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THE ABUSE AND MISUSE OF PROSECUTORIAL DISCRETION IN HIGH-PROFILE CORRUPTION CASES IN NIGERIA: A CALL FOR A PARADIGM SHIFT

Aaron Olaniyi Salau*

ABSTRACT

This article focuses on the place of prosecutorial discretion in the Nigerian context and asks whether and to what extent prosecutorial discretion in high-profile corruption cases involving public officials ought to be guided and constrained by the principles of impartiality, accountability and transparency. In Nigeria, the Attorney General of the Federation (and each state) has the discretion to institute, take over, and discontinue criminal prosecution against any person subject to the constitutional caution to "have regard to the public interest, the interest of justice and the need to prevent abuse of legal process" in its exercise. Despite this constitutional caution, the courts have held that the exercise of such discretion is immune from judicial review. Lately, cases involving the political class and public servants accused of extensive theft of public funds and corrupt practices have been plea-bargained with ludicrous sentences being handed down by Nigerian courts. Considering the widely held belief of political interference, bias and prejudice in these prosecutorial decisions and the damage done thereby to the rule of law, a critical reflection surrounding prosecutorial discretion in Nigeria is imperative. This article draws on doctrinal as well as comparative legal methods to argue that the available devices to constrain prosecutorial discretion in Nigeria do not go far enough to guarantee fairness and accountability and ought to be reformed. The South African model despite its limitations is associated with transparency and accountability and provides an alternative avenue for reform of prosecutorial discretion in Nigeria.

* PhD in Public Law (UCT, Cape Town), LL.M & LL. B (OAU, Ile Ife), B.L. (Lagos); Reader in Law and Coordinator of Clinical Legal Education, Department of Jurisprudence & International Law, Faculty of Law, Olabisi Onabanjo University (OOU), Ago-Iwoye, Nigeria; email: aaron.salau@oouagoiwoye.edu.ng; Orcid: https://orcid.org/0000-0002-6703-7794.

1. INTRODUCTION

Prosecutorial discretion is the authority of a prosecutor to decide whether to initiate, pursue or withdraw criminal charges against a person, the nature of charges to be brought, and the overall handling of a case including a plea agreement.[1] The exercise of such broad powers is essential in maintaining public confidence in the rule of law and a fair and efficient criminal justice system, but it requires accountability in any democratic setting. In Nigeria, considering the myriads of corrupt practices that have caused the near collapse of governance and the economy, the prosecution of high-profile corruption cases involving political functionaries takes on a heightened significance.[2] However, if the Nigerian Supreme Court decision in *State v Ilori*[3] on the prosecutorial powers of the Attorney General is anything to stand by, the course of judicial review of prosecutorial discretion will remain stagnant despite its abuses, particularly in the prosecution of corrupt public officials.[4]

Plea-bargaining was introduced into the criminal justice process as a special device in the prosecution of top-ranking public officials,[5] but the lack of independence and political interference have marred the decisions of the prosecuting institutions.[6] Consequently, public perception is palpable concerning the gross abuse of prosecutorial discretion in favour of

1 Cowdery N (2013) "Challenges to Prosecutorial Discretion" 39(1) *Commonwealth Law Bulletin* 17 – 20.

2 Abe B (2023) "Present State of Some High Profile EFCC Corruption Cases" International Centre for Investigative Reporting, available at https://www.icirnigeria.org/present-state-of-some-high-profile-efcc-corruption-cases/ (visited 20 November 2023); Folorunso OOF (2023) "Plea Bargain and the Fight Against Corruption in Nigeria" 7(1) *Wukari International Studies Journal* 502 – 520 at 513.

3 [1983] 1 SCNLR 94.

4 Olujobi OJ (2021) "Recouping Proceeds of Corruption: Is there any Need to Reverse Extant Trends by Enacting Civil Forfeiture Legal Regime in Nigeria?" 24(4) *Journal of Money Laundering Control* 806 – 833 at 830; Okpala CP (2020) *An Evaluation of the Role of Prosecutorial Discretion in The Anti-Money Laundering Regime of Nigeria* unpublished PhD Thesis, Nottingham Trent University, at 223; Onyema E et al (2018) *The Economic and Financial Crimes Commission and the Politics of (In)Effective Implementation of Nigeria's Anti-Corruption Policy*; Mba O (2010) "Judicial Review of the Prosecutorial Powers of the Attorney-General in England and Wales and Nigeria: An Imperative of the Rule of Law" *Oxford University Comparative Law Forum* 2, para 3.4.1, available at https://ouclf.law.ox.ac.uk/judicial-review-of-the-prosecutorial-powers-of-the-attorney-general-in-england-and-wales-and-nigeria-an-imperative-of-the-rule-of-law/ (visited 2 September 2023).

5 Osipitan T & Odusote A (2014) "Challenges of Defence Counsel in Corruption Prosecution" 10(3) *Acta Universitatis Danubius Juridica* 71 – 94.

6 Aliyu MM (2022) "Challenges to Investigation and Prosecution of Corruption Cases in Nigeria" 7 *African Journal of Criminal Law and Jurisprudence* 24 – 32 at 28.

party loyalists, the president and the political class,[7] particularly in corruption and money laundering cases, with few exceptions.[8] This has caused marked disparities between offences and sentences, proceeds of crime and recoveries, and high public officials and other defendants,[9] which gives the impression of a special "rule of law" being created in their favour as against other citizens.[10] Contrariwise, there is judicial review of prosecutorial discretion under South African jurisprudence, whereby the prosecutor must be independent of political influence, act fairly and in the public interest, is reputed to be more advanced than others in the Commonwealth.[11] Though imperfect, the South African prosecutorial decision-making has shown much resilience despite being beset by political power-play.[12] Drawing on the role of transparency and accountability in South Africa for effective prosecution, this paper argues

7 Osamor R (2022) "Plea Bargaining in an Administrative State" 4(1) *International Journal of Comparative Law and Legal Philosophy* 39 – 44 at 41 – 42; United Nations Office on Drugs and Crime (2019) *Corruption in Nigeria, Patterns and Trends: Second Survey on Corruption as Experienced by the Population* 29. Oguche S (2016) "Development of Plea Bargain in the Administration of Justice in Nigeria: A Revolution, Vaccination against Punishment or Mere Expediency" in Azinge E & Laura A (eds) *Plea Bargaining in Nigeria: Law and Practice* Lagos, Nigeria: Nigerian Institute of Advanced Legal Studies 97 – 119. Referred to in Aborisade RA & Adeleke OA (2018) "One Rule for the Goose, One for the Gander? The Use of Plea Bargaining for High Profile Corruption Cases in Nigeria" 12(2) *African research Review* 1 – 12 at 6.

8 See *A Compendium of 100 High Profile Corruption Cases in Nigeria* 3 ed (2019), available at https://hedang.org/blog/a-compendium-of-100-high-profile-corruption-cases-in-nigeria/ (visited 23 August 2023); Adegbie FF & Fakile SA (2022) "Economic and Financial Crime in Nigeria: Forensic Accounting as Antidote" 6(1) *British Journal of Arts and Social Sciences* 37 – 50, available at https://d1wqtxts1xzle7.cloudfront.net/48258882/Economic_and_Financial_Crime_in_Nigeria__Forensic_Accounting_as_Antidot.pdf?1471969572=&response-content (accessed 24 August 2023). A former Attorney General of the Federation, Mr Aondoakaa, flagrantly exercised his prosecutorial discretion in favour of politically exposed persons when he discontinued the criminal proceedings against former Governor Orji Uzor Kalu and Jimoh Lawal and refused to prosecute the suspects in the Siemens, Willbros and Halliburton corruption scandals, even though the culprits in the corruption scandals had been convicted on the same offences in other jurisdictions, see Office of Public Affairs, US Department of Justice (2009) "Kellogg Brown & Root LLC Pleads Guilty to Foreign Bribery Charges and Agrees to Pay $402 Million Criminal Fine", available at https://www.justice.gov/opa/pr/kellogg-brown-root-llc-pleads-guilty-foreign-bribery-charges-and-agrees-pay-402-million (visited 25 August 2023).

9 *FRN v Tafa Balogun* [2005] 4 NWLR (Pt 324) 190; *FRN v Esai Dangbar* (2012) LPELR-19732 (CA); *FRN v Igbinedion* [2014] All FWLR (Pt 734) 101; *FRN v Cecilia Ibru* unreported charge no FHC/L/297C/2009 (8 October 2010).

10 Aborisade & Adeleke (2018) at 6.

11 Okpaluba C (2020) "Prosecutorial Discretion and Judicial Review: An Analysis of Recent Canadian and South African Decisions" 35(2) *South African Public Law* 27.

12 See *Nkadimeng v the National Director of Public Prosecutions & Others* (Case No. 3554/2015), Gauteng High Court, South Africa (the affidavits of Vusi Pikoli and Anton Ackermann); Africa Criminal Justice Reform *The Appointment and Dismissal of the NDPP: Instability Since 1998*, available at https://acjr.org.za/resource-centre/appoint-and-dismiss-of-ndpp-fs-7-fin.pdf (visited 1 September 2023).

for the adoption of new laws and policies, the repeal and overturning of obsolete criminal laws and judicial decisions respectively, and the amendment of provisions of the Nigerian Constitution. This is towards the reformation of all devices designed to constrain and guide prosecutorial discretion in Nigeria to guide against the abuse of prosecutorial discretion in high-profile corruption cases. Part 2 conceptualises the techniques and methodologies of prosecutorial discretion. Part 3 engages a comparison of the law and practice of prosecutorial discretion in South Africa and Nigeria. Part 4 examines the path towards a paradigm shift in Nigeria's prosecution decision-making based on best practices from the South African experience. Part 5 concludes and charts the way forward.

2. PROSECUTORIAL DISCRETION AND CORRUPTION CASES

The exercise of prosecutorial powers is the embodiment of the accusation principle of criminal justice in common law countries, the significance of which lies in the effective prosecution of persons accused of criminal conduct against the state, but there has been an increasing public awareness of prosecutorial misconduct across nations, particularly on the prosecution for corruption-related crimes. Considering the growing discontent with the law, in common law countries the adversarial principle of criminal justice has taken on an added significance in the prosecution for corrupt practices of persons who hold public office in trust for the people. It demands that prosecutions be carried out with such seriousness as a form of deterrence and to build public confidence in the rule of law. The prosecution’s duty to truth together with the principles of discretion, independence, impartiality, and strategy which are inherent in the rule of law have thus become key in the prosecution of corruption cases in commonwealth countries.

This part begins with an overview of the nature, content, and scope of the concept of prosecutorial discretion; it then gives a background to the emergence of the law and practice of judicial review of prosecutorial discretion in common law countries; and lastly, it highlights the techniques and methodologies of judicial review of prosecutorial discretion.

2.1 Prosecutorial discretion: Nature and scope

The Prosecution is a central component of the criminal justice process in any law jurisdiction. Prosecutors represent the state to determine whether to initiate (and all other decisions incidental thereto), or to withdraw criminal charges in the courts against anyone suspected of having committed a criminal offence.[13] These determinations include the decision to enter into plea negotiations with a suspect and must be made under the law. These exclude whatever tactics or conduct a prosecutor may display before the court from the scope of prosecutorial discretion. The determinative rules and practice vary across jurisdictions with two commonalities. The first concerns the rules of evidence, that is, the availability, admissibility, and credibility of evidence towards the establishment of a reasonable prospect of conviction (*prima facie* case). The second relates to public interest considerations, namely, the nature and seriousness of the crime, type and prevalence of offence, victim interest and impact, and the like.[14]

Considering the extensive ambit of the prosecutorial mandate, prosecutors exercise considerable powers *vis-à-vis* citizens, the victims of crimes and the society.[15] In most Commonwealth jurisdictions (for example, Sierra Leone, Uganda, Guyana, Barbados, Jamaica, Zambia, Fiji, etc), the traditional default position is left unconstrained by judicial review because judges usually refrain from second-guessing the Attorney General's broad prosecutorial discretion, though it is amenable to legal or quasi-legal or contextual evaluations. The general view in the Commonwealth that prosecutorial discretion is not subject to judicial review even if the decision could be considered an abuse of power is based on the Attorney General's quasi-judicial role in the overall scheme of criminal justice.[16] It

13 For Nigeria: The Constitution of the Federal Republic of Nigeria, 1999 (as amended), secs 174 & 211; Administration of Criminal Justice Act, 2015, secs 104 – 106, 109 – 110; South Africa: Constitution of the Republic of South Africa, 1996 (as amended), sections 179(1) – (5); National Prosecuting Authority Act 32 of 1998.

14 Varney H, De Silva S & Raleigh A (2019) *Guiding and Protecting Prosecutors: Comparative Overview of Policies Guiding Decisions to Prosecute* ICTJ 5 – 18.

15 Varney, De Silva & Raleigh (2019) at 1.

16 Mba (2010) para 2.1, before note 75; *R v secretary of State for the Home Department, ex parte Doody* [1994] 1 AC 534 at 564.

accords with the separation of powers doctrine and the demand of discretion as a requirement of independence of the prosecutor, an "essential feature of the criminal justice system",[17] and constitutes the "core" of a prosecutor's responsibilities.[18] Incidentally, Nigerian judges have expressed similar sentiments in their adherence to the traditional position despite repeated promptings that conditions are ripe for them to change course, an issue discussed in more detail in part 3.2 below.

Beyond the foregoing, the unethical inclinations coupled with the trend of prosecutorial misconduct in democratic countries raise serious questions about the role of prosecutorial discretion in the criminal justice system generally and especially in official corruption cases considering the principle of independence. The prosecutorial decision-making is quasi-judicial because prosecutors aim at doing justice through truth-seeking to determine whether an accused has a case to answer by being implicated in the commission of a crime through a criminal investigation. This determination is sometimes referred to as a *prima facie* case or a reasonable and probable cause to believe in the accused's guilt. Independence is key to such a process as a requirement of the public interest whereby the prosecutor's judgment must be free from partisan political or other corruptive influences on or from the prosecutor. Again, since prosecutorial decision-making can inherently cause the loss of liberty, property or life of an accused, or have far-reaching effects on the rights and interests of the victim of crime and the society,[19] there cannot be independence without accountability. Accountability relates to the answerability of prosecutors for their decisions to the demands of public scrutiny since they serve the public interest. Nonetheless, independence is required in terms of shaping outcomes in cases of utmost public interest such as high-profile corruption cases, public prosecutors occupy a vital but sensitive position since they are usually members of the executive arm of government to which they are accountable in most Commonwealth jurisdictions. This, in turn, makes them susceptible to political pressure. The implication then is that the need to uphold the principles of equality

17 *Law Society of Upper Canada v Ontario Public Service Employees Union* 2014 ONSC 270; *Krieger v Law Society of Alberta* 2002 SCC 65 paras 29, 30; *R v Beare* (1988), 45 C.C.C. (3d) 57 (S.C.C.) 76.

18 *R v Nixon* (2011) SCC 34; *Miazga v Kvello Estate* (2009) SCC 51 para 46; *Krieger v Law Society of Alberta* (2002) SCC 65 paras 30 – 32.

19 *Taman v Canada (Attorney General)* 2015 FC 1155 (CanLII) para 17.

before the law, the right to equal treatment under the law and the value of human dignity on a day-to-day basis goes beyond the traditional requirements of accountability based on the separation of powers. Consequently, the influence of constitutionalism has brought a slight but significant shift in a few Commonwealth countries on the imposition of judicial scrutiny on the exercise of prosecutorial discretion by the Attorney General or the Director of Public Prosecutions. As against the hitherto established position, the emerging shift noticeable in Canada, Australia and South Africa is of comparatively recent origin and relates to judicial review of prosecutorial misconduct in exceptional circumstances,[20] and such as flagrant impropriety or malicious prosecution.[21]

In addition, the publication of directions regarding the Attorney General's mandate, where statutory required, has received judicial recognition as vital to ward-off allegations of impropriety, reinforce the public perception of the rule of law and to foster transparency in the performance of the Attorney General's duties.[22]

2.2 Regulation of prosecutorial discretion: The international soft law approach

Serious cases of prosecutorial misconduct have emanated in democratic countries with attendant negative perceptions on the rule of law and the public interest. The decision not to prosecute, withdraw or discontinue corruption charges involving persons of high profile or standing in the community may constitute an abuse of power or legal process for non-adherence to relevant public interest considerations. Among other things and inclusive of the foregoing, the United Nations Guidelines on the Role of Prosecutors (UN Guidelines) and International Standards of Professional Responsibility (IAP Standards)[23] have been developed

20 Canada: *Krieger v Law Society of Alberta* 2002 SCC 65; Australia: *Island Maritime Ltd v Filipowski* (2006) 226 CLR 328 paras 81 – 82 (HCA); South Africa: Selabe BC (2015) *The Independence of the National Prosecuting Authority of South Africa* M Phil Thesis: University of the Western Cape at 257; *National Director of Public Prosecutions and Others v Freedom Under Law* 2014 (2) SACR 107 (SCA) para 51; *Freedom Under Law v National Director of Public Prosecutions and Others* 2014 (1) SACR 111 (GNP).

21 *Krieger v Law Society of Alberta* 2002 SCC 65 paras 46, 47, 49.

22 *Vogel v Canadian Broadcasting Corp., Bird and Good* [1982] 3 W.W.R. 97 (BCSC); *Blackmore v British Columbia (Attorney General)* (2009) BCSC 1299.

23 See the United Nations Guidelines on the Role of Prosecutors (adopted by the 8t United Nations Congress on the Prevention of Crime and the Treatment of Offenders in Havana, Cuba, 27 August to 7 September 1990) (the UN Guidelines) and the International Standards of Professional Responsibility

supplemental to the common law position on the regulation of prosecutorial conduct. These soft law instruments serve to complement domestic constitution, laws, international agreements and other extant sources that regulate the exercise of prosecutorial discretion. The UN Guidelines enjoin prosecutors to be guided by fairness and consistency while keeping in mind the public interest and that of victims when carrying out their duties, while the IAP Standards enjoin prosecutors to proceed "in the institution of criminal proceedings … only when a case is well-founded upon evidence reasonably believed to be reliable and admissible" and to "always act in the public interest".[24] The UN Guidelines also emphasise the need for prosecutors to be guided by the principle of independence. Indeed, fairness and consistency of prosecutorial decision-making are remedial guidelines which directly impact the prosecution of corruption cases.[25]

In South Africa, the UN Guidelines are legally binding on the National Prosecuting Agency and individual prosecutors having been incorporated into the Code of Conduct for prosecutors framed in terms of the Constitution of the Republic of South Africa, 1996 (RSA Constitution) and National Prosecuting Authority Act 32 of 1998.[26] The same could not be said of Nigeria; the UN Guidelines did not receive any specific mention in the National Policy on Prosecution 2016 but the Policy tallies with it in several respects and may come to guide Nigerian courts in dealing with offending prosecutors in the nearest future.

3. TRANSPARENCY AND ACCOUNTABILITY OF PROSECUTORIAL DISCRETION: SOUTH AFRICA AND NIGERIA

Both South Africa and Nigeria have constitutional provisions that emphasise the independence of the prosecutor. While section 179(1) of the RSA Constitution confirms the

and a Statement of the Essential Duties and Rights of Prosecutors (adopted by the International Association of Prosecutors on 23 April 1999 (IAP Standards).

24 IAP Standards (1999) para 4.2(*f*).

25 Sithole S (2023) *A Comparative Study of the Exercise of Prosecutorial Discretion in South Africa, Australia, and the United States of America* unpublished LLD Thesis, University of South Africa at 60.

26 Du Plessis A, Redpath J & Schönteich M (2008) "Report on the South African National Prosecuting Authority" in Grozev Y et al *Promoting Prosecutorial Accountability, Independence and Effectiveness: Comparative Research* Open Society Institute Sofia at 358.

establishment of the National Prosecuting Authority (NPA) headed by a National Director of Public Prosecutions (NDPP), sections 174 and 211 of The Constitution of the Federal Republic of Nigeria, 1999 (as amended) (CFRN 1999 or Nigerian Constitution) provide for the office of the Attorney General of the Federation and Minister of Justice (AGF) and of each state (AGS) as the chief prosecutor. However, in both Nigeria and South Africa, there have been controversies surrounding the exercise of prosecutorial discretion in high-profile corruption cases. While the exercise of prosecutorial discretion is subject to judicial review under the RSA Constitution and the rule of law like the exercise of every public power, the Nigerian Constitution follows the traditional common law approach whereby the AGF/AGS is theoretically subject to the public interest. This part engages a comparative analysis of the cases and relevant constitutional and statutory frameworks of both countries' criminal justice systems as to determine what regard is accorded the principles of justice, fairness, and transparency in prosecutorial discretion.

3.1 Prosecutorial discretion in South Africa: Accountability and transparency mechanisms

In terms of article 179(2) of the RSA Constitution, the NPA is empowered to institute criminal proceedings on behalf of the state and carry out any necessary functions incidental thereto. Several constitutional, statutory and policy mechanisms have been designed to guide and constrain prosecutorial discretion in South Africa including the National Prosecuting Authority Act 32 of 1998 (NPA Act) enacted in terms of section 179(4) of the RSA Constitution. The NPA Act provides the requirements for the Offices of National Directors of Prosecution (NDPs) and Prosecutors and provides guidelines for the powers and responsibilities of the NDPP, Assistant Directors and other Prosecutors, particularly the importance of non-interference in prosecutorial decisions.[27] Section 20(1) of the NPA Act empowers the NDPP to institute, continue and discontinue criminal proceedings. Sections 179(5)(a) and (b) of the RSA Constitution mandate the NDPP, with the concurrence of the Minister of Justice, and after

27 See Burger J (29 September 2016) "Political Interference Weakening the Rule of Law in SA" *SangoNet*, available at www.ngopulse.org/article/2016/09/29/political-interference-weakening-rule-law-sa (visited 2 September 2023). Referred to in Varney H, De Silva S & Raleigh A "Guiding and Protecting Prosecutors: Comparative Overview of Policies Guiding Decisions to Prosecute" (2019) at 24.

due consultation with the DPPs, to determine a "prosecution policy, which must be observed in the prosecution process". This makes the South African prosecution policy a binding instrument. Section 179(4) of the RSA Constitution and section 22(9) of the NPA Act guarantee that the NPA will exercise its powers without fear, favour or prejudice. The Criminal Procedure Act 5 of 1977, the Prevention of Organised Crimes Act 121 of 1998, the Preventing and Combating Corruption Activities Act 12 of 2004[28] and the State Attorney's Amendment Act 13 of 2004 also provide for the powers of public prosecutors.

3.1.1 Prosecutorial independence, accountability and transparency

South African law ensures that prosecutors' independence is held sacrosanct, as is the rule under the common law system.[29] So, the South Africa National Prosecution Policy 2013 (as revised) and policy directives put in place by the NDPP thus obligate the NPA to exercise its prosecutorial functions independently. The NDPP, though a state official, is expected to make prosecutorial decisions devoid of political considerations and prosecutorial discretion free of government authority. Most importantly, the Prosecution Policy requires prosecutors to assess whether "there is sufficient and admissible evidence to provide a reasonable prospect of a successful prosecution",[30] subject to a public policy override.

The NDPP exercises supervisory powers over the work of the NPA. The President who is the sole appointing authority of the NDPP, and of DPPs and other Prosecutors, subject to Parliament, and may suspend pending an enquiry by Parliament and subsequently remove, subject to Parliament's recommendation, the NDPP or a DNDPP or DPP for misconduct, ill-health or incapacity or for not being fit and proper for office. If Parliament so resolves by a confirming resolution, such a director so removed shall stand removed or if otherwise, be reinstated by the President.[31]

28 Section 3 defines corruption as "dishonest or fraudulent conduct and abuse of power by those acting within the public sphere for self-benefit or for the benefit of others".

29 See *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) para 28.

30 NPA South Africa (2013) "Prosecution Policy" at 5, available at https://www.npa.gov.za/sites/default/files/uploads/Prosecution%20Policy%20%28w.e.f.%20June%202013%29.pdf (visited 20 November 2023).

31 NPA Act 32 of 1998, sec 12(6)(*a*)-(*d*).

Like Nigerian law,[32] interference with prosecution is a criminal offence under sections 20(1), 32(1)(a) and (b), 32(2)(a), and 41(1) of the NPA Act. Similarly, sections 9 and 26 respectively of the Prevention and Combating of Corrupt Activities Act 12 of 2004 (PCCA Act) criminalise acts of interference or favouritism or ill-will relating to the institution of criminal proceedings and the sentencing of any person convicted therefor to up to a term of life imprisonment by the High Court. Interestingly, most commentators agree that the South African prosecution structure is unique for its checks and balances as against the classic Commonwealth model, and makes for strong independence, whereby the NDPP does not account directly to the Minister of Justice, who is solely a politician and Cabinet member, but to Parliament.[33] In *National Director of Public Prosecutions v Zuma*, it was held that the Minister may not interfere with prosecutorial discretion but is entitled to be kept informed of important aspects of legal or prosecutorial authority or public interest.

The NPA is furthermore only accountable to Parliament through the NDPP though the latter must submit an annual report to the Minister of Justice under section 35 of the NPA Act, but this does not authorise the Minister to interfere in the prosecution process. Nonetheless, the scandals and controversies attendant upon the exercise of prosecutorial discretion in corruption cases involving high-ranking public servants have generated considerable public interest as to whether the supposed independence of the NDPP is not more apparent than real. This calls for an elucidation of the requirements of judicial scrutiny of prosecutorial discretion in South African law.

3.1.2 Judicial review of prosecutorial discretion: The tests of legality and rationality

There must be a coincidence of the commission of a crime and the breach of a specific criminal provision. So, the Prosecutor can only recommend a charge where a *prima facie* case is made out to secure a conviction, but not otherwise.[34] However, the main consideration to which

32 See Criminal Code Act, Cap. 38 Laws of the Federation of Nigeria (LFN) 2004 (applicable in Southern Nigeria), sec 128 ("compounding penal actions" without the order or consent of a court by any person is punishable with 1-year imprisonment).

33 Under CFRN 1999, sec 88(1), the Legislature has oversight over public agencies subject to the doctrine of separation of powers.

34 *Guriet v Union of Post Office Workers* (1978) AC 435 paras 523 – 524; NPA South Africa (2013)

the discretion is subject is the overriding interest of the public. The courts do not lightly interfere with the NPA's authority and discretion to prosecute except where there has been an improper exercise thereof.[35] Prosecutorial discretion is considered to be part of public power under the Constitution, its foundational values and the rule of law, hence judicial intervention takes place in terms of the twofold constitutional test of legality and rationality.[36] First, the decision-maker or the exercise of power must be within the law and consistent with the Constitution and must not misconstrue the power conferred. South African courts may intervene where the discretion is not made *bona fide* or is exercised improperly,[37] accordingly, prosecutorial misconduct requires proof of ill-motive or bad faith.[38] Secondly, the decision must be rationally related to the purpose for which the power is given while ensuring a rational connection between the means adopted and the end sought to be achieved. Rationality is a minimum for the exercise of public power otherwise a decision not rationally connected to the purpose for which the power is given is deemed arbitrary.[39] These constitute a general standard for legal compliance,[40] so, an overview of the merits of these principles in terms of judicial scrutiny of the abuse of prosecutorial discretion in high-profile corruption prosecution will next be focused upon. While South Africa engages in judicial review underscored by legislation, policies etc, Nigeria has similar legislation in place but the

"Prosecution Policy" at 5.

35 *DA v Acting NDPP* 2012 (3) SA 486 (SCA); *DA v President, RSA* 2013 (1) SA 248 (CC); *NDPP v Freedom Under Law* 2014 (4) SA 298 (SCA).

36 See eg, *Zuma v National Public Prosecution Authority* 2009 (2) SA 277 (SCA); *Democratic Alliance v President, RSA* 2013 (1) SA 248 (CC) para 37; *Freedom Under Law v National Director of Public Prosecutions* 2014 (1) SA 254 (GNP); *National Director of Public Prosecutions v Freedom Under Law* 2014 (2) SA 298 (SCA).

37 *Highstead Entertainment (Pty Ltd t/a "The Club" v Minister of Law and Order* 1994 (1) SA 387 (C); *Wilson v Director of Public Prosecutions* [2002] 1 All SA 73 (NC).

38 *Patel v Director of National Prosecutions* (2018) SACR 420.

39 Broughton DWM (2020) "The South African Prosecutor in the Face of Adverse Pre-Trial Publicity" 23 *PER/PELJ* 1 – 39 at 7. See in this regard, *Booysen v Acting National Director of Public Prosecutions* 2014 (2) SACR 556 (KZD); *Freedom Under Law v National Director of Public Prosecutions* 2014 (1) SA 254 (GNP); *National Director of Public Prosecutions v Freedom Under Law* 2014 (4) SA 298 (SCA); *Democratic Alliance v Acting National Director of Public Prosecutions* 2016 (2) SACR 1 (GP); *Zuma v Democratic Alliance* 2018 (1) SA 200 (SCA); *Minister of Police v Du Plessis* 2014 (1) SACR 217 (SCA) para 31; *Freedom Under Law v National Director of Public Prosecutions* 2018 (1) SACR 436 (GP).

40 Kruger HB (2001) "The Impact of the Constitution on the South African Criminal Law Sphere" 26(3) *Journal for Juridical Science* 116 – 135 at 124; *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) para 27.

judiciary has refused to look at prosecutorial misconduct or abuse. The rationales for this underlie the major differences between Nigeria and South Africa on the regulation of prosecutorial discretion, but before delving into the comparisons, a detailed analysis of the challenge of transparency and accountability of South Africa's NPA will be instructive.

3.1.3 Prosecutorial discretion in high-profile corruption cases: Focus on transparency and accountability

Since a few years of its inception, the ways and manners the various NDPPs, ANDPP, DPPs, etc, have become embroiled in the volatile power-play of a factionalised ANC-led national government of South Africa, coupled with the high turn-over of NDPPs, have cast a question mark over the NPA's perceived independence. The resignation of Ngcuka, the first NDPP, the Pikoli Saga (his suspension and subsequent dismissal by Presidents Mbeki and Motlanthe respectively, and out-of-court settlement of his suit for re-instatement), and the related controversies have all led to an ebbing of public confidence.[41] The NPA has instituted several criminal prosecutions against prominent political figures and state officials, the most prominent being the Jackie Selebi trial, where the then Commissioner of Police and president of the International Criminal Police Organisation (Interpol), was convicted and sentenced to 15 years' imprisonment for corruption. Others included Toni Yengeni,[42] the then Chief Whip of the ruling African National Congress (ANC) in Parliament, Winnie Mandela, the ex-wife of the then President Nelson Mandela, and Allan Boesak.[43]

Nonetheless, this author believes that the ongoing prosecution of former President Jacob Zuma and cohorts for state capture is the true test of the consistency and fairness of prosecutorial discretion in South African law. This assertion is justifiable on several grounds. First, the allegations of politically-motivated witch-hunt and misconduct against prosecutors by Mr Zuma, in the bid to scuttle his arraignment and trial, eventually failed the test of judicial scrutiny. Secondly, the previous decisions to decline the prosecution of Mr Zuma for Investigation into the South African and Analogous Models" 74 *THRH* 247 – 263 at 248 – 249.

41 De Villiers WP (2011) "Is the Prosecuting Authority under South African Law Politically Independent?

42 *S v Yengeni* 2006 (1) SACR 405 paras 52 – 53.

43 De Villers (2011) at 240.

corruption were deemed controversial and have continued to generate unending public and judicial attention.[44] This, in a way, signifies the accountability of prosecutors to the citizens.[45] Thirdly, the opportunity to hold the former president accountable for his tenure in office sets a vital precedent in triumph of the rule of law, whether he is eventually found guilty or not. Moreover, the primary rule regulating prosecutorial duty is that it is not the prosecutor's duty to secure a conviction at all costs. Rather, the prosecutor is expected to act fairly and responsibly towards the accused and place all relevant information at his disposal before the court.[46] The rules and practice of criminal justice in South Africa also place a high premium on the exercise of prosecutorial discretion in determining the reasonable prospects of a successful prosecution (namely, a *prima facie* case), factoring in the public interest.

The Jacob Zuma Prosecution

The ongoing Jacob Zuma prosecution in the "spy-tape" saga represents the height of the NPA's involvement in the non-prosecution or suspicious withdrawals of perceived credible cases of corruption against high-ranking public servants. It is also illustrative of a progressive trend in the exercise of the discretion to prosecute in high-profile corruption cases in South Africa.[47] The prosecution; the various charging, dropping and reinstatement of charges against Jacob Zuma, on various counts of corruption (from 2003–2020) is highly illustrative of the resilience and tenacity of the South African prosecutorial system.[48]

44 See *Zuma v Democratic Alliance* 2018 (1) SA 200 (SCA); *Acting National Director of Public Prosecution v Democratic Alliance* 2018 (1) SA 200 (SCA); *State v Jacob Zuma and Others* Case No. Cc358/05 [8-9] and related litigation; *Helen Suzman Foundation v President of the Republic of South Africa and Others, Glenister v President of the Republic of South Africa and Others* 2015 (2) SA 1 (CC); and *Democratic Alliance v The President of the RSA and Others* 2012 (1) SA 417 (SCA). See also *Freedom Under the Law v NDPP and Others* 2014 (1) SA 254 (GNP) (affirming the decision not to prosecute as unconstitutional and reviewable); *NDDP v Jacob Zuma* 1995 (2) SA 642 (CC) para 35; and *Booysen v NDPP and Others* [2014] 2 All SA 391 (KZD) para 12.

45 See *Nkadimeng & Others v National Director of Public Prosecutions of South Africa and Others*[2008] ZAGPHC 422 (12 December 2008).

46 Okpaluba (2020).

47 See *Alliance v Acting National Director of Public Prosecutions* 2016 (2) SACR 1 (GP) as affirmed in *Zuma v Democratic Alliance* 2018 (1) SA 200 (SCA).

48 See Sithole (2023); Okpaluba (2020) 22; Selabe (2015) at 45.

In a nutshell, the Jacob Zuma prosecution emanated from the outcomes of various investigations by the Directorate of Special Operations (DSO), the anti-corruption and organised crimes unit, and parliamentary committees, beginning from 2003, into allegations of 'improprieties' in a 1999 arms deal negotiated by the South African Government. Mr Jacob Zuma, then Deputy President of South Africa, was accused of collecting bribes to the tune of R1 300 000 million from Shabir Shaik and associated companies. He was indicted on 783 counts of money laundering and racketeering. Notwithstanding, the then NDPP, Bulelani Ngcuka, declined to prosecute Zuma based on a decision that "there was no prospect of a successful prosecution". Subsequently, and after Shaik's conviction in 2005, Advocate Pikoli, (Ngcuka's successor) reviewed and overturned Ngcuka's decision. Incidentally, the charges were reinstated in June 2005, but struck out by the North Gauteng High Court in *Zuma v NDPP*[49] in September 2006. This was due to the prosecutor's inability to proceed with the trial at that stage. In December 2007, the DSO served an indictment on Zuma and the fraud and racketeering charges were reinstated based on an appeal of the earlier striking-out order.[50] However, the charges were again struck out by the trial judge Chris Nicholson in September 2008. This time it was based on technicalities – a decision overturned by the Supreme Court of Appeal in January 2009. In April 2009, Mr Zuma was accused of involvement in 783 incidents of bribery and charged with 18 counts of corruption, fraud and racketeering. In response, he claimed to be the victim of a political conspiracy hatched by the then President Mbeki, together with Ngcuka based on the so-called "spy tapes". The then acting NDPP, Mokotedi Mpshe, again dropped the charges, citing the fact that there had been "collusion" amounting to an abuse of the legal process for extraneous purposes.[51] In 2012, the Supreme Court of Appeal affirmed the right of the opposition Democratic Alliance to challenge the discontinuance of the corruption charges. In 2016, Mpshe's decision was set aside for being irrational by the Pretoria High Court,[52] an appeal against which was dismissed by the Supreme

49 [2008] ZAKZ HC 71 (12 September 2008).

50 Schwikowski M (2 August 2018) "South Africa's President Zuma: A Chronology of Scandal" *DW*https://www.dw.com/en/south-africas-president-zuma-a-chronology-of-scandal/a-42489907(accessed 2 September 2023).

51 Bennum M (2009) "S v Zuma: The Implications for Prosecutors' Decisions" 22 *South African Journal of Criminal Justice* 371 at 378.

52 Herman P (29 April 2016) "Decision to Drop Zuma Corruption Charges 'Irrational', Set Aside as It

Court of Appeal.[53] The charges were then reinstated in the Pretoria High Court leading to another appeal by the NPA and Zuma which was ultimately dismissed by the Supreme Court of Appeal in 2017. Between 2003 and 2018, Jacob Zuma employed several delays tactics to truncate his prosecution. In April 2018, after being forced to step down as President, Jacob Zuma was charged with 18 criminal charges involving, amongst others, fraud, tax evasion, money laundering, corruption, and racketeering, to which he pleaded not guilty on 26 May 2021 at the Pietermaritzburg High Court.

3.2 Prosecutorial discretion in Nigerian law

Prosecutorial discretion in Nigeria primarily emanates from the provision of Nigeria's federal Constitution which confers prosecutorial powers on the Attorney General of the Federation (AGF) for federal offences and on the Attorney General of a State (AGS) over state offences under State laws. Section 174(1) (a)-(c) of the Constitution gives the AGF power to institute, take over and continue, discontinue at any stage before judgment, any criminal proceedings, against any person before any court of law in Nigeria, other than a court-martial, in respect of any offence under any Act of the National Assembly. Section 174(2) empowers the AGF to delegate his powers to Law Officers (of his department) though in practice, criminal prosecutions are undertaken by the DPP (federal) on behalf of the AGF. Section 174(3) provides thus:

> In exercising his powers under this section, the Attorney-General of the Federation shall have regard to the public interest, the interest of justice and the need to prevent abuse of legal process.

Section 211(1)(a)-(c), and (2)(3) of the Constitution confers similar powers on the AGS concerning offences under state laws. These provisions provide leeway to the judiciary to curb any prosecutorial discretion contrary "to the public interest, the interest of justice and the need to prevent abuse of legal process". Regrettably, the Supreme Court of Nigeria, followed

Happened" *News24*.

53 Bateman B (13 October 2017) "SCA Upholds High Court Decision on Zuma Charges" *EWN*, available at https://ewn.co.za/2017/10/13/sca-upholds-high-court-decision-on-zuma-charges (visited 23 November 2023).

by the lower courts, in a slavish adherence to precedent and tradition, have stubbornly maintained a hallowed position to the Attorney General.

In *State v Ilori*,[54] the Supreme Court of Nigeria held that the AGF or AGS has an unquestionable discretion in the exercise of prosecutorial powers to institute or discontinue criminal proceedings. Kayode Eso, JSC, who delivered the leading judgment, had the following to say:

> The pre-eminent and incontestable position of the Attorney-General, under the common law, as the chief law officer of the State, either generally as a legal adviser or specially in all court proceedings to which the State is a party, has long been recognised by the courts. In regard to these powers, and subject only to ultimate control by public opinion and that of Parliament or the Legislature, the Attorney-General has, at common law, been a master unto himself, law unto himself and under no control whatsoever, judicial or otherwise, vis-a-vis his powers of instituting or discontinuing criminal proceedings.

The above dictum represents the law to date in Nigeria, albeit a slavish adherence to the erstwhile common law position.[55] Nigerian judges in other decisions that border on the prosecutorial powers of the Attorney General express similar viewpoints.[56] Courts in the Commonwealth countries of England, Canada, Australia, and South Africa are now side-stepping and even outrightly departing from such a default position of the law. Relatedly, in interpreting section 174 of CFRN 1999, the full panel of the Supreme Court in *FRN v Osahon & Ors*[57] authoritatively affirmed that the AGF or AGS does not have the monopoly to prosecute:

> The implication of the intendment of section 174(1) aforesaid of the Constitution is that the office of the Attorney-General does not have the monopoly of

54 1983] 1 SCNLR 94.

55 Opinion (28 March 2010) "Prosecutorial Powers of the Attorney-General under the Constitution: The Supreme Court Erred in Law and Undermined the Public Interest in The State v Ilori" *Sahara Reporters*, available at https://saharareporters.com/2010/03/28/prosecutorial-powers-attorney-general-under-constitution-supreme-court-erred-law-and (visited 3 September 2023).

56 See *Ndi Okereke Onyuike v The People of Lagos State & Others* (2013) LPELR-24809 (CA); *Fawehinmi v Akilu* [1987] 4 NWLR (Pt 67) 797, 829; *Attorney-General of Kaduna State v Mallam Umaru Hassan* (1985) LPELR-61726 (SC); *Col Halilu Akilu & Anor v Chief Gani Fawehinmi* (1989) LPELR-20424, 8-9 (CA) (holding that the prosecutorial powers of the Attorney General must be exercised according to factors laid down in the Constitution "subject to his own conscience and good faith" and is "under no control whatsoever, judicial or otherwise, save the loss of his job if he offends his political master").

57 [2006] 5 NWLR (Pt 973) 361.

> prosecution though it has the power to take over any case in any Court and decide whether to go on with it or not.

Consequently, as part of efforts to eradicate the pervasive corruption in Nigeria, additional prosecuting agencies were established to prosecute specific offences of corruption under the supervisory powers of the AGF. The Corrupt Practices and Other Related Offences Act, 2000 otherwise called ICPC Act, based on the Independent Corrupt Practices Commission (ICPC) which it established on 29 September 2000. The ICPC Act criminalises the offence of corruption and other related crimes more broadly and which it prohibits and seeks to prosecute.[58] The Corrupt Practices and Other Related Offences Commission Act defines corruption to include bribery, fraud and other related offences. The Economic and Financial Crime Commission (Establishment) Act 2004 (EFCC Act) established the Economic and Financial Crimes Commission (EFCC). The EFCC has sweeping powers to enforce the Money Laundering Act of 2004. The EFCC Act also empowers the EFCC to investigate and prosecute financial and economic crimes such as fraud, bribery, illegal enrichment, money laundering, the Advance Fee Fraud and Other Related Offences Act, 1995, the Failed Banks Act, 1991, and any other law or regulation relating to economic and financial crimes including the Criminal Code.[59] The EFCC Act does not in any way refer to the need to guide against prosecutorial misconduct in corruption cases which is a gap in this legislation. In addition to these agencies, the Police have statutory powers to investigate and prosecute crimes, and there is the Code of Conduct Bureau empowered to receive declaration of assets of public officers to ensure transparency throughout their tenure of office. In theory, the legal provisions that established the specialised prosecuting agencies maintain the principle of prosecutorial independence.

3.2.1 The criterion of prima facie case

A *prima facie* case by the prosecution against the defendant is a principle of the Nigerian Constitution;[60] it is the hallmark of a fair exercise of prosecutorial discretion whereby an accused ought not to undergo the rigours of criminal trial if no nexus exists between him and

58 ICPC Act, secs 8, 9, 10, 15 & 18 (corrupt demands, bribery, abuse of position, gratification, corrupt advantage, inflating contract prices, funds diversion, etc.).

59 ECONOMIC and Financial Crimes Commission (Establishment) Act, 2004, sec 7(2).

60 CFRN 1999, sec 36(5).

the commission of the offence alleged.[61] Care should be taken to distinguish between a *prima facie* case after the conclusion of the investigation but before arraignment and a *prima facie* case at trial. A *prima facie* case based on which a decision to prosecute is made, even if weak, may suffice.[62] A *prima facie* case is not the same as proof which comes later when the court has to find whether the accused is guilty or not guilty. In *Abacha v State*,[63] the Nigerian Supreme Court restated the position that a *prima facie* case could be "facts that clearly reveal a crime and show that the accused person is linked with it ... that the accused has something to explain at the trial". However, the prosecutor has a lot of latitude to determine whether there is a *prima facie* case or not from the police investigation that could sometimes be abused.[64] This can be the case where, for instance: the defendant is arraigned to enable the prosecutor gather more evidence; the evidence against the defendant is flimsy and the elements of the offence do not coincide; the bringing of charges or decision not to prosecute serves purely political interests; he has taken a bribe, etc.[65] Such situations were fully adumbrated in *Mohit v The Director of Public Prosecutions of Mauritius (Mauritius)*.[66] So, the question that remains to be answered in whether the courts would be willing to grant a stay of proceedings upon a complaint of abuse of prosecutorial discretion before a charge is laid or of the court process after a charge has been filed. In *Ikomi v State*,[67] the Nigerian Supreme Court stated:

> The courts have inherent jurisdiction to prevent abuse of their process … [These] powers of courts to prevent abuse of process includes the power to safeguard an accused person from oppression and prejudice such as would result if he is sent to trial pursuant to an information which discloses no offence with which he is in any way linked.

61 *Ikomi v State* (1986) 3 NWLR (Pt. 28) 340; *Mohammed Abacha v FRN* [2002] 11 NWLR (Pt 779) 437, 486, 496; *Dariye v FRN* (2005) LPELR-24398.

62 *Ikomi & Ors v State* [986] 17 NSCC (Pt 1) 730, 731

63 [2002] 11 NWLR (Pt 779) 437, 486, 496.

64 Akaraiwe I (2013) *The Prosecutor's Handbook for the Ministry of Justice, Enugu State*, available at Prosecutorial%20Discretion/MOJ-Enugu-Prosecutors-Handbook.pdf (visited 3 September 2023).

65 Muntingh L, Redpath J & Petersen K (2017) *An Assessment of the National Prosecuting Authority: A Controversial Past and Recommendations for the Future* at 22.

66 [2006] UKPC 20 (25 April 2006). See also Mujuzi J (2022) "The Power of Prosecutorial Heads to Intervene in Private Prosecutions in Commonwealth Countries" 36(2) *Loyola Journal of Social Sciences* 97 – 122 at 108 – 109.

67 [1986] 3 NWLR (Pt 28) 340.

The above dictum has given some clarity on the justiciability of prosecutorial abuse. The power also derives from the Constitution and Criminal Code. Recently, to obviate the crushing delays in criminal trials, the Administration of Criminal Justice Act, 2015 (ACJA 2015) has now prohibited the quashing of a criminal charge before trial.[68] Incidentally, the application of the novel provision has led to inconsistent decisions by the Supreme Court and the Court of Appeal.[69] Beyond the foregoing, the problem is usually that the prosecuting agencies, particularly the EFCC, have been seen to be inconsistent in their prosecutorial decision-making as is discussed next.

3.2.2 Corruption cases and abuse of prosecutorial discretion in Nigeria

The pervasive nature of corruption in Nigeria eroded the public's confidence in the country's political, economic and justice institutions, and in turn, promoted a culture of contempt for the rule of law and created a broken system leading to an increment in organised crime. This led to the establishment of additional prosecuting agencies to prosecute specific offences of corruption. These agencies derive their powers from the AGF's constitutional mandate and are subject to his supervisory powers for the prosecution of federal offences though their enabling laws empower the anti-corruption agencies to prosecute cases investigated by them.[70] Hence, such powers must be exercised with the fiat of the AGF. For instance, the ICPC Act in section 61(1) provides that every prosecution shall be deemed to be with the consent of the Attorney General. Therefore, in practice, the anti-corruption agencies do not have to get the AGF's express consent as all prosecutions are implied to be with his consent. It has not also helped that in 2011, the AGF published a practice guideline that the EFCC must get express consent of his office before any prosecution commences.

However, as stated by Adeniran, the instances of selective prosecution based on political considerations has dimmed the perception of effectiveness and impartiality of the

68 Administration of Criminal Justice Act, 2015, sec 396(2).

69 See *Saraki v FRN* [2016] 3 NWLR (Pt 1500) 531; *Onnoghen v FRN* [2020] 12 NWLR (Pt 1738) 289 – 302.

70 Basel Institute in Governance "Engaging the Private Sector in Collective Action Against Corruption: A Practical Guide for Anti-Corruption Agencies in Africa", available at https://baselgovernance.org/taxonomy/term/178 (visited 3 September 2023); EFCC Act 2004, sec 14(2).

specialised agencies.[71] According to a survey on corruption as experienced by the population, a recurring theme was the perception of bias in the investigation and prosecution of alleged offenders, notably the EFCC.[72] Some of the helmsmen and prosecutors of the EFCC have been implicated in such flagrant infractions of prosecutorial discretion such as engaging in "media trials", filing of charges when investigation is incomplete, bribery, unconscionable plea bargain agreements, etc.[73] The problems related to the use of plea bargains will be further elaborated upon considering its many controversial outcomes.

3.2.3 Plea agreements

Plea bargaining in criminal cases, the use of which was introduced by prosecutors for the EFCC in 2005, has been a haven for various abuses of prosecutorial power.[74] It was first smuggled into the lexicon of Nigeria's criminal justice through section 14(2) of the EFCC Act. The provision permits EFCC to compound crimes.[75] This is an exchange of money or other consideration for an agreement not to report a crime or prosecute an accused, but it was converted into a full-fledged plea-bargaining practice by the EFCC. It seemed to have proved remarkable in the conviction of corrupt top-ranking public officials.[76] However, the EFCC has used section 14(2) without the required openness because its agreements with some defendants charged with embezzling public funds were not even reduced into writing which makes the assessment of such settlements difficult. This was made possible because the section does not state any procedure for its application. Plea bargaining with the guidelines for its judicial approval were subsequently introduced in ACJA 2015 to protect the rights and

71 Adeniran AI (2019) *Qualitative Study on Patterns, Experiences and Manifestations of Corruption in Nigeria* 21, available at https://www.unodc.org/documents/data-and-analysis/statistics/corruption/nigeria/Qualitative_Study_on_Corruption_in_Nigeria_2019.pdf (visited 3 September 2023).

72 See United Nations Office on Drugs and Crime (2019) *Corruption in Nigeria, Patterns and Trends: Second Survey on Corruption as Experienced by the Population* 29.

73 Chioma U (19 April 2021) "Abuse of Prosecutorial Powers: Why Citizen Magu Should Face Criminal Trial" *The Nigerian Lawyer*, available at https://thenigerialawyer.com/abuse-of-prosecutorial-powers-why-citizen-magu-should-face-criminal-trial/ (visited 3 September 2023).

74 Osamor R (2022) "Administration of Criminal Justice in Nigeria and Plea Bargaining: Motions Without Movement" 6(2) *African Journal of Law and Human Rights* 120 – 129 at 125.

75 Bello AO (2006) "Plea Bargaining and Criminal Justice in Nigeria: Issues, Problems and Prospects" 1 *Current Law Series* 42 at 47.

76 Osipitan & Odusote (2014); Osamor (2022).

interest of crime victims.[77] In *Yakubu v FRN*,[78] the Nigerian Supreme Court affirmed the Court of Appeal's reversal of a Federal High judgment which validated an unconscionable plea bargain, a singular attempt to clarify the law on what was fast becoming a national embarrassment. Also, most prosecutions commence by resorting to "charge-stacking" and arraignment on several hundreds of charges ostensibly to coerce a guilty plea. This may be the practice in other jurisdictions, particularly the United States, but it turns out to be counterproductive as it makes the prosecution cumbersome and expensive since a more concisely worded set of charges could have sufficed.[79] The utter disregard for the victim's rights and interests has also been implicated in these plea agreements.[80] In corruption cases, the state *qua* the people, can be regarded as the victim, but as it turns out, the situation where the prosecutors engaged by the state turn around to negotiate unconscionable pleas which deprive the state of its resources must be deprecated.[81] A few of the cases usually cited are worthy of mention.[82] Most of these involved high-ranking public servants and politicians except a few businessmen with political connections, mostly bankers like Cecelia Ibru.

1. *FRN v Tafa Balogun*:[83] 70 counts of alleged money laundering of over US$130 Million (US dollars) were reduced to six counts and a six-month sentence bargain;
2. *FRN v Lucky N Igbinedion*:[84] The defendant offered to forfeit three properties plus N3.5 million fine which was approved for a-N4.4 billion theft of government funds;

77 See ACJA 2015, sec 270(1) & (2).

78 (2022) LPELR-57749 (SC).

79 *FRN v Igbinedion* [2014] All FWLR (Pt 734) (Lucky Igbinedion who was arraigned on 191 counts of offences); *FRN v Cecilia Ibru* unreported charge no FHC/L/297C/2009 (8 October 2010) (Mrs Cecilia Ibru, who was arraigned on 25 counts of offences); *Dauda v Federal Republic of Nigeria* [2018] 10 NWLR (Pt 1626) (Chief Dauda, who was arraigned on 208 counts of offences); Oliomogbe H, Ugbegbe L & Apkodonor G (18 December 2009) "Nigeria National Court Clears Ibori of Graft Charges, EFCC Kicks" *The Guardian*, available at https://guardian.ng/news/nigeria/national/court-clears-ibori-of-graft-charges-efcc-kicks/ (visited 20 August 2023) (Chief James Ibori, who was arraigned on 170 counts of offences).

80 Tijah AM (2019) "An Examination of the Rights of Crime Victims in Plea Bargain Agreements in Nigeria" 9 *Benue State University Law Journa*l 107 – 129 at 114 – 128.

81 See *Yakubu v FRN* (2022) LPELR-57749 (SC).

82 Anifowose D (2022) 'Plea Bargaining in the Nigeria Criminal Justice System: Major Challenges, and the Way Forward', available at https://www.researchgate.net/publication/366293134 (visited 2 September 2023)

83 *FRN v Tafa Balogun* [2005] 4 NWLR (Pt 324) 190.

84 *FRN v Igbinedion* [2014] All FWLR (Pt 734) 101; Sahara Reporters (30 December 2008) "Igbinedion Gets

3. *FRN v Cecelia Ibru*:[85] The defendant agreed to forfeit $2 Billion (US dollars) worth of assets comprising 94 choice properties in the United States, Dubai, Nigeria, etc, and serve a six-month jail term all of which she spent in hospital for a theft of over US$2 Billion (US dollars);
4. *Alamiesieigha v FRN*:[86] Two-year jail term was served within a few hours for a theft of over US$100 Million of public assets.

Furthermore, the case of Mr James Ibori,[87] a former governor of Delta State in Nigeria, who was charged with and convicted of money laundering and corruption in the United Kingdom (for funds looted from Nigeria) raised concerns about the Nigerian prosecutorial system's independence. It has been argued that Mr Ibori was never charged in Nigeria because his influential status might have influenced the authorities to not pursue charges against him.[88]

Similarly, the so-called "Dasukigate" trial (the seemingly interminable trial of the former national security adviser, Dasuki, for embezzlement and money laundering)[89] and the trial of Mrs Diezani Alison-Madueke, a former Nigerian Minister of Petroleum Resources, who has been variously investigated on corruption allegations, including embezzlement and money laundering must also be mentioned. In the case of Mrs Madueke, though she has sought refuge abroad, critics have raised questions about the Nigerian authorities' delay in requesting her extradition and prosecuting her and whether political considerations have

Easy Plea Bargain: No Jail Time, Keeps Billions in Stolen Funds, Keeps Vast Properties", available at https://saharareporters.com/2008/12/30/igbinedion-gets-easy-plea-bargain-no-jail-time-keeps-billions-stolen-funds-keeps-vast (visited 11 August 2023).

85 Unreported Charge No. FHC/L/297C/2009; Sesan (21 July 2016) "'Looters' Plea Bargain Proposal to FG Sparks Debate" *The Punch*, available at https://punchng.com/looters-plea-bargain-proposal-fg-sparks-debate/ (visited 10 June 2023).

86 [2006] 16 NWLR (Pt 1004) 41.

87 See Oliomogbe H, Ugbegbe L & Apkodonor G (18 December 2009) "Nigeria National Court Clears Ibori of Graft Charges, EFCC Kicks" *The Guardian*, available at https://guardian.ng/news/nigeria/national/court-clears-ibori-of-graft-charges-efcc-kicks/ (visited 20 August 2023).

88 Human Rights Watch (17 April 2012) "Nigeria: UK Conviction a Blow Against Corruption", available at https://www.hrw.org/news/2012/04/17/nigeria-uk-conviction-blow-against-corruption (visited 21 November 2023).

89 See Corruption Cases Database, Money Laundering, "FRN vs Col. Sambo Dasuki (Former National Security Adviser) & 5 Others", available at https://corruptioncases.ng/cases/frn-vs-col-sambo-dasuki-former-national (visited 20 November 2023).

affected the progress of her case.[90] Mr Dasuki, on the other hand, has been in detention for about eight years.

4. THE PATH FORWARD: A PARADIGM SHIFT IN NIGERIA'S PROSECUTION SYSTEM

Despite the rigid position of the Supreme Court in *State v Ilori*, attention must be drawn to the other push-and-pull factors in the ongoing crisis of judicial review of prosecutorial discretion in Nigeria. The first relates to new statutory provisions that seems to tighten instead of lighting the path to judicial review of prosecutorial discretion in Nigeria such as the Administration of Criminal Justice Act, 2015. On the other hand, there are instances of applications for the enforcement of the fundamental right to liberty which are filed and sometimes granted to restrain the police and the specialised prosecuting agencies from arresting, investigating and prosecuting some suspects.[91] This is akin to an indirect or backdoor route to judicial review. The third is the emergent introduction and dissemination of a National Policy on Prosecution 2016 (NPP 2016), the Guidelines for Prosecutors in the Federal Republic of Nigeria (GPFRN), and the Code of Conduct for Prosecutors (CCP) by the AGF under the aegis of the Body of Attorneys-General in Nigeria. Each will now be described.

Work started on the preparation of a national prosecution policy a few years back and was finally concretised in the NPP 2016. The Policy lays down the evidential and public interest tests among the basic criteria governing the decision to prosecute in which the public interest test is overriding. It requires the prosecutor to determine whether there is sufficient evidence to justify the institution of a charge or continuation (the evidential test) and must consider several factors, whether or not prosecute in the public interest (public interest test).[92] The decision not to prosecute a complex case of organised crime, corruption inclusive,

90 The former Petroleum Minister has been on the EFCC "Wanted" List at Least Since 2015, see *Premium Times* (2 October 2015)) "EFCC Seals Abuja Home of former Nigerian Minister, Alison-Madueke", available at https://www.premiumtimesng.com/news/190949-efcc-seals-abuja-home-of-former-nigerian-minister-alison-madueke.html (visited 20 November 2023).

91 See Falana F (23 January 2023) "Courts Lack Power to Stop Arrest, Investigation and Prosecution of Criminal Suspects Political Leaders Who Make False Promises are Fraudsters" *Vanguard News*, available at https://www.vanguardngr.com/2023/01/courts-lack-power-to-stop-arrest-investigation-and-prosecution-of-criminal-suspects/ (visited 3 September 2023).

92 NPP 2016, para 9(1) & (4)(*a*)–(*m*).

must be reported to the Attorney General promptly.[93] The prosecution of complex cases is therefore given special attention in parity with international standards. The prosecutor shall consider the following issues in deciding whether or not to prosecute: plea bargain and restorative justice to which well-articulated rules apply. In engaging in a plea bargain or charge bargain, the prosecutor shall adhere to the provisions of the law while paying attention to the interest of the victim of the crime, the interest of the public and the ends of justice. The prosecutor shall consider the legality of the plea bargain and ensure that there are safeguards against abuses.[94] These policy guidelines must be followed by prosecutors in addition to the Criminal Code Act and could be used to curb abuse of prosecutors' powers, but the policy is not yet legally binding. The GPFRN applies to all prosecutors in Nigeria and was made according to the exercise of the powers conferred on the AGF and AGS by sections 174 and 211 of the CFRN 1999. It makes copious references to the principles of fairness, diligence and effectiveness. In the decision to prosecute complex cases, the public interest should prevail. A case is to be regarded as complex or difficult where the case has a significant international dimension; it involves cash or assets of a value exceeding N50 million; it requires specialised knowledge of financial, commercial, fiscal or regulatory matters; it involves allegations of fraudulent conduct against persons; it involves substantial or significant loss of funds to the government; it is likely to be of widespread public concern and involves trans-border, terrorist or organised economic crimes. The thrust of the policy is to support and limit prosecutorial powers. Lastly, the CCP is a set of ethical rules to guide prosecutors in the Nigerian criminal justice system by which prosecutors must justify the objectiveness and fairness of decisions whether or not to prosecute.

It was also prepared by the Body of Attorneys General based on the concern that public prosecution should be carried out with the highest degree of professionalism and ethical behaviour. Under the Code, prosecutors are regarded as gate-keepers in criminal justice, who should carry out their duties with the highest degree of professionalism, independence and impartiality to ensure public confidence in the integrity of the criminal

93 GPFRN para 9(*a*).
94 GPFRN para 15(2)(*c*).

justice system. On the institution of criminal proceedings, Code 4(2)(d) thereof provides that the prosecutor shall proceed only where there is *prima facie* evidence and shall not continue with the prosecution in the absence of such evidence. Section 7, subsection (b) of the Code lists the sanctions to be applied to erring prosecutors who may be private legal practitioners engaged by the State, Law Officers in the Ministry of Justice, police officers or private persons. The sanctions for misconduct include the withdrawal of any Fiat or authority to prosecute conferred by the Attorney General and referral to the Legal Practitioners Disciplinary Committee for disciplinary action.

All three documents discussed here are mere guidebooks, none of which is binding (unlike the South Africa National Prosecution Policy), to prescribe statements of good values, best practices and a guide towards rendering efficient, effective, accountable and professional prosecutorial services in Nigeria. The policy, rules and code contained in these documents are still in infancy and though freely available on the Internet, they are not yet widely circulated, hence currently known to only professional lawyers and law officers. Consequently, demands of professionalising and strengthening the prosecutorial process calls for the NPP 2016 to be enacted into law or incorporated by reference into the Criminal Code Act. The guiding principles therein can become justiciable while an independent parliamentary oversight must be established to enhance the transparency and public participation in the process.

5. CONCLUSION

The discussions in this paper have shown that transparency and accountability are contributing factors to successful prosecutorial decision-making. In terms of comparison, South Africa's prosecutorial structure has several advantages over the Nigerian system. This is based on the embedded legal devices to promote transparency in the prosecutorial process. The South Africa National Prosecution Policy is clear on transparency and fairness. Similarly, Nigeria's Criminal Code Act[95] has provisions to deal with corruption and abuse of office. The

95 Chapter 12.

interventions of the major opposition parties in South Africa have also made a huge impact in seeing that the elusive prosecution of Jacob Zuma does not go cold. While the problem with Nigeria's prosecutorial system is not solely a lack of transparency, there are serious issues of non-implementation of laws and policies and inadequate checks and balances through parliamentary and judicial oversight. Nonetheless, both systems have experienced political and corruptive interferences. One of the factors contributing to the abuse of prosecutorial discretion in Nigeria is the failure of independent oversight. While the two broad issues to consider when deciding whether to prosecute (namely, whether a *prima facie* case exists and whether the public interest is best served by the prosecution of the case), the discretion accorded to the prosecutor is subject to and has often been abused in Nigeria contrary to the dictates of the public interest, especially in high-profile corruption cases. In high-profile corruption cases involving political functionaries, prosecutorial discretion plays a crucial role in upholding the rule of law and ensuring a fair and impartial judicial process. Both South Africa and Canada emphasise the independence of prosecutors through constitutional provisions, statutory frameworks, and jurisprudential precedents. While political pressure and public expectations may arise, the proper exercise of prosecutorial discretion is essential for maintaining public trust in the criminal justice system and ensuring that justice is served without fear or favour.[96] Hence, there is a need for transparency and accountability in prosecution and of prosecutors under the rule of law. A proper exercise of prosecutorial discretion is significant for the avoidance of political influence if based on the law and evidence. If not selective, based on bias or personal vendettas, it will promote the principle of equal treatment under the law that is vital for maintaining public trust in the legal system.

Chapter 14 (relating to administration of justice) of the Nigerian Criminal Code Act covers such situation though yet to be fully implemented. A balanced consideration by prosecutors of the severity of the alleged corruption, the strength of the evidence, and the potential impact of the case on society is good for accountability and fairness. Moreover, the appropriate decisions to prosecute high-profile corruption cases can serve as deterrents against corrupt behaviour, but if inappropriately handled could undermine the deterrence

96 NPA South Africa, "Prosecution Policy", 4 ("Role of Prosecutor"); CCP, para 3 (Ethic of "Impartiality").

effect and erode public confidence in the ability of the legal system to combat corruption and uphold justice. Accordingly, to avoid selective justice, prosecutors must implement the law consistently in line with legislation. The conclusions reached here call for requisite constitutional, legal, and policy reforms as these are required to pave the way for judicial review, as appropriate, of the discretionary powers to prosecute sensitive and complex cases under the Nigerian criminal justice system.

The long-term solution to curb the abuse of prosecutorial discretion in Nigeria would entail some constitutional amendments. Sections 174 and 122 of the CFRN 1999 should be amended to depoliticise the Office of the AGF (and AGS) while retaining the DPP's Office under the overall supervision of the AGF *only* in complex cases of utmost public interest corrupt practices by public officers inclusive. The AGF should be designated as Chief Prosecutor and National Legal Adviser while the Minister of Justice (and Commissioner for Justice) would be a political office to be occupied by another functionary. This should limit the roles of the AGF and AGS to prosecutorial decision-making similar, in some ways, to what obtains in Canada, United Kingdom and South Africa. In the interim, and barring such constitutional amendment, the NPP 2016 and the associated GPFRN and the CCP should be further reviewed in terms of the UN Guidelines with a view to curbing the abuse of prosecutorial powers in corruption cases and enacted into law by the National Assembly. New provisions in terms of the UN Guidelines should be inserted into the EFCC Act 2004 to give copious guidance on the transparency and accountability of prosecutors to guide against prosecutorial misconduct in corruption cases. Finally, the judiciary must consciously take on a new "activist" role to set aside or depart from the decision in *State v Ilori* and line of cases and more so in the strictest scrutiny of any unfettered and abusive exercise of prosecutorial discretion.