Emerging disclosure regime in criminal proceedings in Nigeria: issues and prospects[1]

Akeem Olajide Bello[2]

ABSTRACT

This article reviews the emerging disclosure regime in criminal proceedings in Nigeria and its future prospects. Until recently the Laws governing the administration of criminal justice in Nigeria contain very little provisions governing disclosure in criminal proceedings. The recent reform of the Administration of Criminal Justice Laws in Nigeria have also not addressed the need to provide adequate rules governing disclosure in criminal proceedings. The paper examines the provisions on disclosure obligations in criminal trials in Practice Directions of two Courts exercising criminal jurisdiction in Nigeria. The examination reveals that the provisions of the Practice Directions are designed to address case management issues and not specifically to regulate disclosure obligations of the prosecution and defence. The article charts the direction that the regulation of disclosure obligations in criminal proceedings in Nigeria should follow.

Keywords: *Disclosure. criminal proceedings. equality of arms. fair hearing.*

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2 Akeem Olajide Bello, LLB. Hons. (Benin), LLM. & PhD. (Lagos), BL. Nig., Senior Lecturer, Department of Public Law, Faculty of Law, University of Lagos. Dr Bello was a former Senior Special Assistant to the Attorney General, Lagos State, Lagos, Nigeria between 2007 and 2011, E-mail: abello@unilag.edu.ng or jidekate@hotmail.com

1 INTRODUCTION

Nigeria operates a federal system of Government with a national federal government and 36 federating units known as States. The country operates a dual system of criminal justice with federal courts trying offences under federal law and State courts trying offences under State laws. A common feature of both system is the paucity of rules governing disclosure obligations in criminal proceedings. Existing laws in Nigeria contain very little regulation of disclosure obligations in criminal proceedings. The recent Administration of Criminal Justice Law Repeal and Re-enactment Law 2011 of Lagos State and the Federal Administration of Criminal Justice Act 2015 did not address the regulation of disclosure obligations. The adoption of Practice Directions by two Federal Criminal Courts, the Federal High Court Practice Directions 2013 and the Practice Direction on the Implementation of Criminal Justice Act 2015 in the Court of the Federal Capital Territory 2017 imposed limited disclosure obligations on the prosecution and defence.

This article reviews the emerging disclosure regime in criminal proceedings in Nigeria and its future prospects. The article is arranged in five parts. The first part is the introduction. The second part examines the justification for disclosure obligations and its constitutional foundations. The limited disclosure obligations under existing laws is the focus of the third part. The fourth part examines the regulation of disclosure obligations in England and identifies lessons that Nigeria can draw from the law and practice of disclosure in England. The fifth part concludes the article.

2 JUSTIFICATION OF DISCLOSURE OBLIGATIONS AND ITS CONSTITUTIONAL FOUNDATIONS

Disclosure in criminal trial refers to the surrendering of relevant

evidence such as confessions, statements, witness lists or scientific evidence to the defendant before trial.[3] The justification for disclosure can be traced to constitutional rights of defendants in criminal trials. The adversarial criminal justice system practiced in Nigeria and in countries with common law background is underlined by constitutional rights of defendants which provide a basis for disclosure obligations. A defendant standing criminal trial is presumed to be innocent until proven guilty.[4] This presumption imposes on the prosecution the obligation to adduce evidence to establish the guilt of the defendant beyond reasonable doubt. This presumption in Nigeria is part of the constitutional right of defendants to fair hearing. In Nigeria, a defendant is also guaranteed the right to fair hearing within a reasonable time by a court established by law and constituted in a manner to secure its independence and impartiality.[5] The right to fair hearing guaranteed under section 36 of the Nigerian Constitution is substantially similar to article 6(1) of the European Convention on Human Rights (Convention). Then the European Commission on Human Rights[6] in Kaufman v. Belgium has interpreted article 6 (1) of the Convention to require the observance of the principle of "equality of arms" under which the defendant in criminal proceedings must have "a reasonable opportunity of presenting his case to the court under conditions which do not place him at a substantial disadvantage *vis a vis* his opponent."[7]

In Jespers v. Belgium[8], the European Commission held that the "equality of arms" principle imposes on prosecuting and investigating

3 Duhaime's Law Dictionary, available online at http://www.duhaime.org/LegalDictionary/D/Disclosure.aspx (accessed on 1 July 2018).
4 Section 36(5) of the Constitution of the Federal Republic of Nigeria 1999 (hereafter (CFRN).
5 Section 36(1) of CFRN.
6 The European Commission on Human Rights became obsolete in 1998 with the restructuring of the European Court of Human Rights, it held an important role in assisting the European Court of Human Rights from 1953 to 1998.
7 50 D.R. 98 at 115, quoted from Archbold, Criminal Pleading, Evidence and Practice, 2008 at pp. 1740 para. 16-64.
8 27 D.R. 61, Quoted from Archbold, Criminal Pleading, Evidence and Practice, 2008 at pp. 1755, para. 16-63.

authorities an obligation to disclose any material in their possession, or to which they could gain access, which may assist the accused in exonerating himself or in obtaining a reduction in sentence. This principle extends to material which might undermine the credibility of a prosecution witness.

The importance of the above pronouncements by the European Commission on Human Rights is that the right to fair trial imports an obligation on the part of the prosecution to disclose any material under their control which may exculpate the defendant. This is an obligation which applies by constitutional force whether it is expressly provided in any other legislation or not. The constitutional foundations of the right underscores its importance.

Furthermore section 36(6) (b) of the Constitution guarantees the right of a person charged with a criminal offence to be given adequate time and facilities for the preparation of his defence. In *C.O.P. v. Okoye*[9] the Court Appeal in interpreting the meaning of facility for the purpose of section 36(6)(b) adopted the meaning of facility as: "Something that permits the easier performance of an action, course of conduct, etc., to provide someone with every facility for accomplishing a task, (...). The quality of being easily or conveniently done or performed". (at page 417 para. B-C).

The court held that evidence against the accused, including statements of witnesses for the prosecution, necessary for the preparation of an accused defence are facilities within the meaning of the provisions. The court also defined defense for the purpose of section 36(6)(b), as accused person's stated reason while the prosecutor has no valid case.

3 DISCLOSURE OBLIGATIONS IN EXISTING LAWS

3.1 Rules of Professional Conduct for Legal Practitioners

9 (2012) 14 NWLR (Pt. 1320) 390.

The Rules of Professional Conduct for Legal Practitioners in Nigeria (the Rules)[10] imposes certain obligations on prosecutors in relation to public prosecution. Rule 37(4) imposes a duty on the prosecution to promote justice, not conviction. The primary duty of a lawyer engaged in public prosecution is not to convict but to see that justice is done.[11] Commenting on this aspect of the duty of the prosecution, the Nigerian Supreme Court observed in Atanda v. Attorney General[12] that: "We have to remind prosecuting counsel that they ought to look on themselves not as advocates but as ministers of justice, and their task is not to secure convictions but to help in the administration of justice".

The duty to seek justice and not conviction is arguably the basis of the duty imposed on the prosecution by Rule 37(6) not to suppress but to disclose exculpatory evidence. The Rules provide that a prosecutor shall not suppress facts or secrete, witnesses capable of establishing the innocence of the accused persons; but he shall make timely disclosure to the lawyer for the defendant, or to the defendant if he has no counsel, of the existence of evidence known to the prosecution or other government lawyer that tends to negate the guilt of the accused, mitigate the degree of the offence or reduce the punishment.[13] The duty to disclose exculpatory evidence favorable to defendants is also reinforced by the National Policy on Prosecution.[14]

10 Made under section 12(4) of the Legal Practitioners Act.
11 C. Ferguson-Gibert, "It is Not Whether You Win or Lose, It is How You Play the Game: Is the Win-Loss Scorekeeping Mentality Doing Justice for Prosecutors?" (2001) 38(1) California Western Law Review, 1.
12 (1965) NMLR 225 at p. 232.
13 In the US case of Alcorta v State of Texas 355 U.S. 28, 28(1957) the prosecutor was aware that its star witness was sexually involved with the defendant's wife-whom the defendant was prosecuted for killing after he came upon her and the star witness in a parked car. This fact was not disclosed to the defence. The judgment in the case was reversed and fresh trial was ordered.
14 The Body of Attorneys-General of Nigeria comprising of the Attorney General of the Federation and State Attorneys General adopted three documents setting out the National Policy on Prosecution and regulating the professional conduct of prosecutors. These are the National Policy on Prosecution, Guidelines for Prosecutors in the Federal Republic of Nigeria and a Code of Conduct for Prosecutors in Nigeria.

3.2 Administration of Justice Acts/Laws

The Criminal Procedure Act and the Criminal Procedure Code which was adopted[15] to govern administration of criminal justice in the Southern and Northern States in Nigeria respectively did not contain any specific provisions guiding disclosure in criminal proceedings. The practice however, evolved of the prosecution attaching "proof of evidence" to Information filed in the High Court in the Southern States or a Charge filed in the High Court in the Northern States.[16] This practice required the prosecution to attach to the Information and Charge, copies of witness statement and any other evidence that the prosecution intends to rely on at the trial. Recently in *Akwuobi v. The State*[17] the Supreme Court held that it was not mandatory to attach witness statement to a Charge in the High Court under the Criminal Procedure Code in Benue State (a Northern State). This limited disclosure practice was not available in criminal trials before inferior courts of record known as Magistrates' Courts in the South and Area Courts in the North. In these inferior courts defendant are tried summarily[18] with the particular of offence stated on a document known as the "charge sheet."

The recently enacted Federal Administration of Criminal Justice Act 2015 (ACJA) and the Administration of Criminal Justice Law Repeal and Re-enactment Law 2011 of Lagos State (ACJL) slightly improved on the State of the Law. Section 251 of the ACJL requires that an information filed in the High Court should be accompanied with the following: (i) proof of evidence; (ii) list of witnesses; and (iii) list of exhibits. Section 77(2) of ACJL extends the limited disclosure

15 The legislations were initially Federal Acts, but were later adopted in the course of Nigerian constitutional history as State Laws when Nigerian changed from a unitary to a federal system of government.
16 The provision of section 338 of the Criminal Procedure Act, Cap C41 Laws of the Federation of Nigeria 2010 and Section 185 of the Criminal Procedure Code does not contain any requirement for attaching proof of evidence to information or charge.
17 [2017] 2 NWLR (Pt. 1550) 421.
18 This is the procedure adopted for the trial of minor offences and misdemeanors involving punishment of not more than three years imprisonment.

to trials in Magistrates' Courts involving a felony by providing that the prosecution shall, on request, give the defendant statements of witnesses and report of experts that the prosecution intends to rely on at the trial, before or at the commencement of the trial.

The ACJA contains provisions on disclosure of proof of evidence by the prosecution. It requires that an information shall include proof of evidence consisting of: (i) the list of witnesses; (ii) the list of exhibits to be tendered; (iii) summary of statements of the witnesses; (iv) copies of statement of the defendant; (v) any other document, report, or material that the prosecution intends to use in support of its case at the trial; (vi) particulars of bail or any recognizance, bond or cash deposit, if defendant is on bail; (vii) particulars of place of custody, where the defendant is in custody; (viii) particulars of any plea bargain arranged with the defendant; (ix) particulars of any previous interlocutory proceedings, including remand proceedings, in respect of the charge; and (x) any other relevant document as may be directed by the court.[19] The provisions of the ACJA is broader than the ACJL and provides specific issues which should be disclosed in an information. The provision allowing the court to direct the production of "any other relevant document" would enable the defendant to request for the disclosure of any other document which may be in possession of the prosecution and may be relevant to exculpating the defendant. In summary trials before a Magistrate Court or Tribunal, section 350(2) of ACJA, requires the prosecution to provide the defendant with all materials that are intended to rely on at the trial, before or at its commencement.

3.3 Practice Directions

The Federal High Court Practice Directions[20] (FHC Direction) issued

19 Section 379(1)(a) of ACJA.
20 The Practice Directions were issued by the Chief Judge of the Federal High Court under section 254 of CFRN to regulate the practice and procedure of the Federal High Court in criminal proceedings.

on 30th June 2013 was designed to fast track criminal trials in the court and to ensure that delays in criminal trials are largely eliminated.[21] Rules 4 and 5 of the FHC Directions relate to disclosure obligations. Rule 4 obliges the prosecution to disclose the followings:

> (I) to serve the defence with copies of the statement of evidence and documentary exhibits 7 days before the arraignment hearing;
> (II) to provide the defence with written case summary of the evidence and documentary exhibits 7 days before the arraignment hearing; and
> (III) to specify what further evidence the prosecution can bring forth and how long it will take to serve the evidence on the court and the defence.

The novel provisions in the FHC Directions is the requirement that the statement of evidence, documentary exhibits and written case and evidence summary be served on the defence 7 days before arraignment. This novel provisions will provide the defence and his team with materials required to determine whether they have any preliminary application relating to the charge and to prepare the defence. A second novel requirement in the FHC Directions relates to the obligation imposed on the defence by Rule 5 to specify the followings in writing:

> (I) the defence being raised;
> (II) aspects of the prosecution case which are agreed;
> (III) aspect of the prosecution case which is in dispute; and
> (IV) witnesses required for cross examination and why.

The objective of Rule 5 arguably is to ensure equality of arms between the prosecution and the defence. If the defence is entitled to know beforehand the case for the prosecution, there is nothing unfair in requesting the defence to disclose the essential aspect of his case. The constitutional validity of the provisions came up in 2014

21 See the Explanatory Note.

in Federal Republic of Nigeria v. Francis Atuche & Anor.[22] before a Federal High Court sitting in Lagos. The 1st defendant challenged the constitutional validity of the provisions of Rule 5. The 1st defendant argued that Rule 5 contravenes the provision of section 36 of the Constitution which presumes the defendant innocent until proven guilty. Second, it was contended that requiring the 1st defendant to specify his defence in writing assumes that a prima facie case has been established against him which requires a defence. A prima facie case it is argued can only be established against the defence after the prosecution has led evidence and a determination is made by the court that a prima facie case is made out, thereby requiring a defence. The court accepted the 1st defendant's argument and ruled that the provisions of Rule 5 violates the constitutional presumption of innocence and the defendant's right to fair trial. The court also ruled that a defendant may voluntarily elect to comply with Rule 5 as was done by the 2nd defendant in the case.

In evaluating the ruling it is important to explain an aspect of criminal trials in Nigeria which heavily influenced the decision of the Court. In Nigeria, after the close of prosecution's case, the court may record a "not guilty" conclusion without calling on the defendant to enter his defence where the court considers that the evidence against the defendant is not enough to justify the continuation of the trial. Alternatively, the defendant or his legal practitioner has the option of making a no case submission. [23] It is only if the court rejects a no case submission that the defendant will be called to enter his defence. The court accepted the argument that Rule 5 requiring the defendant to specify the defence in writing violates the provision of ACJA and ACJL which furthers the presumption of innocence and the burden of proof on the prosecution to prove its case against the defendant beyond reasonable doubt.

22 Unreported Ruling of Aliu Saidu J. Unreported Suit No.FHC/369C/2009 delivered on 30th of September 2014.
23 Section 302 ACJA.

This writer submits that the court misconstrued the objectives of Rule 5. Rule 5 is not intended to abrogate the constitutional rights of defendant to fair trial and the presumption of innocence. Rule 5 is designed as a case management tool to enable the prosecutors and defence narrow the issues between the parties to ensure prompt trials. In addition, disclosure rules are designed to ensure "equality of arms" between the prosecution and the defence. If the prosecution is obliged to disclose exculpatory evidence to the defence, there is nothing unfair about requiring the defence to disclose important facts relating to his defence to the prosecution. This would afford the prosecution equal opportunity to adequately prepare its case to protect the interest of the public. Justice has been described as a three ways traffic; for the State, the defendant and the victim. Justice would require that the prosecution is not compelled to disclose its case to the defence while the defence is allowed to secret his defence and spring it as a surprise on the prosecution during trial. The need to ensure justice for all is stressed in *Josiah v The State*[24] by Justice Oputa of the Nigerian Supreme Court as follows:

> (…) Justice is not a one-way traffic. It is not justice for the appellant only. Justice is not even only a two way traffic. It is really a three-way traffic- justice for the appellant (accused) of a heinous crime of murder; justice for the victim…. 'whose blood is crying out to heaven for vengeance' and finally justice for society at large – the society whose social norms and values had been desecrated and broken by the criminal act complained of.

Requiring the defence to make certain disclosures is not unprecedented in Nigerian criminal justice. Where a defendant wishes to raise a plea of alibi that he was somewhere else at the material time an offence was committed and he could therefore not have committed the offence, he is required to make that disclosure to the police

24 (1985) 1 NWLR (Pt. 11) 125 at p.141.

at the earliest opportunity to enable his alibi to be investigated. It is a settled principle of law that a defendant who fails to disclose his reliance on alibi at the earliest opportunity but raises it during the trial will not be allowed to rely on it.[25] If there is no constitutional objection to defence disclosing a plea of alibi during investigation before criminal proceedings are filed in court, then one wonders how requiring the defence to disclose his defence after service of proof of evidence on him by the prosecution would constitute a violation of his constitutional rights.

In order to respond to the concerns raised in the judgment, it is suggested that Rule 5 can be redrafted to accommodate the judgment but without losing the need for disclosure as follows:

Rule 5 (a) - Disclosure where defence accepts factual basis of prosecution's case

> (I) Where a defendant admits the factual basis of the prosecution's case but seeks to rely on a recognized defence to criminal liability, the defendant shall specify in writing the proposed defence.
> (II) Where the sub rule (i) of this paragraph applies, the defendant shall specify in writing those aspects of the prosecution case which is in dispute and the witnesses required for cross examination, and why.
> (III) In any other situation not covered the by sub rule (i) of this paragraph, a defendant may elect to specify in writing the defence it intends to raise at the trial.

Rule 5 (b) Disclosure after Prima Facie Case is Established

Where a defendant elects not to make a no case submission after the close of the prosecution's case or where after a no case submission the court rules that a defendant has a case to answer the following rules shall apply.

The defendant shall specify in writing:

25 Eke v State [2011] 3 NWLR (Pt. 1235) 589, Ikuepenika v The State [2011] 1 NWLR (Pt. 1229) 449 and Adeyemi v. The State [2011] 5 NWLR (Pt. 1239) 1.

(I) the defence being raised;
(II) aspects of the prosecution case which are agreed; and
(III) aspect of the prosecution case which is in dispute.

The proposed new Rule 5(a) will cover a situation where a defendant admits the factual basis of the prosecution's case but intends to raise a recognized defence to criminal liability that excuses, justifies or authorizes his action. There is nothing unfair in requiring such a defendant to disclose the fact to the prosecution to enable the prosecution prepare its case to challenge the proposed defence. In such a situation there can be no issue of the defence raising a no case submission and the court can proceed to trial to consider the proposed defence. The proposed new Rule 5(b) addresses the decision in Federal Republic of Nigeria v. Francis Atuche & Anor. while achieving the objectives of disclosure.

In 2017 the Chief Judge of the Federal Capital Territory issued a Practice Direction on the Implementation of Criminal Justice Act 2015 in the Court of the Federal Capital Territory (FCT Direction).[26] The FCT Direction also contained some disclosure protocols. Order 5(1) of the FCT Direction requires the prosecution and the defence to disclose to each other and the court relevant material and or information within their knowledge, or in their possession or accessible to them, pertaining to the case that will assist the court:

(I) to identify the issues to be decided upon in the course of their trial, and/or
(II) to narrow down the issue that is in dispute, and/or;
(III) to ensure a speedy and fair hearing for the defendant, victim, witnesses and other parties.

Order 5(2) enjoined the court to encourage the prosecution and defense to agree on non-contentious evidence. Order 5(3) restates the conventional disclosure obligation of the prosecution to serve

26 The FCT Direction took effect from 25th of April 2017.

on the defendant all the materials, information or proof of evidence that it intends to rely on to prove the charge against the defendant not later than five working days before the date of arraignment. Order 5(4) requires the defendant after receipt of materials from the prosecution to indicate on the Case Management Form what aspects of the prosecution case he agrees or disagrees with and may elect to disclose the defense he intends to raise at the trial. Order 5 (5) provides that where a defendant notifies the prosecution of the aspects of the prosecution's case that he disagrees with and discloses the defense he intends to raise, the prosecution in light of such disclosure shall further review all the material in their possession and shall make timely disclosure to the defendant of the existence of material known to the prosecution that tends to negate the guilt of the defendant, mitigate the degree of the offence charged or reduce the punishment.

The FCT Direction is arguably an upgrade on the FHC Directions. The provisions of Order 5(1), (2) and the first part of (3) are designed to narrow down issues between the parties and ensure effective case management to ensure speedy trials. The FCT Directions coming after the FHC Directions make the disclosure of defense optional obviously to reflect the decision in the case of Federal Republic of Nigeria v. Francis Atuche & Anor. The FCT Directions, however, provide an incentive for a defendant to disclose his defence by predicating the prosecution's obligation for further review of all material in their possession on the optional disclosure by the defense under Order 5(4). After such further review, the prosecution is obliged to disclose the existence of material known to it that tends to negate the guilt of the defendant, mitigate the degree of the offence charged or reduce the punishment. Where the defence fails to disclose such defence, there may be no way the prosecution would be able to evaluate the materiality of such evidence. This provision commendably goes beyond case management goals to promote the equality of arms between the prosecution and the defence. It, however, fail to impose obligation

on the defense where it does not raise a no case submission and is willing to proceed to enter his defence after the prosecution has closed its case. In such a situation, equality of arms would oblige the defendants to specify their defence thereby giving the prosecution opportunity to prepare their encounter.

4 DISCLOSURE PROVISIONS IN ENGLAND - ANY LESSONS FOR NIGERIA?

4.1 Disclosure Obligations in England

The current legal framework on disclosure in criminal proceedings in England in relation to offences into which criminal investigations commenced on or after April 4, 2005 are found in Parts I and II the Criminal Procedure and Investigations Act 1996 as amended by the Criminal Justice Act 2003.[27] The disclosure process can be classified into three involving initial disclosure by the prosecution, defence disclosure and duty of continuing disclosure imposed on the prosecution.

The prosecutor at the initial stage must disclose to the defendant any prosecutor material which has not been disclosed previously and which might "reasonably be considered capable of undermining the case for the prosecution against the accused or the case for the accused" or giving to the accused a written statement that there is no discloseable material. Commenting on the import of the disclosure criteria, the House of Lords *R v H and C*[28] noted as follows:

> If material does not weaken the prosecution's case or strengthen that of the defendant, there is no requirement to disclose it. For this purpose the parties respective cases should not be restrictively analysed. But they must

27 These are supplemented by Attorney General's Guidance on Disclosure December, 2013 and the Judicial Protocol on the Disclosure of Unused Materials in Criminal Cases December, 2013.
28 Section 3(1) of the Criminal Procedure and Investigations Act 1996 as amended by the Criminal Justice Act 2003.

> be carefully analysed, to ascertain the specific facts the prosecution seek to establish and the specific grounds on which the charges are resisted. The trial process is not well served well if the defence are permitted to make general and unspecified allegations and then seek far reaching disclosure in the hope that material may turn up to make them good. Neutral material or material damaging to the defendant need not be disclosed and should not be brought to the attention of the court.

The import once of the above provision is that the prosecution is not obliged to disclose all materials. The followings have been held to be discloseable materials: (i) previous convictions;[29] (ii) the identity of persons who might have witnessed an incident giving rise to criminal charges including those who dialed 999 to report an incident;[30] (iii) and information as to the reward to be paid, after the trial, to a registered police informant who was a prosecution witness.[31] After reviewing different approaches for formulating discloseable materials Rt. Hon. Lord Cousfield, suggested that the following should be regarded as exculpatory material worthy of disclosure:

> (I) Evidence which may point to the conclusion that no crime has been committed;
> (II) Evidence which may contradict evidence (real or oral) on which the prosecution's case will rely;
> (III) Information which may cast doubt on the credibility, or reliability of prosecution's witnesses;
> (IV) Information which may be inconsistent with scientific or otherexpert evidence on which the prosecution will rely or with infe-rences which may be drawn from such evidence;
> (V) Evidence or information which may point to another personas perpetrator; or
> (VI) Evidence or information which might reduce the degree of seriousness of the offence.[32]

The second stage of the disclosure regime requires the defence

29 [2004] UKHL 3, at paragraph 35.
30 R v Vasilou [2000] Crim. L.R. 845.
31R v Heggart [2001]4 Archbold News 2.
32 R v Allan [2005] Crim. L.R. 716

in all trials before the Crown Court to give a defence statement to the court and the prosecutor within 28 days of the initial disclosure by the prosecution. The defence written statement must contain the followings: (i) nature of the defence including any particular defenses on which the defendant intends to rely; (ii) indication of the matters of fact on which the defence joins issue with the prosecution; (iii) setting out, in the case of each such matter, why he takes issue with the prosecution; (iv) indicating any point of law (including any point as to the admissibility of evidence or an abuse of process) which he wishes to take, and any authority on which he intends to rely for that purpose; (v) particulars of any alibi including the name, address and date of birth of any witness the accused believes is able to give evidence in support of the alibi, or as to many of the details as are known to the accused when the statement is given; and (vi) any information possessed by the defendant which might be of material assistance in identifying of finding such witnesses.[33]

Section 6C of the Criminal Procedure and Investigations Act requires the defendant to give to the court and the prosecutor a notice indicating whether he intends to call any persons (other than himself) as witnesses at his trial. The notice should contain the name, address and date of birth of each proposed witness, or as many of those details as are known to him when the notice is given. The defendant is also expected to provide any information in his possession which might be of material assistance in identifying or finding any of the proposed witness or that the defendants do not know their details.

The third stage of the disclosure process is the continuing duty of disclosure imposed on the prosecution. The prosecution is required to keep under review the question whether at any given time (and in particular, following the giving of a defence statement) there is a prosecution material which-

33 Rt. Hon Lord Coulsfield, "Review of the Law and Practice of Disclosure in Criminal Proceedings in Scotland," August 2017, at p. 20 available online at http://www.gov.scot/Resource/Doc/197545/0052835.pdf (accessed on July 1 2018).

> (a) might reasonably be considered capable of undermining the case of the prosecution against the accused or of assisting the case for the accused, and
> (b) has not been disclosed to the defence.[34]

There are consequences for the prosecution and the defence for failure to comply with disclosure obligations. Failure by the prosecution to comply with its disclosure obligations does not on its own constitute grounds for staying proceedings for abuse of process.[35] It may however constitute grounds for staying proceedings for abuse of process if it involves such delay by the prosecution that the accused is denied a fair trial.[36] In R v. Boardman where the prosecution failed to disclose a master CD of a telephone call data despite repeated demands from the defence in a prosecution of stalking charges concerning sexually explicit and abusive text messages, the trial judge excluded the call and cell site data thereby effectively ending the prosecution. The prosecution unsuccessfully appealed to the Court of Appeal. In *R v DS and TS* [37] the Court of Appeal dealt with a prosecution appeal where grave failures in the unused material disclosure process had led to the trial judge stopping the trial on the eighth day and subsequently staying the proceedings as abuse of process. The prosecution's appeal succeeded because as noted by the Lord Chief Justice it was not a case where the judge had concluded that a trial would be unfair but rather that a stay was necessary to protect the integrity of the criminal justice system. It was therefore necessary to examine the relevant factors and to review the trial court's balancing decision. The court held that the late disclosed documents were of limited materiality and only relevant to issues of credibility. The court

34 Section 6A (1) & (2) of the Criminal Procedure and Investigations Act 1996 as amended by the Criminal Justice Act 2003.
35 Inserted by section 34 of the Criminal Justice Act 2003 and came into effect on 1st of May 2010.
36 Section 7A of the Criminal Procedure and Investigation Act 1996 as amended by section 37 of the Criminal Justice Act 2003.
37 Section 10(2) of the Criminal Procedure and Investigation Act 1996 as amended by the Criminal Justice Act 2003

also noted that there had been a significant failure by the defence to identify, request and pursue disclosure items in a timely fashion.

There are also consequences for the defence for failure to comply with defence disclosure obligations. Where this happens, two consequences may follow:

> (a) the court or any other party may make such comments as appears appropriate; and
> (b) the court or jury may draw such inferences as appear proper in deciding whether the accused is guilty of the offence concened.[38]

4.2 Any Lessons for Nigeria?

The legal framework for disclosure obligations in criminal proceedings in England is more comprehensive in England compared to Nigeria. Disclosure proceedings in England has admirably served the objective of case management and of ensuring equality of arms between the prosecution and the defence. There is much to be said in favour of moving disclosure obligations beyond the pristine position of requiring only the prosecution to disclose exculpatory evidence to the defence without any disclosure obligations on the defence. The introduction of defence disclosure in England amongst other efficiency benefits is predicated on the need to reduce the number of ambush defences. The courts have been increasingly concerned about the use of ambush defences and advocated a managerialist approach to criminal procedure which requires the early and active participation of the defence.[39]

Concerns relating to the defence disclosure violating the presumption of innocence, privilege against self-incrimination and the burden on the prosecution to prove its case beyond reasonable have been

38 Section 10(3) of the Criminal Procedure and Investigation Act 1996 as amended by the Criminal Justice Act 2003
39 [2015] 1 Cr. App. R. 33.

raised.[40] Requiring the defence to indicate his defence to a charge in a defence disclosure may work against the presumption of innocence by implying that he has a case to answer when all the prosecution has done at this stage is to merely allege that the defendant has committed an offence. These were some of the concerns that led the Nigerian court in Federal Republic of Nigeria v. Francis Atuche & Anor to declare unconstitutional the defence disclosure obligation contained in the Court's Practice Direction.

Having regard to the above concerns it is suggested that reform of disclosure obligations in criminal proceedings should not wholly adopt the England's approach to disclosure obligations particularly with reference to defence disclosure obligation. A modified approach earlier suggested for Nigeria would ensure equality of arms between the prosecution and the defence and ensure fair trial for defendants. There is no valid legal objection to the initial disclosure obligations and the prosecution is continuing duty of disclosure after defence disclosure as practiced in England and it is therefore recommended that it should be adopted in Nigeria. It is suggested that the disclosure obligations be introduced by way of amendments to the Administration of Criminal Justice Acts/Laws in Nigeria to provide a strong legal basis compared to Practice Directions which are generally viewed as merely directory and not obligatory.

In England, as seen earlier, breach of disclosure obligations attracts sanctions for the prosecution and the defence. Failure by the prosecution to comply with disclosure obligations may constitute grounds for staying proceedings for abuse of process if it involves such delay by the prosecution that the accused is denied a fair trial or, as seen in the case of R v Boardman, may lead to the exclusion of undisclosed evidence by the courts. Where a defendant fails to comply with disclosure obligations the court or any other party may make such comments as appears appropriate or the court may draw

40 [2015] EWCA Crim. 662.

such inferences as appear proper in deciding whether the accused is guilty of the offence concerned. It is recommended that the reform of disclosure obligations in Nigeria should adopt the sanctions regime in England for non-compliance. Without sanctions the parties may not take the disclosure obligations seriously.

Allowing the courts or adverse party to make comments on non--disclosure by defence and the court to draw any proper inference does not contravene the privilege against self-incrimination under the Nigerian Constitution. Section 36(11) of the Constitution provides that no person who is tried for a criminal offence shall be compelled to give evidence at the trial. While a defendant cannot be compelled to give evidence at trial, the Nigerian Supreme Court in *Sugh v. The State*[41] held that observations and inferences (unfavorable ones) made by the trial court (having regard to the totality of the evidence) against the accused were valid where the accused did not give any evidence to contradict the case made against him. In Okoro v. The State[42] the Supreme Court provided the rationale for allowing inferences where the defendant exercised his privilege against self-incrimination thus:

> The right to silence permits the accused person's silence on questions against or concerning him. The right to silence is one the civil liberties in the legal system of this country and the cornerstone of our judicial system....It follows therefore that no accused could be convicted of not talking but perhaps the prosecution could call the court's attention in appropriate cases to the accused's silence where evidence linking him to the offences charged exists. Then the irresistible inference of guilt from that evidence linking the accused person with the offence charged might be abundantly clear.[43]

While a defendant who fail to discharge disclosure obligation

41 Section 11 of the Criminal Procedure and Investigation Act 1996 as amended by section 39 of Criminal Justice Act 2003.
42 A, Owusu-Bempah, "Defence Participation Through Pre-trial Disclosure: Issues and Implications" (2013) 17 International Journal of Evidence and Proof 183 at p. 189.
43 *Ibid*, at pp. 192-199.

cannot be compelled to do so by law or by order of court, the court can make such inferences as appear proper in deciding whether the accused is guilty of the offence concerned.

5 CONCLUSION

The article reviewed the justification and constitutional foundation for disclosure obligations in criminal proceedings in Nigeria. The emergence of limited disclosure obligations under Nigerian Laws starting with disclosure obligations under the Rules of Professional Conduct in the Legal Profession, the Administration of Justice Laws and the Court Practice Directions were also examined. The examination revealed that the extant laws provides for limited disclosure obligations and issues arising from the introduction of defence disclosure were discussed. The paper examined the legal framework for disclosure obligation in England. It recommends the adoption of the English approach subject to the qualification with respect to defence disclosure obligations to accommodate the decision in the Nigerian case of Federal Republic of Nigeria v. Francis Atuche & Anor. The suggested modification would not only enhance case management in criminal trials in Nigeria, it would also ensure equality of arms between the prosecution and the defence.

REGIME DE ABERTURA EMERGENTE DE PROCESSOS CRIMINAIS NA NIGÉRIA: QUESTÕES E PERSPECTIVAS

Este artigo analisa o regime emergente de abertura em processos criminais na Nigéria e suas perspectivas futuras. Abertura de processos criminais refere-se à entrega de provas relevantes, tais como confissões, declarações, listas de testemunhas ou evidências científicas ao réu antes do julgamento. Até recentemente, as leis que regem a administração da justiça criminal na Nigéria continham poucas disposições que regulam a

abertura de processos criminais. A recente reforma da Administração de Leis de Justiça Criminal na Nigéria também não abordou a necessidade de fornecer regras adequadas para a abertura de processos criminais. Este trabalho examina as disposições sobre as obrigações de abertura em julgamentos criminais nas "Instruções Práticas" de dois tribunais que exercem jurisdição criminal na Nigéria. O exame revela que as disposições das "Instruções Práticas" foram elaboradas para tratar de questões de gerenciamento de casos e não especificamente para regulamentar as obrigações de abertura da acusação e defesa. O artigo mostra a direção que a regulamentação das obrigações de divulgação em processos criminais na Nigéria deve seguir.

Palavras-chave: *Abertura. Processo Penal. Equidade de armas. Escuta justa.*

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