁶ ACJA 2015 Section 15(2).

²⁷ ACJA 2015 Section 16(1)(2).

²⁸ ACJA 2015 Section 16(3).

²⁹ (2004) All FWLR (PT. 202)1799.

³⁰ ACJA 2015 Section 15(4).

³¹ Researcher's own observation

²¹ ACJA, Section 8(1).

²² ACJA, Section 8(2).

²³ ACJA, Section 10.

²⁴ ACJA 2015 Section 10

Lagos State where electronic recording of the making of confessional statement is already provided for. The final provisions of the ACJA took cognizance of the observed practical problems.

Recording of Statement of Suspect

In line with international best practice, the ACJA stipulates that where a person is arrested on allegation of having committed an offence, the person's statement shall be taken in the presence of a legal practitioner of his/her choice, or where he/she has no legal practitioner of his choice, in the presence of an officer of the Legal Aid Council, official of a Civil Society Organization, a Justice of the Peace or any other credible person of his choice.³² The Legal Practitioner or any other person mentioned in this provision shall not interfere while the suspect is making his/her statement. Where a suspect does not understand or speak or write in the English language, an interpreter, shall record and read over the statement to the suspect to his understanding and the suspect shall then endorse the statement as having been made by him, and the interpreter shall attest to the making of the statement.³³ The interpreter shall endorse his name, address, occupation, designation or other particulars on the statement. The suspect shall also endorse the statement with his full particulars.³⁴

Monthly Report by Police to Supervising Magistrate

As a part of the innovations in the Nigerian criminal justice system to check police abuse, the ACJA provides that an officer in charge of a police station or an official in charge of an agency authorized to make an arrest shall on the last working day of every month report to the nearest magistrate the cases of all suspects arrested with or without warrant within the limit of their respective stations or agency, whether the suspect has been admitted to bail or not.³⁵ Such report is to contain the particulars of the persons as prescribed in the ACJA.³⁶ Upon receipt, the magistrate is to forward the report to the Administration of Criminal Justice Monitoring Committee. The Committee shall analyze the report and advise the Attorney-General of the Federation as to the trends of arrests, bail, and related matters. Again, this provision is quite commendable as it will serve as a form of check and balance on the activities of law enforcement agencies. In addition to the above provisions, Section 34 of ACJA provides that the Chief Magistrate or where there is no Chief Magistrate within the police division, any magistrate designated by the Chief Judge for that purpose, shall conduct monthly inspection of police stations and other places of detention within his territorial jurisdiction. During the visit, the magistrate may:

- * Call for and inspect the record of arrest;
- * Direct the arraignment of the suspect;
- * Where bail has been refused, grant bail to any suspect where appropriate.

Non-Custodial Sentences

The ACJA in different sections attempted to address the problem of excessive use of imprisonment as a disposal method by introducing some alternatives to imprisonment.³⁷ These include the introduction of suspended sentences, community service, parole and probation. It also provides that

the court, in exercising its powers shall have regard to the need to: (a) reduce congestion in Nigerian prisons; (b) rehabilitate prisoners by making them to undertake productive work; and (c) prevent convicts who committed simple offences from mixing with hardened criminals.

While reforming the Nigerian criminal procedure through the enactment of the ACJA in 2015, there were salient issues of meeting the requirements of the United Nations Minimum Standard Rules for Non-custodial Sentences³⁸ (The Tokyo Rules 1990). There is also the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 1985. These are two important international legal instruments for which Nigeria is a signatory and must be guided by them. With the help of this writer who is a member of the Implementation Committee of the ACJA, corrections are being made to the fact that the ACJA did not make provisions for making sure that the non-custodial sentencing should be by the consent of the defendant as prescribed by Rule 3.3.2 of the United Nations Minimum Standard Rules for Non-Custodial Sentences. Furthermore, there have been recommendations made to relevant judicial authorities and the legislature for subsidiary legislation that will help to strengthen the necessary institutions for effective implementation of the ACJA 2015 particularly in areas such as probation, community service and parole in order to become an enduring procedural law document for Nigeria.

Scope and Context of Nigerian Criminal Law

The Nigerian criminal law is now contained in two principal Codes, the Criminal Code and the Penal Code³⁹ and several other legislations creating criminal offences. Indeed an accurate construction of the enabling provision of the Codes would lead to the conclusion that only the two Codes contain the criminal laws of the country.

This is because the other offences outside the Codes are offences because they have been so declared by the Codes. The relevant portion of section 2 of the Criminal Code Act 40 provides that—(1) The provisions contained in the Code of Criminal Law set forth in the Schedule to this Act, and hereinafter called “The Code” shall, except to the extent specified in subsection (2), be the law of each Region, of Lagos with respect to the several matters therein; To the same effect is section 2 of the Penal Code⁴⁰ which is contained in the Schedule to this Law shall be the Law of the Northern Region with respect to the several matters therein dealt with and the said Schedule may be cited as, and hereinafter called, the Penal Code.

³⁸ Adopted by General Assembly Resolution 45/110 of 14 December 1990. For a critique of the Standards see Van Zyl Smit D, Snacken S and Hayes D. One cannot legislate kindness: Ambiguities in European legal instruments on non-custodial sanctions. 2015. *Punishment & Society*. Vol. 17(1) pp3-26. See also Yekini AO and Salusi Esq M. Probation as a Non-custodial Measure in Nigeria: Making a Case for Adult Probation Service. 2013. *African Journal of Criminology and Justice Studies: AJCJS*, Vol 1, No1, pp101-107. Rouhi E, Dezaki LR & Karveh MJ. Protection of Prisoner's Human Rights in Prisons through the Guidelines of Rule of Law. 2017. *Journal of Politics and Law*; Vol. 10, No. 1, pp71-83.

³⁹ The Criminal Code, Cap.42, with the close adaptation in the Western State, Cap. 19 and the Former Eastern Region (now Eastern States) Cap. 30 and the Penal Code No. 18 of 1959.

⁴⁰ Cap.42 1958, Laws of the Federation of Nigeria. 68.

³² ACJA, Section 17 (2).

³³ ACJA, Section 17 (3).

³⁴ ACJA, Section 17 (4 & 5)

³⁵ ACJA, Sections 15 & 18

³⁶ ACJA 2015 Sections 28 & 15.

³⁷ ACJA 2015 Sections 455, 460 & 468.

The Criminal Code was based on the Queensland code, which was introduced into the State of Queensland, Australia in 1899 by the British. It is known that Sir James Fitz Stephen,⁴¹ a popular English criminal lawyer was instrumental in drafting it and made sure that it became a replacement in Australia for the English common law of crimes. Even though the draft code was not enacted into law by the British Parliament it became an essential commodity exportable to the British colonies and protectorates. By 1888, the Colony of Lagos and the Southern Provinces of Nigeria made effort to enact a criminal code which culminated in Criminal Code Bill of 1899. By 1904, a Criminal Code was enacted for the Northern Protectorates. Following the amalgamation of both the Northern and Southern Protectorates, the Criminal Code which was hitherto enacted for only the Northern Protectorate became operative throughout (Niger Area) Nigeria in 1916. By 1960, the Northern Region replaced the Criminal Code with the Northern Nigerian Penal Code for the fact that the Penal Code, based upon the model of the Sudan Code, is more suitable to a community that is predominantly Muslim.⁴² From that date, the Criminal Code became applicable only in the Southern States of Nigeria.

Because of the variegated history of the Criminal Code, it is easy to find traces of the New York Penal Code, Italian Penal Code of 1880, St. Lucia Criminal Code, Indian Penal Code and the Draft English Code of 1879. The Code in itself can be defined as a compilation of relevant laws in a given area. According to Stephens in *Katsina N.A v Kogo*⁴³, the object of codification is to reduce to writing the whole law upon a given object in such a manner that when the code becomes a law, every question which can arise upon the subject which it deals will be provided for by its express language.

Conclusion

With the enactment of the ACJA 2015, there is increased movement towards harmonizing criminal procedures and criminal justice administration in Nigeria. Before now, there was dire need to comprehensively reform criminal justice procedures because the applicable laws (CPA and CPC) were obviously no longer suitable to meet the current challenges of organized and emerging crimes. The ACJA, drawing from the tested and effective provisions of the CPA and CPC, and as well as from comparative best practices, not only introduced modern, innovative and forward-looking provisions into Nigeria's criminal justice system, but it also unified criminal justice administration in the country. As a result, investigators, prosecutors, defense lawyers, paralegals, prison officials, and other stakeholders who work across states will no longer be burdened by the dichotomy of diverse statutory laws applicable in different parts of the country.

Criminal conducts are now, more than in the early 20th century when the CPA and CPC were enacted, much organized, ferocious and cross-border. Therefore, crime management and criminal justice administration should adhere to the emerging trends, engendered by the easy movement of persons and goods, and the huge impact of Information Technology on criminality the world over. The ACJA is a welcome innovation that underscores the imperatives of regular law reform in advancing democratic good governance and the rule of law in Nigeria. As the federal criminal justice sector kick-starts the implementation of the ACJA, all the states of the federation that have not enacted the Act are expected to urgently do so in order to widely eliminate the cumbersome processes and excessive delays in the criminal justice administration in Nigeria.

⁴¹Gubba v. Gwandu N.A, (1947) 12 W.A.C.A.141.

⁴²Fagoji v. Kano N.A, (1957) N.R.N.L.R57.

⁴³ (1938) 14 N.L.R.49.