

WHISTLE BLOWING POLICY AND THE FIGHT AGAINST CORRUPTION IN NIGERIA: IMPLICATIONS FOR CRIMINAL JUSTICE AND THE DUE PROCESS¹

Abstract

Corruption is a cankerworm that has eaten deep into the fabrics of every system in Nigeria. It is a crime with such a despicable viral effect and disastrous tendency like a terror bomb. Though it is more of an executive crime but no well-meaning government handles corruption with levity because the extremity of its ugly tentacles is capable of obstructing good governance. Therefore, the system has to be sanitized to make the process hitch free for strategic developmental adventure. One of the major challenges in the fight against corruption is detecting and exposing corruption. Whistle blowing therefore becomes a veritable means to fight this cancerous crime. After all, criminal justice exists for the control and prevention of crime. However, in every crime control and prevention exercise, due process of law demands that no free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will the state proceed with force against him, or send others to do so, except in accordance with the law or by the lawful judgment of a competent court. This paper deals with the challenges the enforcement of whistle blowing policy is posing to the Nigerian criminal justice process.

Key words: Criminal Justice Process, Due Process, Whistle Blowing Policy, Corruption, Nigeria

1. Introduction

One may wonder why this paper is not directed to the criminal justice system so to say. The answer is not farfetched as the challenges the Whistle Blowing policy is posing is to the criminal justice process and not the system, strictly speaking although both the process and the system are interwoven. The criminal justice system is rather a collection of institutions meant to work together to carry out the criminal justice process in the administration of criminal justice according to due process of law. However, if justice is the quality of being just, or the administration of the law or authority in maintaining the law,² and if justice is to be seen in a sense of morality and equity,³ then criminal justice in its restrictive and qualified sense,⁴ is justice according to the law relating to crimes and trial of persons accused of committing crimes. It is justice which a person receives as his desert after he has been tried for committing an offence under the Law creating that offence and in accordance with the legal procedure for the trial. Criminal justice does not just descend on a suspect or an accused from nowhere, it is administered through a process within a system, that process in criminal law is called the criminal justice process. And the U.S. Supreme Court in *Booth v. Maryland*⁵ held that to administer justice, the decision of the court should be based on reason and relevant evidence concerning the crime and the defendant rather than on emotion. In another case of *Regina v. Paty*⁶ the need

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² Concise Oxford English Dictionary, 11th Ed. (Oxford University Press, 2007) p. 772.

³ That is according to Natural Laws approach. See F Adaramola, *Basic Jurisprudence*, 2nd Ed. (Lagos: Nayee Publishing Co. Ltd., 2003) p. 239. He defines functional Justice as the application of the rules and principles of legal justice to social everyday problem that is brought before the courts and quasi-judicial and administrative bodies. It connotes justice in the perpetual, precarious and inevitable balancing of jural relationships between individual citizens inter se on one hand and citizens and communal institutions such as government and its agencies, on the other.

⁴ That is according to positive laws approach. See G O S, Amadi, *Police Powers and the Rights of Citizens in the Nigeria Criminal Justice System*, Unpublished Ph.D. Thesis, Faculty of Law, University of Nigeria. 1993, p. 28.

⁵ 482 U.S. 496 (1987).

⁶ 92 Eng. Rep. 232, 234 (1704). In this case, the British House of Commons had deprived one John Paty and certain other citizens of the right to vote in an election and committed them to Newgate Prison merely for the offense of pursuing a legal action in the courts. The Queen's Bench, in an opinion by Justice Powys, explained the meaning of 'due process of law' as follows: It is objected, that by Mag. Chart. c. 29, no man ought to be taken or imprisoned, but by the law of the land. But to this I answer, that lex terrae is not confined to the common law, but takes in all the other laws, which are in force in this realm; as the civil and canon law.... By the 28 Ed. 3, c. 3, there the words *lex terrae*, which are used in Mag. Char. are explained by the words, due process of law; and the meaning of the statute is, that all commitments must be by a legal authority; and the law of Parliament is as much a law as any, nay, if there be any superiority this is a superior law. Chief Justice Holt dissented in this case because he believed that the commitment had not in fact been by a legal authority. The House of Commons had purported to legislate unilaterally, without approval of the British House of Lords, ostensibly to regulate the election of its members. Although the Queen's Bench held that the House of Commons had not infringed or overturned due process, John Paty was ultimately freed by Queen Anne when she prorogued Parliament.

for observing due process in justice administration was emphasized and the meaning further extended. Thus in the enforcement of any law issued by a legal authority due process is the rule and not the exception. The idea or policy of reporting wrongdoing in private or public organization in the public interest to the authorities concerned known as 'whistle blowing' is globally gaining support. It is no longer strange that some employees or members of the public who are courageous expose a financial scandal, misappropriation of public funds and the likes.

Yet, despite the fact that whistle blowing could be beneficial to the society in the fight against corruption as well as in curbing same, it can raise some problem. This is because where due process is followed, at any point where investigation is beclouded and information is not forthcoming, the case could be responsibly suspended in search of further information without going public on air. It will make a caricature of the justice process if in the mist of prosecution contrary information flows in that the whistle blower gave false information or that the outcome of investigation shows that the wrong person is being prosecuted. Ordinarily, because of the existence of the common law duties of trust, loyalty and confidence a whistle-blower could be legitimately dismissed and prosecuted. However, it was held in *Gartside v Outram* as an exception to the duty of trust, loyalty and confidence,⁷ that there is no confidence as to the disclosure of iniquity, especially where the disclosure is in public interest, and any purported exclusion of this exception, by a contract of employment would be void. The reason for this as given by Lord Denning in *Initial Services Ltd. v. Putenic*⁸ was that: no private obligations can dispense with that universal one which lies on every member of the society, to discover every design which may be formed, contrary to the laws of the society, to destroy the public welfare.

2. The Nigerian Criminal Justice and the Due Process

Criminal justice exists for the control and prevention of crime. The criminal justice process involves all the agencies and procedures set up to manage both crimes and those accused of violating the criminal law.⁹ The criminal justice process cannot be conveniently discussed without reference to the criminal justice system because the process takes place within the system. While the criminal justice process involves series of steps beginning with a complaint or information of crime commission, followed by a criminal investigation and arrest, prosecution processes and ending with a probable acquittal/discharge or the release of a convicted offender after serving his term or even the execution of an offender where applicable.¹⁰ The criminal justice system is the collective institutions through which an accused offender passes until the accusations have been disposed of or the assessed punishment concluded. The system has three components namely, the law enforcement, the judicial process and corrections.¹¹ According to Reid the accused, like a product goes from station to station in the system, and at each station something is done in the system and something is done to the accused. If the accused 'passes' inspection, he moves on to the next station. Theoretically, if the accused goes through the entire system and 'passes' he is ready to return to society¹². The criminal justice system is the major meeting place of the police and the citizen, and it is here that the clash between the exercise of police powers and the claim of rights by the citizen occurs¹³.

Ordinarily, without applying the law yet, everyone in the society is presumed innocent until the person commits a crime or is accused of one. But legally speaking, it is trite that an accused is presumed innocent until proved guilty. As such in Nigeria, the criminal justice process within the system is set on motion the moment a complaint is made to the police by the society or any member of the society or by the police on its own detecting the commission of a crime¹⁴. It is then that the accused/suspect is ready for 'processing' in the words of Reid. He may or may not go through the process of prosecution depending on the outcome

⁷ (1986) 20 LJ CH 113, 114, 116

⁸ (1968) QD, 396.

⁹ J A Inciardi, *Criminal Justice*, 7th ed. (Boston: Mc Graw Hill, 2004) p. 139.

¹⁰ J A Inciardi; *op.cit.*, p. 381.

¹¹ *Black's Law Dictionary op.cit.*, p. 381.

¹² S T Reid, *Crime and Criminology*, (Hinsdale Illinois: The Dryden Press, 1976) p. 260 (cited in Amadi, *op.cit.*, p. 32 – 33.

¹³ G O S Amadi, *ibid*; P. 31

¹⁴ *Ibid*; p. 31.

of the investigation and his involvement in the alleged crime. Nevertheless, the police can prosecute,¹⁵ subject to constitutional provision.¹⁶ The accused may even obtain a *nolle prosequi* or withdrawal of charge by the Attorney-General as the case may be. Which power overrides that of the police (or the private person) to prosecute and it is not subject to control by the court.¹⁷ However, although the police have no power to enter a *nolle prosequi*, they can always if circumstance warrants, withdraw their charges from the Court.¹⁸ When any of these exculpating circumstances take place, the accused is free to leave the system and return to the society. Nonetheless, a *nolle prosequi* or withdrawal of a charge is not equivalent to an acquittal, and it is no bar to a new indictment or charge for the same offence.¹⁹ Of course, crimes are not statute barred, and so the accused may be brought back into the criminal justice system if the need arises. Where the accused is found guilty and is sentenced to a prison term, he is institutionalised for the process of reformation and rehabilitation before he gets back to the society. But more so, where the accused gets convicted and receives a capital punishment, in the words of Amadi, ‘the process of reformation and rehabilitation becomes a non-issue since eventually, he will be hanged or executed as the case may be or may remain in the prison for life. Yet if given a reprieve, he still has a chance of leaving the system and returning to the society. This in a nut shell is the Nigerian criminal justice process and anything bereft of this is outside the due process of law notwithstanding the purpose and intention.

By ‘due process’, it is the conduct of legal proceedings according to established rules and principles for the protection and enforcement of private rights, including notice and the right to a fair hearing before a tribunal with the power to decide the case.²⁰ Lord Denning M. R, opines that ‘due process of law’ is the measure authorised by the law so as to keep the streams of justice pure: to see that arrests and searches are properly made; that lawful remedies are readily available; and that unnecessary delays are eliminated.²¹ Against this background, by due process of law within the context of this paper, the writer means the legal process within the criminal justice system, which helps to protect the people’s fundamental right especially the right to fair hearing. It therefore includes the right to be notified of charges or proceedings, the right to have your case thoroughly and properly investigated, to be tried by an impartial judge or magistrate under the established procedures; to defend oneself in a court of law; and the right to be cleared of charges if not convicted. Due process requires that a person cannot be charged under a law that does not exist. Due process within the Nigerian criminal justice process includes the processes of arrest and investigation, arraignment and trial, acquittal or conviction, sentence (punishment) and/ or prerogative of mercy.

3. Criminal Justice Process, Whistle Blowing and Fight against Corruption

Whistle-blowing could be linked to ethics and morality; the act of whistle-blowing is usually not a legal obligation but a personal choice. The driving force for whistle blowing is the call for individual responsibility. And whether an individual will blow the whistle or not depends on whether the whistleblower perceives individual responsibility and has the gut to shoulder the responsibility. By way of definition Whistle-blowing has been defined as ‘...a colloquial term usually applied to the raising of concerns by one member of an organization about the conduct or competence of another member of the same organization or about the activities of the organization itself’²² It is the disclosure by a person, usually an employee in a

¹⁵ Police Act Cap. P 19, LFN 2004, s. 23, with Regulations Robbery/Firearms Special Provision Act and Advance Fee Fraud Act, 2006. The law has widened the scope of institutions that can prosecute crime including the EFCC for financial crimes.

¹⁶ Ss. 174, 211, which relates to the power of the Attorney-General of the Federation and the state as the case may be, to institute and undertake, take over and continue or discontinue criminal proceedings against any person before any court of law in Nigeria except the court martial.

¹⁷ *R v. Comptroller of Patents* (1899) 1 Q. B 909 at 914, *State v. Ilori* (1983) 1 SCNLR 94.

¹⁸ Police Act, s. 23.

¹⁹ Ss. 73 (3), 74 (4), of the C P A, 253 (3) C P C, See also *Clark & Anor. v. A. G. Lagos State* (1986) 1 QLRN 119. In that case the court held inter alia that the effect of a *nolle prosequi* is a mere discharge and not an acquittal. See also the Constitution of the Federal Republic of Nigeria 1999 as amended, s. 36 (9).

²⁰ *Black’s Law Dictionary: 7th ed., op.cit.*, p. 516. According to the Black’s Law Dictionary, the words ‘due process’ have a precise technical import, and are only applicable to the process and proceedings of the court of justice; they can never be referred to an act of legislature’ Alexander Hamilton, Remarks on an Act for Regulating Elections, New York Assembly, 6th Feb. 1787, in 4 papers of Alexander Hamilton 34, 35 (Harold C. Syrett ed.1962).

²¹ L. Denning, M. R, *The Due Process of Law* (London: Butterworths, 1980) p. 1

²² Testimony of Guy Dehn to the Shipman Inquiry (2003). Cited in Ibrahim Sule: Whistleblowers’ Protection Legislation: in Search for Model for Nigeria available on http://www.pcaw.co.uk/policy_pub/shipman_transcript.html (Retrieved 11thFebruary, 2016)

government agency or private enterprise, to the public or to those in authority of mismanagement, corruption, illegality or some other wrongdoing.²³ It has also been defined as causing something bad that someone is doing to stop especially, by bringing it to the attention of other people²⁴. Miceli and Near defined it as the disclosure of illegal, immoral or illegitimate practices by employees, under the control of their employers, to persons or organizations that may be able to effect action²⁵. Elsewhere, it is defined as the reporting of alleged unethical conduct of employees, management, directors and other stakeholders of an institution by an employee or other person to appropriate authority²⁶.

On the hand, a whistleblower according to the Black's Law Dictionary is an employee, who reports employers' wrongdoing to a governmental or law enforcement agency.²⁷ For Gilan,²⁸ whistle-blowers are persons (usually workers) who at their own risk, having been 'motivated by a sense of personal, and/or public duty, may expose what they perceive as specific instances of wrongdoing, which may be within the private and/or public sector'. The whistleblower tells people in authority or the public about dishonest or illegal practices at the place where they work. He provides information to law enforcement or regulatory agencies about a business that is engaged in suspected illegal or improper activities.²⁹ It has also been defined as any person(s) including the employee, management, director, depositors, service providers, creditors and other stakeholders of an institution who reports any form of unethical behavior or dishonesty to the appropriate authority.³⁰ Whistleblower as a term is synonymous with the term informant but they are not exactly the same thing. While Informants are often involved in some sort of unethical activities and use their disclosure as a means to clarify their own role or to reduce their liability, whistleblowers reveal information by their own will, selflessly, in good faith without any personal interest but because of their commitment to public interest and public good.

Whistle blowing is as helpful to the society as it is risky for the whistleblower. Although, whistle blowing could prevent a great disaster or harm befalling on the general public or large number of innocent people. Yet it is indisputable that the whistle blower is at a great risk and therefore needs some sort of legal protection while due process in prosecution is highly recommended. There is the fear of the effect and impact of what the whistle blower is going to reveal and the dangers to his life and livelihood, to his family, reputation and profession. On the other hand if he decides to keep silent, his silence may cause great disaster to the public and if he blows the whistle he could face discipline or dismissal from his work because he is seen as a threat by colleagues and his employer. He could be called names, labeled negatively or seen as a trouble maker. There is the fear that he might be prosecuted or get an action for defamation or that the report may be interpreted as an attack on an individual or body. This is more common with internal whistle blowing. Despite the risk surrounding whistle blowing there has been a growing support for whistle blowing internationally³¹ particularly in the areas of good governance, public accountability and fight against

²³ The Free Dictionary by Farlex <<https://www.commonscemedia.org/app-reviews/the-free-dictionary-by-farlex>> accessed 25 March 2017

²⁴ The Cambridge Advanced Learner's Dictionary <www.google.com.ng/cambridge+learner's+dictionary> accessed 21st April, 2017.

²⁵ Miceli, et al., 'whistleblowing in organization', (Routledge/psychpress, US 2008) 6. Cited in C. Chukwu: Promotion of Whistle blowing as a Tool for Fighting Corruption in Nigeria. Her unpublished project work which I supervised in 2016 in the Faculty of Law, Enugu State University of Science and Technology.

²⁶ Section 1.0, CBN Guidelines for whistle-blowing for Banks and other Financial Institutions in Nigeria, 2014. <<https://www.scu.edu/ethics/whistle-blowing-in-the-public-sector>>

²⁷ Black's Law Dictionary (9th ed.) 734

²⁸ G Gillan 'Whistleblowing Initiatives – Are they merely Secrecy Games and/or Blowing in the Wind?' *Company Lawyer*, 24, (2003). Cited in Ibrahim Sule; op. cit.

²⁹ Barbara El. 'Examples of whistleblowing in Business' (2016) OM <smallbusiness.chron.com/examples-whistleblowing-busienss-2651.html> accessed 29 March 2016.

³⁰ J. Nadler and M. Schulman, 'Whistle Blowing in the Public Sector' (2016) *MCAE*

³¹ The United Nations Convention against Corruption (UNCAC), European Council's Criminal Law Convention on Corruption (Article 22) and Inter-American Convention against Corruption (Article III). Under Article 33 of the UNCAC signatory countries are encouraged to take domestic measures to incorporate in their legislations and other provisions protecting whistleblower witnesses and their families from any unwarranted treatment. The countries are also urged to set in place measures that facilitate reporting of corruption to appropriate agencies (Asian Institute of Management). Countries have also been called upon to provide effective mechanism for protecting witnesses who disclose wrongdoing and their families and relatives from actual or potential harassment, retaliation or intimidation. (Article 32). The Convention advocates for some enhanced support for whistleblowers and witnesses, for instance

corruption. In Nigeria two bills on whistle blowing and protection of whistle blowers have been waiting to be passed into law³². In the midst of the long waiting, on 21st December 2016 the Federal government put in place a whistle blowing policy to encourage people to expose fraud in the public and private sectors. The whistleblower stands to collect between 2.5 and 5% of the monies recovered³³. As at March 2017 the Federal Government is still urging the National Assembly to pass the bill³⁴ and as at 19 May, 2017 the bill has not been passed into law³⁵.

It is indisputable that corruption³⁶ cannot be fought, unless it is detected, reported and punished or addressed. Yet the fight against corruption just like any other crime has to be in accordance with due process of law. Obviously one major challenge that faces Nigeria in her fight against corruption is the detection and prosecution of corruption irrespective of who is involved. This is precisely why whistle-blowing is one of the most direct ways of detecting corruption. The fact that these corrupt practices revealed by whistle blowers are almost connected to top political officers who have the capacity of obstructing investigation affects the free flow of the criminal justice process³⁷. It is said that political office holder have an aura of invincibility around them. Where the offender is a top political officer the risk to the whistle blower can be considerable. Unfortunately, these offences are bailable offences. One of the fears of a whistle blower is victimization. As long as the accused/suspect remains free, the whistle blower(s) will remain in fear of being victimized. Thus there is need to protect the whistle blower and to make the offender sign an undertaking about the safety of the whistle blower who revealed his crim. There is also need to reform both the political and justice system to ensure that no one is above the law. There is also the need to keep the suspect in custody until after the investigation is concluded and the suspect is charged to court or released for want of evidence. When a member of the high powered interest group is affected in the whistle blowing, information can turn blurred and obscure thereby obstructing the criminal justice process³⁸.

relocating them to a safer environment. Also, Countries such as Turkey, South Africa, South Korea, Australia and a host of others have whistleblowers' protection laws.

³² The first bill is captioned 'WHISTLEBLOWER PROTECTION BILL, 2008' (H.B. 117). It seeks to provide for the manner in which individuals may in the public interest disclose information that related to unlawful or other illegal conduct or corrupt practices of others and to provide for the protection against victimization of persons who make these disclosures. The bill was sponsored by Senator Ganiyu Olanrewaju Solomon. The second bill which is the most recent is captioned SAFEGUARDED DISCLOSURE (WHISTLEBLOWERS, SPECIAL PROVISIONS, ETC.) BILL, 2009 (H.B. 167). It seeks to make provision for the procedure in terms of which persons employed in the public and private sectors may disclose information regarding unlawful and other irregular practices and conduct in workplace and to provide protection against any occupational detriment or reprisals of a person making such disclosures. The bill has been sponsored by Honourable John Halims Agoda.

³³ The whistle blowing policy has revealed a lot since inception. The Senate president Bukola Saraki, is facing an 18-count amended charge at the Code of Conduct Tribunal over false declaration of assets and other corrupt charges relating to his former position as the then Governor of Kwara State. The minister of Transport, Rotimi Amaechi was accused by judges of trying to influence the outcome of some election petitions before them. The secretary to Federal Government Babachir Lawal is embroiled in his own grass cutting corruption scandal. Kayoed Fayemi, the Minister of Solid Minerals has been indicted by the Ekiti State House of Assembly for misappropriating N40billion of public funds while he was Governor of the State. There are corruption allegations against some other senior functionaries of both past and present administration. Minister of power, works and Housing, Babatunde Raji Fashola is alleged to have misappropriated public funds including using millions of naira to build his personal/official website. The corruption history of most of our legislator can be baffling. Meanwhile, senate has refused to confirm the appointment of Acting Chairman of the EFCC Ibrahim Magu, over a Department of Secret Service (DSS) report that indicts him of corruption. Unfortunately, even when indicted, most of them appear so untouchable, especially if they were appointed by government of the day.

³⁴ I Inyang, *Daily Post*, May 21, 2017.

³⁵ A Olasupo, 'National Assembly to pass bill on whistle blowing soon', *The Guardian* (APC Iseyin/Iwajowa/Kajola/Itesiwaju Federal Constituency).

³⁶ The Black's Law Dictionary³⁶ defines it as depravity, perversion or taint; an impairment of integrity, virtue or moral principle, especially the impairment of a public official's duty by bribery OR the act of doing something with an intent to give some advantage, inconsistent with official duty and the rights of others; a fiduciary's or official use of a station or office to procure some benefits either personally or for someone else, contrary to the rights of others.

³⁷ A good example is the suspended member of the House of Representatives Hon. Abdulmumin Jibril, who brought allegations of so-called budget-padding by the National Assembly Members to the knowledge of the presidency and security agencies. No report on the outcome of the investigations into the allegations. And for daring to blow the whistle he has been suspended by his colleagues. Yet while he suffers the suspension the suspects are reviewing another budget

³⁸ The latest discovery at Ikoyi was alleged to belong to a former Managing-Director, Operations at the Nigeria National Petroleum Corporation, NNPC, Mrs Esther Nnamdi-Ogbue. But shortly after the media report, Mrs Esther Nnamdi-

4. Conclusion and Recommendations

The culture of disclosing wrongdoing in the public and private sector seem to be a welcome development in Nigeria as a tool for the fight against corruption. However, in the control and prevention of crime within the criminal justice process, due process of law is the rule and not the exception. Fair hearing is the watchword. The National Assembly as a matter of urgency should pass the whistle blowers bill into law to have adequate protection for whistle blowers, have legal backing and get the Federal Government more committed to his promises. Provision must be made for fair hearing in the process of investigating report of an alleged impropriety. There is need to review and update our law of evidence to reflect the technological advancements in the country and globally as well as update the judiciary to be in tune with current technological know-how for justice delivery. The Administration of Criminal Justice Act, 2015 has improved the regulation of criminal trials in Federal Courts and courts in the Federal Capital Territory. We recommend that states should bring it home and make it part of their laws.

Ogbue issued a statement denying ownership of the large sums of money. Through a statement by her lawyer, Emeka Etiaba, SAN, Mrs Ogbue had expressed shock at the said recovery and saluted the courage and efforts of the EFCC in the war against corruption but said the money was not her own. <http://www.vanguardngr.com/2017/04/whistle-blowing-panacea-corruption>. retrieved 20/5/2017.