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THE STATE AS ZEALOUS ADVERSARY: A CRITIQUE OF PUBLIC DEFENDER SYSTEM IN NIGERIA

Muinat T. Abdulgani*** D. O. Okanyi*******Musa Kasim Bello**

*[Ph.D, B.L] Deputy Director, (Academics), Nigerian Law School, Kano Campus, Bagauda, Kano

<abdulgani.muinat@nigerianlawschool.edu.ng><<https://orcid.org/0009-0009-8211-5154>>

**[Ph.D, B.L] Deputy Director (Academics), Nigerian Law School, Augustine Nnamani Campus, Agbani

<okanyi@nigerianlawschool.edu.ng><<https://orcid.org/0009-0009-5456-6003>>

*** [LLM, B.L-Doctoral candidate] Senior Lecturer, Nigerian Law School, Bwari, Abuja

<mkbello@nigerianlawschool.edu.ng><https://orcid.org/0009-0007-9133-2025>**10.5281/zenodo.20772632**

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Abstract

The Ministry of Justice in Nigeria headed by the Attorney-General is saddled with the responsibility of counselling the state in all legal matters. By a structural design, the same Ministry houses the Department of Public Prosecution and the Department of Citizens' Rights. Using Lagos State as a case study, the paper examines the fundamental structural conflict this would create in the criminal justice system and analyses how this institutional design creates an inherent conflict of interest that violates the constitutional guarantee of fair trial and effective legal representation. There is bound to be institutional conflict, in the sense that MOJ funds public defender system while at the same time conducting prosecutions. This arrangement involves far reaching implications for access to justice and fair hearing as well as impacting on indigent defendants. It is against this background that the authors examine the extent of involvement of the Nigerian state as a zealous adversary in public defender system as well as associated implications on access to justice. By employing doctrinal legal analysis, the constitutional provisions (particularly Section 36(6) (c) of the 1999 Constitution), statutory frameworks (Administration of Criminal Justice Law 2015, Lagos State Office of Public Defender Law), judicial precedents, and selected international human rights instruments are all examined. The paper therefore argues that when both prosecution and defence answer to the same Attorney-General within a unified ministerial hierarchy, the adversarial system's fundamental premise structure being opposing parties will be compromised. The authors therefore maintain that a reasonable observer cannot be assured of confidence in the impartiality and effectiveness of defence counsel structurally subordinated to the very authority prosecuting the accused. The study concludes that the constitutional powers conferred on the Attorney-General under Sections 174 and 211 are exclusively prosecutorial and do not extend to supervising defence functions as well as constituting an *ultra vires* exercise of authority and violates the maxim *nemo judex in causa sua*.

Keywords: Conflict of interest, Public defender, Fair trial, Legal representation, Adversarial system

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1. Introduction

The Nigerian criminal justice system employs the adversarial system which was inherited from the common law tradition as against the inquisitorial system. This system rests on a foundational premise which is that truth and justice emerge from the vigorous contest between genuinely opposing parties-‘the prosecution and the defense,’-before an impartial arbiter. The system entails that the prosecutor, representing the state's interest in public order and accountability, will advocate zealously for conviction and the defense counsel whilst representing the accused person's interest in liberty and due process, will advocate equally zealously for acquittal or mitigation, leaving the judge (presented with the best arguments and evidence from both sides) to render an impartial, informed and just decision.

It is worth noting that this adversarial model contains a critical assumption that often goes unstated: that prosecution and defense are institutionally independent. In other words, the prosecutor must be free to pursue conviction without influence from defense interests. The defender must be free to advocate for the accused without influence from prosecutorial imperatives. Flowing from the above, when this institutional independence is compromised, the adversarial system's epistemological foundation crumbles. The contest of opposing parties becomes theater rather than genuine advocacy, and the search for truth and justice is fundamentally undermined by this structural anomaly.

In Nigeria, this foundational assumption faces a profound challenge. In Lagos State, for instance, and several other Nigerian jurisdictions, the institutional structure of criminal justice creates a situation where prosecution and defense both operate within the same Ministry of Justice, under the ultimate authority of the same Attorney-General. On one side of the ministerial edifice sits the Directorate/Department of Public Prosecutions, staffed by state counsel who prosecutes criminal cases on behalf of the state, while on the other side, sits the Office of the Public Defender/Citizens' Rights, staffed by counsel who ostensibly provide independent legal representation to indigent accused persons. Now, both directorates report through the same administrative hierarchy to the same Attorney-General, who is simultaneously the Chief Law Officer of the state, the head of the Ministry of Justice, and the constitutionally designated as chief prosecutor.

This is particularly troubling because this institutional arrangement creates what can best be described as a structural conflict of interest. Having the state, through its Attorney-General, simultaneously prosecutes accused persons and defends them thereby supposedly “killing and saving them in the same breath.” The same authority that determines prosecutorial strategy, allocates resources for prosecution, and exercises ultimate control over state counsel prosecuting cases also exercises administrative supervision over counsel tasked with defending against those very prosecutions. How well can justice be said to be achieved for the accused? As observed in *Akeem Jimoh v The State*,¹ this arrangement means that “the only justice available to a poor accused person is the measure handed to him by his prosecutor.”²

The implications are profound. When a public defender stands in court to represent an indigent accused, that defender answers professionally and administratively to the same Attorney-General whose office is prosecuting the case. Career advancement, performance evaluation, resource allocation, case assignment—all are ultimately controlled by the prosecutorial arm of the state. The defender may be individually committed to zealous advocacy, but the structural reality creates pressures, dependencies, and conflicts that no individual commitment can fully overcome. The reasonable observer, watching such a trial, cannot maintain confidence that the defense is genuinely independent or that the accused is receiving the effective legal representation guaranteed by the Constitution.

The paper examines this structural conflict, using Lagos State as a case study while recognizing that similar structures exist in other jurisdictions in Nigeria. The analysis proceed from the constitutional guarantee of fair trial and effective legal representation, through statutory frameworks and judicial precedents, to international human rights obligations. The central argument of the authors is that the current institutional structure violates the guarantee of a fair hearing, contradicts fundamental principles of natural justice, exceeds the constitutional powers of the Attorney-General, and fails to meet Nigeria's obligations under international human rights law.

¹ Unreported (Appeal No. CA/1/31B/2006

² per His Lordship Dongban-Mensem JCS delivered on the 25th July, 2016

2. Nature and Scope of Conflict of Interest

A conflict of interest exists when an individual or institution has competing professional obligations or interests that could influence decision-making in ways counter to the best interests of those they serve.³ The authors are therefore of opinion that a conflict of interest exists in the situation,⁴ not merely in demonstrated bias or actual harm. The issue is not whether public defenders are individually corrupt or biased—most are dedicated professionals—but whether the structural arrangement creates a situation where impartiality and independent judgment cannot be assured.⁵

In the context of legal representation, conflict of interest typically arises when a lawyer represents clients with competing interests—for example, representing both parties to a transaction or both plaintiff and defendant in litigation. Professional ethics rules universally prohibit such dual representation precisely because effective advocacy requires undivided loyalty. The lawyer cannot simultaneously advance one client's interests and another client's competing interests.

The situation in Nigeria's Ministry of Justice structure creates an analogous situation, but even more troubling conflict. While conceding that the individual prosecutors and defenders are not the same persons, they operate within a unified institutional structure under common leadership. The Attorney-General, who exercises ultimate supervisory authority over public defenders, is simultaneously the chief prosecutor—the very party against whom the defenders must advocate. This creates multiple levels of conflict including administrative conflict (defenders depend on prosecutors' supervisors for resources, assignments, and career advancement), strategic conflict (institutional knowledge flows between prosecution and defense through common administration), loyalty conflict (defenders owe professional duty to clients but administrative loyalty to an authority whose primary function is prosecution) and accountability conflict (evaluation of defender performance occurs within an institution whose primary mission is securing convictions).

³ European Union, “Agents for Citizen-driven Transformation (ACT): Developing a ‘Conflict of Interest’ Policy”, CSO Toolkit/ Guidelines, European Union in collaboration with British Council, p. 4. [hereinafter European Union] Available at https://www.justice-security.ng/sites/default/files/act_toolkit_developing_a_conflict_of_interest_policy.pdf.> Accessed 01/02/26

⁴ *Ibid*, European Union, p. 7

⁵ *Ibid*, European Union, p. 5

i. The Lagos State Context

Lagos State provides a particularly apt case study for examining this structural conflict. As Nigeria's commercial capital and most populous state, Lagos has a substantial criminal justice caseload and relatively well-developed legal institutions compared to many Nigerian states. The Directorate of Public Prosecutions of Lagos State was established by Gazette No. 4 published on July 4, 1968, following the creation of Lagos State in 1967.⁶ The Office of the Public Defender (OPD)⁷ was established more recently, with the mandate of ensuring equal access to justice for indigent residents of Lagos State. Both offices operate within the Lagos State Ministry of Justice under the Attorney-General and Commissioner for Justice.⁸ The DPP prosecutes criminal cases⁹ in the High Court and Magistrate Courts. The OPD provides free legal representation to indigent accused persons. On the organizational chart, both appear as distinct directorates, but both ultimately report to the Attorney-General, and both depend on the Ministry of Justice for budgets, staffing, and administrative support.¹⁰

It is noted that this structure is not unique to Lagos. Several other Nigerian states have adopted similar models, with public defence functions housed within Ministries of Justice or under Attorney-General's supervision. However, some states have recognized the conflict and adopted alternative structures, including independent Legal Aid Councils. This variation across states provides both a comparative framework for analysis and a demonstration that alternative, less conflicted structures are feasible.

3. Structure and Methodology of this Article

This article employs doctrinal legal analysis, examining constitutional provisions, statutes, case law and international instruments to build a comprehensive critique of structural conflict in

⁶ The first Director of Public Prosecutions for Lagos State was Mr. (now Late Justice Olanrewaju O. Bada (1968-1972) who was deputy to the Late Honourable Justice Sogbetun then Federal Director of Public Prosecutions.

⁷ Now known as the Bureau of Public Defender, was established in July 2000 under the administration of the then-Governor Bola Ahmed Tinubu (with Professor Yemi Osinbajo as Attorney-General). It began as a unit within the Directorate of Citizen's Rights in the Ministry of Justice and gained statutory footing through the Lagos State Office of the Public Defender Law 2003 (reviewed in 2008)

⁸ See generally "Lagos State Ministry of Justice, Law Office", available at <https://lagosstatemoj.org/public-prosecution>. Accessed 28/01/26. See also Wheeler, H., "Welcome to the Ministry of Justice, Lagos State", January 3, 2022. Available at <http://lagosministryofjustice.org/welcome-to-the-ministry-of-justice-lagos-state>. Accessed 01/02/26

⁹ A prosecutor is a lawyer who acts for the government against someone accused of a crime in court. See generally, "Public Prosecutor (Meaning)" Cambridge English Dictionary. Retrieved 2018-07-17

¹⁰ Note that this dependency is systemic, not individual, so much so that dedicated lawyers may strive for zealous representation, but institutional incentives and pressures can constrain it.

interest in public defence system Nigeria. The analysis is divided into four main segments. The introduction; the theoretical framework, drawing on structural conflict theory to understand how institutional arrangements shape outcomes independent of individual actors' intentions; Section three conducts detailed legal analysis across four levels: constitutional provisions establishing fair trial rights and prosecutorial powers; federal legislative framework including the Administration of Criminal Justice Act 2015; Lagos State-specific legislation creating the structural conflict; and international and regional human rights instruments establishing standards for effective legal assistance, while the last segment synthesizes the analysis to demonstrate the conflict's constitutional, statutory, and international law dimensions, concluding with comprehensive recommendations for structural reform.

The overarching argument is straightforward but profound: a state cannot be a zealous adversary against itself. When prosecution and defence answer to the same institutional authority, the adversarial system's fundamental premise is violated, the Constitution's guarantee of effective legal representation becomes illusory, and justice itself is compromised. Structural reform is not merely advisable but constitutionally required.

I. Theoretical Framework on Structural Conflict Theory

Structural conflict theory provide the analytical lens for understanding how institutional arrangements create conflicts independent of individual actors' motivations or ethics. Rooted in the work of Karl Marx and developed by subsequent scholars across sociology, political science, and organizational theory, structural conflict theory dwells on social structures—institutions, hierarchies, resource distribution systems—generate competing interests and systematic tensions.

Classical Marxist theory focused on economic structures, arguing that capitalism's organization of production creates inherent conflict between those who own capital and those who sell labor. The conflict arises not from individual capitalists' or workers' moral failings but from their structural positions within the economic system. Owners maximize profit by minimizing wages; workers seek higher wages to improve living standards. The system structurally positions these groups in opposition regardless of individual relationships or intentions.

Modern structural conflict theory extends beyond economic relations to analyze how institutional structures create conflicts in diverse contexts including organizations, legal systems, and professional settings. The key insight is that structures shape interests, incentives, and behaviors in ways that individual ethics or good intentions cannot fully overcome. When a structure positions actors in inherently conflicting roles, the conflict persists regardless of those actors' personal integrity.

Several core concepts from structural conflict theory are particularly relevant to analyzing the public defender problem. In the first instance, the concept of structural position recognizes that individuals occupy positions within institutional hierarchies and systems that shape their interests and obligations. A public defender's structural position within the Ministry of Justice creates dependencies and loyalties that exist regardless of that defender's personal commitment to clients. Secondly, what can be referred to as a role conflict occurs when a single actor or institution must fulfil incompatible roles. The Attorney-General's simultaneous roles as chief prosecutor and supervisor of public defenders create inherent role conflict. Thirdly, resource dependency theory demonstrates how control over resources creates power relationships. Public defenders' dependence on the Ministry of Justice for budgets, staffing, and career advancement creates structural subordination to prosecutorial authority.

Structural conflict theory has particular purchase in analysing legal institutions because law itself is fundamentally concerned with mediating conflicts and structuring institutional relationships to promote fair outcomes. The adversarial system's design reflects implicit recognition of structural conflict principles. By separating prosecution and defense into distinct, independent roles, the adversarial system acknowledges that these functions involve inherently competing interests that must be institutionally separated to function effectively. Similarly, the principle of judicial independence—that judges must be institutionally separate from the parties and from political authorities—reflects recognition that structural position shapes judgment. A judge structurally subordinate to one party or to government cannot be presumed impartial regardless of individual integrity. The structure creates conflict that undermines the judicial function.

Professional ethics rules similarly reflect structural conflict principles. Rules prohibiting lawyers from representing clients with conflicting interests recognize that the lawyer's structural

position—owing duties to multiple clients with competing interests—creates conflicts that compromise effective representation. The prohibition exists regardless of whether the lawyer believes they can maintain impartiality, because the structure itself creates unacceptable risk.

Applied to the Nigerian public defender context, structural conflict theory illuminates several key dynamics. The theory explains why well-intentioned individual defenders may nonetheless provide inadequate representation. The issue is not individual competence or ethics but structural constraints on zealous advocacy. A defender who knows that aggressive advocacy against the prosecution could damage relationships with supervisors who control career advancement faces structural pressures to moderate advocacy regardless of client interests. Also the structural conflict theory explains why the problem persists despite periodic reforms or exhortations. Calls for public defenders to be more zealous, or for prosecutors to respect defense independence, cannot overcome structural conflicts embedded in institutional design. As long as the structure positions defenders within prosecutorial hierarchies, the conflict remains.

Moreover, the theory highlights how resource dependency creates power. Public defenders depend on the Ministry of Justice—headed by the chief prosecutor—for budgets, staffing levels, office space, and administrative support. This dependency is not merely inconvenient but constitutive of a power relationship that structurally subordinates defense to prosecution. When budget allocations favor prosecution (more prosecutors, better resources, higher salaries), defenders face not merely resource disadvantage but structural signals about institutional priorities.

II. The Reasonable Observer Test and Structural Bias

Nigerian jurisprudence employs the 'reasonable observer' test to assess whether institutional arrangements create unacceptable appearance of bias. In *Pam v Mohammed*,¹¹ the Supreme Court defined the reasonable observer as a complete stranger, unbiased and impartial, with faculty to distinguish truth from falsehood and good from evil—a hypothetical legal standard for judging fairness and equity.

¹¹ (2008) 16 NWLR (pt.1112) 1

A reasonable man was described in this context as "The reasonable person and the impartial observer mean the same. They mean a complete stranger, an unbiased person to the proceedings. A reasonable person is a person with reason having a faculty of the mind by which he distinguishes truth from falsehood, good from evil. A reasonable person is a fair, proper and just and unbiased person. An impartial observer is not partial. He favours neither Plaintiff nor the Defendant. He is disinterested in the matter, as he treats both the Plaintiff and the Defendant alike. He is an unbiased person. Both, the reasonable person and the impartial observer are the hypothetical legal standard for determining or judging fairness, fair play and equity. The test of the reasonable man in Nigerian Courts is no more the man at the Clapham junction in London but are anywhere in the Nigerian cities."¹²

Structural conflict theory enhances the reasonable observer test by focusing attention on structural rather than individual bias. The question is not whether any particular public defender harbours bias against their client, but whether the structural arrangement creates an appearance of bias that the reasonable observer cannot overlook. When the reasonable observer learns that defence counsel and prosecuting counsel both answer to the same Attorney-General, that both work in the same Ministry building, that both depend on the same authority for resources and career advancement, can that observer maintain confidence in the defence's independence? The answer from structural conflict theory is unequivocal: structural arrangements that position adversaries under common authority create systematic appearance of bias that no amount of individual integrity can dispel. The reasonable observer, understanding the structural relationship, cannot be confident that the defence will zealously pursue client interests when doing so conflicts with institutional interests of the authority supervising both defence and prosecution.

This theoretical framework guides the subsequent legal analysis. The question is not whether Nigerian public defenders are individually corrupt or incompetent—there is no evidence suggesting this—but whether the structural arrangement violates constitutional requirements for effective legal representation and fair trial. Structural conflict theory suggests that it does, and the following sections demonstrate this through detailed legal analysis.

¹² Per Haruna Simon Tsammani, JCA (pp. 26-27, paras. B-A) in *Usman v State*. See also *Mathew v State* (2018) 9 NWLR (Part 1625) p. 399

4. Legal framework

The framework covers constitutional and legislative regimes as well as International and human rights perspectives.

I. Constitutional Framework

The Constitution of the Federal Republic of Nigeria 1999 (as amended),¹³ as the *grund norm* provide the foundational framework for analysing the public defender conflict. Any policy or institutional structure that violates the Constitution is null and void. Chapter IV of the Constitution, which enshrines fundamental rights, provides the philosophical foundation for constitutional safeguards protecting accused persons. The state's primary duty is to protect these rights, not to create structures that inherently infringe upon them. Section 36(6)(c) of the Constitution is the cornerstone provision, guaranteeing every person charged with a criminal offense the right "to defend himself in person or by legal practitioners of his own choice."¹⁴ This provision has been subject to extensive judicial interpretation. The critical phrase is "of his own choice," which Nigerian courts have interpreted to require not merely any lawyer, but effective and competent legal representation. In *Udofia v The State*, the Supreme Court opined that improper, ineffective, or half-hearted representation denies fair hearing. Where state-assigned counsel is structurally subordinated to the prosecution, the element of meaningful choice and effectiveness is illusory for indigent accused persons. In other words, a lawyer who is structurally subordinate to the prosecution cannot provide such representation.

In *Atano v A.G. Bendel State*,¹⁵ the Supreme Court held that "the principle of fair hearing is fundamental to all court procedure and proceedings, and like jurisdiction, the absence of it vitiates the proceedings no matter how well conducted."¹⁶ This principle extends beyond judicial proceedings to the entire criminal justice process. When defense counsel cannot advocate freely due to structural subordination to the prosecution, the principle of fair hearing is violated at the foundational level.

¹³ The Constitution of the Federal Republic of Nigeria, 1999 (as amended) [Hereinafter "The Constitution"]

¹⁴ Section 36(6)(c) of The Constitution

¹⁵ (1988) 2 NWLR (pt. 75) p. 201

¹⁶ See also *Mfa v. Inongha* (2014) 4 NWLR (Part 1397) p. 343; *Chitra Knitting & Weaving Manufacturing Co. Ltd v. Akingbade* (2016) LPELR (40437) p. 1 and *Fapa Co. Ltd v O. W. C. Ltd* (2017) 12 NWLR (Part 1579) p. 169 at 189-190 paras G-A

Section 36(1) requires that courts and tribunals be "established by law and shall be independent and impartial."¹⁷ While this provision directly addresses the judiciary, the principle of impartiality extends to the entire judicial process. The adversarial system assumes that both parties present their cases to an impartial tribunal. However, when one party (the defence) is structurally compromised, the overall impartiality of the proceedings is undermined. Justice cannot emerge from a fundamentally unbalanced contest.

The constitutionality of having both prosecutor and defender from the office of the Attorney-General was directly addressed in *Usman v State*.¹⁸ The Court of Appeal answered in the negative, finding that such an arrangement violates constitutional fair hearing guarantees.¹⁹ This precedent establishes that the structural conflict is not merely problematic but unconstitutional.²⁰ The Court of Appeal in distinguishing the case of *Usman* (supra) from *Idowu Okanlawon v The State*²¹ observed that "the distinction as proffered by the Court below is not as simple as that as that explanation is forgetting the reality on ground which is that even though, by the Lagos State

¹⁷ Section 36 (1) of the Constitution

¹⁸ *Usman v. State* (2017) LPELR-51595 (CA)

¹⁹ The Court of Appeal had invited the counsel to the parties to address it on the constitutionality/fair hearing of the office of the Attorney-General being the Prosecutor and at the same time the defence for the Appellant at the trial. The Court of Appeal *suo motu* raised the issue of whether the representation of the Appellant by the Public Defender which is under the Office and control of the Attorney-General constitutes a breach of the Appellant's constitutional right to fair hearing. In the final analysis, the court held that the appeal succeeded and it was allowed. In that case, it was observed from the record that the office of the Attorney-General, Ogun State acted both as the Appellant's Prosecutor and the Defender at the trial Court. The prosecutor was from the Ministry of Justice, Ogun State while the Defence Counsel was from the office of the Public Defender of the Citizen's Right Department of the Ogun State Ministry of Justice. The question now is, how does the Attorney-General convince the ordinary reasonable citizen present at the trial that justice must not be done but must be seen to be done when he instructed one counsel from the Department of Public Prosecution to prosecute the Appellant and another counsel from the Department of the Citizen's Right to defend the Appellant.

²⁰ The Court of Appeal went further to distinguish the case of *Usman* from that in *Idowu Okanlawon v The State* (2015) LPELR - 284 (SC) in which the Court of Appeal ruled the Public Defender of Lagos State could defend an accused person prosecution from the office of the Attorney General of Lagos State. That the two cases are distinguishable in that the Public Defender in Lagos has an office independent of the Ministry of Justice while that of Ogun State is dependent of the Ministry of Justice Ogun State and so a similar defence of an accused prosecuted from the Ministry of Justice cannot prevail.

It is to be noted that the Attorney General of any State of the Federation is provided for under Section 195(1) of the Constitution of the Federal Republic of Nigeria (CFRN) 1999 to the effect that the Attorney General of a State is the Commissioner for Justice and the Chief Law Officer of the State.

The grouse of the respondent at the appellate stage including this Apex Court is that he was not represented by the appropriate counsel and there is nothing in the record to show that he was improperly or unfairly defended. Also throughout the proceedings at the trial Court there was no whimper of dissatisfaction in regard to the legal representation or how the proceedings were conducted. This issue of the impropriety of a Public Defender standing for the accused/respondent, and prosecuted by the Ministry of Justice is amazing.

²¹ (2015) LPELR - 284 (SC). See also *Lukman Olufeko v. The State* Appeal No. CA/1B/31C/2006 delivered on the 15th of May 2017

Legal instrument creating the public Defender or Department of Citizen's Rights had specified its independence, all the same the lawyers therein are of Lagos State Government whose head is the Chief Law Officer and Attorney General and Commissioner of Justice, Lagos State. In the case of Ogun State the Citizens' Rights Department is a department in the Ministry of Justice and the head again is the Attorney General even though there is no specification in stating that the said department is independent.”

Moreover, Sections 174 and 211 of the Constitution, which confer prosecutorial powers on the Attorney-General of the Federation and States respectively, are exclusively prosecutorial in nature. Section 211(1) provides that "The Attorney-General of a State shall have power: (a) to institute and undertake criminal proceedings against any person before any court of law in Nigeria other than a court-martial in respect of any offence created by or under any law of the House of Assembly; (b) to take over and continue any such criminal proceedings that may have been instituted by any other authority or person; and (c) to discontinue at any stage before judgment is delivered any such criminal proceedings instituted or undertaken by him or any other authority or person." Section 211(2) further provides to the effect that "The powers conferred upon the Attorney-General of a State under subsection (1) of this section may be exercised by him in person or through officers of his department." These provisions authorize the Attorney-General to prosecute and to exercise prosecutorial functions through departmental officers. Critically, they do not authorize the Attorney-General or officers of the prosecutorial department to simultaneously represent defendants against those prosecutions. Such dual representation would create an obvious clash of interest.

The constitutional provisions thus establish two critical points. First, the right to effective legal representation of one's choice is constitutionally guaranteed and cannot be satisfied by structurally compromised counsel. Second, the Attorney-General's constitutional powers are exclusively prosecutorial—they extend to prosecuting crimes, not to defending against prosecutions. For the Attorney-General to exercise supervisory control over defense functions constitutes an *ultra vires* exercise of authority, exceeding the constitutional grant of power.

Such an act will inevitably lead to a situation aptly stated in the unreported case of *Akeem Jimoh v. The State*²² where it was held as follows: "The Respondent stated in their brief that it is a long-standing tradition in Ogun State for poor accused persons to be represented by the same Attorney-General prosecuting them. This means that the only justice available to a poor accused person is the measure handed to him by his prosecutor. At this point, I am wondering if the accused person was aware that his counsel is a representative of his prosecutor".²³

II. Federal Legislative Framework: ACJA 2015

The Administration of Criminal Justice Act (ACJA) 2015 and the Lagos State Administration of Criminal Justice Law (ACJL) 2015 (as amended in 2021) constitute the primary statutory frameworks governing criminal procedure in Nigeria. While these statutes do not explicitly create public defender offices, they establish the procedural environment within which prosecution and defence operate, and their provisions illuminate the structural conflict problem. The provisions of both the ACJA and ACJL clearly define prosecutorial powers and functions. These provisions consistently describe prosecution as a function exercised by or under the authority of the Attorney-General. The statutes create detailed procedures for prosecution, from filing of charges through trial and appeal. Significantly, they establish the prosecutor's duty not merely to secure conviction but to see that justice is done—a duty requiring prosecutors to disclose exculpatory evidence, avoid oppressive tactics, and respect defendants' rights.

This prosecutorial duty to serve justice creates a theoretical balance in the criminal process: even the prosecutor, as state representative, must act fairly rather than seeking conviction at all costs. However, this balance is disrupted when the institutional structure subordinates defence to prosecution. The prosecutor's duty to fairness, while important, cannot substitute for genuinely independent defence advocacy. The prosecutor serves the state's interests in both conviction and fairness; the defender serves only the accused person's interests. These are distinct and often conflicting roles.

The ACJA and ACJL reinforce the constitutional right to legal representation, with numerous provisions referencing the defendant's right to counsel. However, the statutes assume that such counsel will be genuinely independent. When statutory provisions reference "legal

²² (Appeal No. CA/I/31B/2006) delivered on the 25th of July, 2016

²³ Per His Lordship Dongban-Mensem JCA

representation" or "defence counsel," they presuppose an adversarial relationship between prosecution and defence. The quality of representation contemplated by the statutes is compromised when structural conflicts undermine defence independence. This article also examined the innovation of the concept of 'Plea Bargaining'. The provisions of ACJA 2015 and the 2021 amendment to the ACJL (Part 13A) introduces provisions for plea bargaining. Plea bargaining involves negotiation between prosecution and defence to resolve cases through guilty pleas in exchange for reduced charges or sentencing recommendations. In a properly functioning adversarial system with independent prosecution and defence, plea bargaining can serve legitimate functions including reducing caseloads, providing certainty, and allowing defendants to make informed choices. However, when prosecution and defence answer to the same institutional authority, plea bargain transforms from a negotiated agreement between independent parties into a potentially coercive administrative process. How can genuine negotiation occur when both "parties" report to the same supervisor? How can the defendant be confident that their counsel is advocating zealously for the best possible deal when that counsel's career depends on maintaining good relationships with the very prosecutors with whom they negotiate? The structural conflict converts plea bargaining from a procedural safeguard into a case-clearance mechanism where the interests of institutional efficiency potentially override defendants' interests in the best possible outcome. This more so, that it is the prosecutor who initiates the plea bargain and the probability of the defence counsel agreeing to it is very high (after all, they are birds of the same feather who might not want the state resources to continue being supposedly wasted); and seeing that the Court is not bound by the sentence term agreement or assurance of the parties. How fair a trial then would the accused be said to have had in this circumstance.

III. The Office of Public Defender in Lagos State

The Lagos State Office of the Public Defender Law is the specific legislation creating the institutional structure at the heart of this analysis. This law establishes the Office of the Public Defender²⁴ and defines its structure, powers, and functions. It is this law that creates the structural conflict by placing the public defender within the Ministry of Justice under the Attorney-General's supervision.

²⁴ A creation of The Office of the Public Defender (OPD) Law, Lagos State (Cap O6, Laws of Lagos State 2015)

Section 2(1) of the OPD Law states "There is established an office to be known as the Office of the Public Defender." This provision creates the office but critically locates it administratively within the Ministry of Justice. The office operates not as an independent agency but as a directorate of the Ministry, alongside the Directorate of Public Prosecutions. This organizational placement is the root of the structural conflict.

Section 3 outlines the functions of the OPD, typically including providing free legal services and representation to indigent persons, offering legal advice, and defending persons unable to afford private counsel. These are laudable functions that address real access-to-justice concerns. However, the critical question is whether the law guarantees the OPD's independence in performing these functions, or whether it leaves the office subject to the direction and control of the Attorney-General who simultaneously heads the prosecutorial function.

The organizational chart of the Lagos State Ministry of Justice reveals the hierarchical relationship. The Attorney-General sits at the apex. Beneath the Attorney-General, supported by the Solicitor-General and Permanent Secretary, are various directorates including the Directorate of Public Prosecutions and the Office of the Public Defender. While these directorates have different day-to-day functions, they share common administrative infrastructure, report through common hierarchies, and ultimately answer to the same authority. This structure creates multiple levels of dependency and control. Budgetary allocation for the OPD comes through the Ministry of Justice, with the Attorney-General exercising significant influence over resource distribution. Staffing decisions, including hiring, promotion, and assignment of public defenders, occur within the Ministry's overall human resources framework. Performance evaluation of public defenders occurs within institutional evaluation systems overseen by Ministry leadership. Access to support services, office space, equipment, and administrative assistance all depend on Ministry allocation.

More fundamentally, the structural arrangement means that the same Attorney-General who is, by constitutional designation under Sections 174 and 211, the "Chief Prosecutor" of the state also exercises supervisory authority over the office defending against those prosecutions. This arrangement embodies the structural conflict in statutory form. The law creates an institutional design where the same authority prosecutes and defends—where the state is simultaneously adversary and advocate for the accused.

The absence of explicit provisions in the OPD Law guaranteeing functional independence is telling. The law does not establish the OPD as an independent agency. It does not provide for autonomous budgeting. It does not create safeguards preventing Attorney-General interference in case strategy or client representation. It does not establish independent oversight or accountability mechanisms. These omissions are not mere drafting oversights but reflect the fundamental design choice to house public defence within the prosecutorial ministry.

IV. International and Regional Human Rights Instruments

While international instruments are not directly enforceable in Nigerian courts without domestication, they serve important functions in constitutional interpretation. Nigerian courts regularly reference international human rights instruments when interpreting domestic constitutional provisions, particularly fundamental rights guarantees. Moreover, as a state party to various international treaties, Nigeria has undertaken obligations under international law that inform assessment of domestic practices.

The International Covenant on Civil and Political Rights (ICCPR),²⁵ which Nigeria ratified in 1993, provides in Article 14(3)(d) that everyone charged with a criminal offense shall be entitled "to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it." This provision establishes the right to state-provided counsel for indigent accused persons.

However, the right is not merely to any counsel but to effective legal assistance. The UN Human Rights Committee, which monitors compliance with the ICCPR, has interpreted this provision to require that assigned counsel be competent and effective. General Comment No. 32 states "It is incumbent on States parties to ensure that persons entitled to be assigned counsel do in fact receive effective legal assistance." Structural subordination of defence counsel to prosecutorial authority compromises effectiveness in ways that individual competence cannot overcome.

The African Charter on Human and Peoples' Rights, domesticated in Nigeria²⁶ through the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act,²⁷ provides in

²⁵ [Hereinafter the 'ICCPR']

²⁶ Thereby giving it force of law

Article 7(1) (c) the right to defence, including the right "to be defended by counsel of his choice."²⁸ Like the Constitution, this provision emphasizes choice and effective representation, not merely formal presence of any lawyer.

The United Nations Basic Principles on the Role of Lawyers,²⁹ while not a binding treaty, provide authoritative guidance on standards for legal profession and defence representation. Principle 16 states: "Governments shall ensure that lawyers are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference." Structural subordination to one's legal adversary constitutes a clear form of "improper interference"³⁰ that prevents lawyers from performing professional functions effectively.

Principle 17³¹ provides "Where the security of lawyers is threatened as a result of discharging their functions, they shall be adequately safeguarded by the authorities." In the Nigerian context, "security" includes not merely physical safety but professional and functional security—the ability to advocate zealously without fear of professional retaliation. When defenders answer administratively to prosecutors, their functional security is fundamentally compromised.

The Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa, adopted by African justice ministers in 2004, provides that "legal aid shall be provided by competent lawyers who are independent from the State." This regional standard explicitly recognizes that effective legal aid requires independence from state control—precisely what Nigeria's current structure fails to provide.

These international and regional instruments establish several key principles. First, the right to legal assistance for indigent accused is recognized as a fundamental fair trial guarantee. Second, this right requires not merely formal representation but effective assistance by competent, independent counsel. Third, independence from state prosecution is a necessary condition for

²⁷ Domesticated as a National law, via Cap. A9 LFN 2004

²⁸ The African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act [Hereinafter, 'The African Charter']

²⁹ The United Nations Principles on the Role of Lawyers (1990) [Hereinafter 'The UN Principles']

³⁰ *Ibid* The UN Principles, Principle 1:

³¹ *Ibid*, The UN Principles, Principle 17

effective defence. Fourth, Nigeria has undertaken international obligations requiring it to provide such independent, effective defence representation.

The current structural arrangement violates these international standards. By housing public defence within the prosecutorial ministry under the Attorney-General's supervision, Nigeria maintains a legal aid structure that cannot guarantee the independence required by international law. This places Nigeria in breach of its obligations under the ICCPR and African Charter, and contradicts the spirit of authoritative interpretive instruments including the UN Basic Principles and the Lilongwe Declaration.

5. The Multi-Dimensional Nature of the Structural Conflict

I. Constitutional Violations

The foregoing analysis demonstrates that the structural placement of public defenders within the Ministry of Justice violates multiple constitutional provisions. Most fundamentally, it violates Section 36 (6) (c)'s guarantee of the right to defence "by legal practitioners of his own choice." When the only affordable option for an indigent accused is a public defender structurally subordinated to the prosecutor, the element of "choice" becomes illusory, and the quality of representation falls below constitutional standards.

The structure violates the fair hearing guarantee of Section 36(1). In *Akeem Jimoh v The State*,³² it was observed that "The Respondent stated in their brief that it is a long-standing tradition in Ogun State for poor accused persons to be represented by the same Attorney-General prosecuting them. This means that the only justice available to a poor accused person is the measure handed to him by his prosecutor."³³ This situation fundamentally violates fair hearing because the accused does not receive genuinely adversarial representation but rather representation controlled by the adversary. In *Lukman Olufeko v The State*,³⁴ the Court further elaborated that "One cannot support two competing sides. An impartial observer cannot leave the courtroom and believe that the trial has been balanced and fair on both sides of the trial. The office of the Public Defender is under and within the control of the Attorney-General of the

³² *supra*

³³ Per Justice Dongban-Mensem JCA

³⁴ *supra*

State, the de jure head of the prosecutorial arm... Without an iota of doubt, a reasonable man present and watching the trial would arrive at the conclusion that there has been a violation of the right to the fair hearing of the Appellant." (Per Okoronkwo JCA)

The structure also constitutes an *ultra vires* exercise of the Attorney-General's authority. Sections 174 and 211 of the Constitution grant the Attorney-General prosecutorial powers—to institute proceedings, take over prosecutions, and discontinue proceedings. These are explicitly prosecutorial functions. Nowhere do these provisions authorize the Attorney-General to defend accused persons against the state's prosecutions. The exercise of supervisory control over defence functions thus exceeds constitutional authority. Furthermore, the arrangement violates the principle of separation of powers embedded in the constitutional structure. While separation of powers is often discussed in terms of the three branches of government—executive, legislative, judicial—the principle extends to functional separation within the criminal justice system. The adversarial system requires functional separation between prosecution and defence. Housing both under common executive authority fundamentally undermines this necessary separation.

II. Violation of the principle of Natural Justice

Beyond specific constitutional provisions, the structural arrangement violates fundamental principles of natural justice that undergird the legal system. The maxim *nemo judex in causa sua*—no one should be judge in their own cause—stands as a cornerstone of natural justice. This principle prohibits any person or body from adjudicating matters in which they have an interest or bias. While *nemo judex* is most commonly applied to judges and adjudicators, its underlying principle extends to any situation where impartiality is required. When the Attorney-General supervises both prosecution and defence, the state becomes, in effect, both adversary and defender—judge in its own cause. The state prosecutes the accused while simultaneously controlling the accused person's defence. This violates the spirit of *nemo judex* by creating a situation where one party to the adversarial contest controls both sides.

The related principle *audi alteram partem*—hear the other side—requires that all parties to a proceeding have opportunity to present their case. However, this opportunity is meaningless if one side's presentation is structurally compromised. When defense counsel cannot advocate

freely due to institutional subordination to the prosecution, the accused person's "side" is not genuinely heard in the sense natural justice requires. Justice must not only be done but must be seen to be done. This principle, articulated in countless common law cases, recognizes that public confidence in the justice system requires not merely actual fairness but the appearance of fairness. When a reasonable observer learns that both prosecution and defence answer to the same authority, public confidence is inevitably undermined. The appearance of fairness is destroyed even if individual actors maintain personal integrity.

IV. Practical Implications and Real-World Impacts

The structural conflict has concrete, observable impacts on criminal justice administration. First, it creates systematic pressure for public defenders to moderate advocacy. A defender who knows that aggressive cross-examination of prosecution witnesses, vigorous challenges to police testimony, or appeals of convictions could strain relationships with superiors who control career advancement faces structural incentives to pull punches. Individual defenders may resist these pressures, but the structural incentive exists regardless. The arrangement also facilitates information asymmetries that disadvantage defence. When prosecution and defence share common administration, institutional knowledge flows more readily to prosecutors. Prosecutors may learn of defence strategies, weaknesses, or constraints through administrative channels. While explicit sharing of case-specific information would be unethical, structural proximity creates opportunities for information leakage that independent institutions would prevent.

Moreover, resource allocation systematically favours prosecution. When budgetary decisions occur within a ministry whose primary function is prosecution and whose leadership is constitutionally designated as chief prosecutor, prosecution receives priority. More prosecutors are hired than defenders. Prosecutors receive better office space, equipment, and support staff. Salary scales may favour prosecution. These resource disparities compound the structural disadvantage defence already faces.

Furthermore, the structure undermines attorney-client privilege and confidentiality. While individual defenders maintain ethical duties to protect client confidences, structural proximity to prosecution creates risks. When defenders work in the same building, use common

administrative systems, and report through common hierarchies as prosecutors, maintaining confidentiality becomes more challenging. The appearance that confidentiality cannot be guaranteed may discourage accused persons from fully trusting and communicating with their defenders.

Finally, the arrangement creates perverse incentives around plea bargaining. With the 2021 ACJL amendment introducing formal plea bargaining, the structural conflict becomes even more problematic. Plea bargaining requires good-faith negotiation between prosecution and defense. However, when both answer to the same institutional authority, plea bargaining can become an administrative case-clearance mechanism rather than genuine negotiation. Institutional pressure to clear caseloads may override defendants' interests in obtaining the best possible deal or going to trial when appropriate.

V. Comparative Perspectives

Nigeria is not unique in grappling with how to structure indigent defence services. Examining alternative models employed in other jurisdictions illuminates the feasibility and advantages of structural independence. In many common law jurisdictions, public defence is structured as an independent agency separate from prosecutorial authorities.

The United States provides one model, though with significant variation across jurisdictions. Some states and the federal system employ public defender offices that are independent agencies or parts of the judicial branch rather than the executive branch. While not perfect—public defenders often face resource constraints—this structural independence ensures that defenders do not answer administratively to prosecutors.

Within Nigeria itself, variation exists across states. Some states have recognized the structural conflict and established legal aid councils as independent agencies rather than Ministry of Justice directorates. While implementation challenges persist, these alternative structures demonstrate that independence is institutionally feasible within the Nigerian context.

The Legal Aid Council of Nigeria, established at the federal level, provides another model. While the Council faces its own challenges including chronic underfunding, its structure as an independent agency demonstrates recognition of the principle that legal aid should not be

subordinated to prosecutorial authority. State-level legal aid could follow similar organizational principles.

The key insight from comparative analysis is that structural independence is achievable. Creating independent public defender agencies requires political will and legislative action, but not revolutionary institutional innovation. The structures, procedures, and oversight mechanisms necessary for independent agencies are well established in administrative law. What is required is commitment to the principle that effective defence requires institutional separation from prosecution.

Alternative funding mechanisms also warrant consideration. Rather than relying on Ministry of Justice budgetary allocations, independent public defender agencies could receive funding through dedicated legislative appropriations, judicial branch budgets, or legal aid funds generated through court fees and fines. Such mechanisms ensure that defence funding does not depend on prosecutorial priorities.

6. Conclusion

This article demonstrated the fundamental structural conflict created by housing Nigeria's public defender system within the same Ministry of Justice that prosecutes criminal cases. Through multi-level legal analysis spanning constitutional law, statutory frameworks, judicial precedents, and international obligations, the research demonstrates that this institutional arrangement is legally, constitutionally, and ethically indefensible. The constitutional analysis revealed that the structure violates the provision of Section 36(6)(c) which guarantees effective legal representation of one's choice, undermines Section 36(1), right to fair hearing and constitutes an *ultra vires* exercise of the Attorney-General's authority beyond the prosecutorial powers conferred by Sections 174 and 211. The structure also violates fundamental principles of natural justice including *nemo judex in causa sua* and the requirement that justice be seen to be done. The ACJA and ACJL assumed genuinely adversarial prosecution and defence, the actual institutional structure contradicts this assumption. The Lagos State OPD Law creates the structural subordination without any safeguards for functional independence. International instruments including the ICCPR, African Charter, and UN Basic Principles on the Role of

Lawyers establish that effective legal assistance requires independence from state prosecution—a standard Nigeria's current structure fails to meet.

Structural conflict theory illuminates how institutional arrangements shape outcomes independent of individual actors' intentions. The authors emphasized that the issue is not whether individual public defenders or prosecutors act with personal integrity (it is acceded that most do) but whether the structure creates systematic conflicts, pressures and appearances of bias that compromise effective defence representation. The reasonable observer test confirms that the structure creates unacceptable appearance of partiality that undermines public confidence in the administration of justice. The imputation of conflict clearly exists. The fundamental question posed in this article's title—can the state be a zealous adversary against itself?—admits of only one answer: No. The authors argued that a state cannot prosecute accused persons through one office while simultaneously providing genuinely independent defence through another office answerable to the same authority. The adversarial system's premise of opposing parties cannot be maintained when both parties answer to common supervision. The constitutional guarantee of effective legal representation becomes illusory when structural subordination prevents zealous advocacy.

Based on the foregoing analysis, authors advanced the following recommendations for structural reform:

A. Legislative Reforms

- i. Immediate amendment of the Lagos State Office of Public Defender Law to establish the OPD as an independent agency structurally separate from the Ministry of Justice, with its own governing board, autonomous budget, and administrative independence.
- ii. Establishment of a Lagos State Legal Aid Council as an independent statutory body, modelled on the federal Legal Aid Council but with enhanced guarantees of functional independence, adequate funding, and professional autonomy for legal aid lawyers.
- iii. National-level legislative reform requiring all Nigerian states to establish independent legal aid systems structurally separate from prosecutorial authorities, with minimum standards for independence, funding, and quality of representation.
- iv. Amendment of the Administration of Criminal Justice Law to include provisions explicitly guaranteeing the independence of indigent defense services and prohibiting structural subordination of defence to prosecutorial authorities.

B. Structural and Institutional Reforms

- i. Creation of an independent Public Defender Commission or Legal Aid Board with autonomous governing authority, separate from the Ministry of Justice and executive branch control, potentially placed under legislative or judicial branch oversight.
- ii. Establishment of dedicated, ring-fenced funding for indigent defence through mechanisms such as court fees and fines allocated to legal aid, legislative appropriations separate from Ministry of Justice budgets, or percentage allocations from state budgets with constitutional or statutory protection.
- iii. Development of professional standards and oversight mechanisms for public defenders including peer review systems, independent complaint mechanisms, continuing legal education requirements, and performance metrics focused on client outcomes rather than institutional efficiency.
- iv. Physical and administrative separation of public defender offices from prosecutor offices, including separate office locations, independent administrative support systems, separate information technology systems to protect client confidentiality, and prohibition of shared personnel or facilities.

C. Interim Measures

Recognizing that structural reform requires time and political will, the following interim measures should be implemented immediately:

- i. Judicial awareness and scrutiny: Trial courts should scrutinize cases where public defenders from the Attorney-General's office represent accused persons, ensuring that defendants understand the structural relationship and consent knowingly to such representation.
- ii. Ethical guidelines: The Nigerian Bar Association should develop and enforce ethical guidelines specifically addressing the conflicts created by the current structure, including requirements for public defenders to zealously advocate despite structural pressures, and prohibitions on information sharing or coordination between prosecution and defense functions.
- iii. Expansion of Legal Aid Council services: The federal Legal Aid Council should expand state-level presence to provide alternative independent representation options for indigent accused persons in states where public defenders remain under Attorney-General supervision.
- iv. Pro bono representation: The organized bar should develop robust pro bono programs to provide independent representation for indigent accused, reducing reliance on structurally compromised public defenders.

D. Accountability and Monitoring

- i. Establishment of independent monitoring mechanisms to assess quality of indigent defence representation, including client satisfaction surveys, outcome analysis comparing conviction rates and sentences for public defender clients versus privately

represented defendants, and appellate review of effectiveness of representation claims.

- ii. Regular public reporting on indigent defence system performance, including caseloads per defender, time spent per case, resources allocated to defence versus prosecution, and outcomes achieved for clients.
- iii. Creation of independent ombudsman or inspector general position to investigate complaints about public defender services and recommend reforms.



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