

## ANALYSIS OF THE LEGAL AND INSTITUTIONAL FRAMEWORK FOR THE FIGHT AGAINST CORRUPTION AND FINANCIAL CRIMES IN NIGERIA

By

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### Abstract

*Corruption has affected many countries all over the world especially the developing countries. It has various implications for both the developed and developing economies. Corruption hampers development and thus raises the level of poverty in any economy that finds itself entrenched in corrupt practices. Corruption creates uncertainty and risks in the growth and developmental potentials of any country. The rate of corruption occurring in the corridors of power in Nigeria led to the creation of anti-corruption agencies such as the EFCC (Economic and Financial Crimes Commission) and the ICPC (Independent Corrupt Practices and Other Related Offences Commission and the Code of Conduct Bureau amongst others. However, these agencies have made almost no headway in fighting corruption and Nigeria is rated as one of the most corrupt nations in the world. The failure of these institutions has been attributed to inefficiency, government policies and poor funding amongst others. Corruption has continued to weaken institutions, discourage investment and retard economic development. Corruption has also led to diversion of developmental resources of the society to private or personal use. This has contributed to the leakage of capital from Nigeria for illegal deposits abroad. This paper will look at the institutions set up in the fight against corruption and financial crimes. Our main emphasis will be on Independent Corrupt Practices and Other Related Offences Commission (ICPC), the Code of Conduct Bureau (CCB) and the Economic and Financial Crimes Commission (EFCC).*

**Keywords:** *Legal Framework, Corruption, Financial Crimes*

### Introduction

Corruption remains one of the most difficult challenges countries are confronted with. It is perceived as the enemy of stability. It threatens the integrity of the state system, erodes the rule of law, weakens the state's capacity to respond to crime and endangers the well-being of the citizens.<sup>1</sup> It is unarguable that many of the world's most unstable and least developed states are those with the highest level of corruption.

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<sup>1</sup>Fighting corruption to improve global security. An analysis of International and Assets Recovery system available at [http://injaljournal.org/2010/07/accessed 23/7/2012](http://injaljournal.org/2010/07/accessed%2023/7/2012).

On the list of the many challenges facing Nigeria as a country today, corruption and financial crimes comfortably enjoys a top position. Corruption especially in the public sector is one of the most serious, dangerous, social, economic and political problems facing the world today. Corruption includes many activities that are anti- social and work against the development of society and good governance including bribery, embezzlement, fraud, abuse of discretion or misuse of one's power, favoritism and nepotism. While corruption is a problem affecting practically all aspects of life, it is of greater concern in the public sector.

It must be emphasized that corruption is not limited to monetary gratification. Benefits derived from these could also be in kind or in pleasure or other intangible forms, employment patronage, use of contraire security, threats to the state or the large society to obtain approval, for extra budgetary allocation for the personal enrichment of public officers, undeserved status and or benefits also constitute corrupt practices.

Corruption like a fluid concept, germinates in states soil, spreads its tentacles within the shores of states and harvests; its fruits in international domain. Today, corruption is a global problem which poses serious threat to the development of international community. Most developing states are victims of this problem. Corruption also causes reduction in investment, lack of respect for rule of law and human rights, undemocratic practices and diversion of funds intended for development and provision of essential services. It affects governments' ability to provide basic services to its citizens. Most importantly, corruption has the greatest impact on the most vulnerable part of a country's population, the poor. Furthermore corruption has become one of the most salient manifestations of the organized crime syndicate of the globalized world which have grave national and international ramifications.<sup>2</sup>

Corruption is responsible for the perpetual collapse of infrastructure and institutions. It is behind the underdevelopment and cyclical failure of democracy in Nigeria. Corruption stands in the way of people having access to goods and services that they need to maintain a decent standard of living. Corruption makes it possible for human right violators to go unpunished by enjoying impunity; others do not have access to justice, and they are not secure and cannot protect their livelihoods. Court officials and the police pay more heed to bribes than to law. Hospitals do not attend to the sick because the medical staff pays more attention to patients who grease their palms. Public clinic/hospitals lack supplies due to corrupt public officials contracting procedures. Schools cannot offer their students a proper education because the education budget has been mismanaged, as a result, teachers cannot be paid and books cannot be purchased. In numerous ways like this, corruption deprives vulnerable people of income and prevents them from fulfilling their political, civil, social, cultural and economic rights.<sup>3</sup>

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<sup>2</sup> R. Ribadu, A Critical Overview of Corruption ,<http://ssrn.com> abstract:891898 p.1 accessed 2/3/2001

<sup>3</sup> Article 49, International Covenant on Civil and Political rights, entered into force on 23 March, 1976

## Meaning of Corruption

The Oxford dictionary defines corruption “To destroy or pervert the integrity or fidelity of (a person) in his discharge of duty, to induce, to act dishonestly or unfaithfully, to make venal, to bribe.”<sup>4</sup> Both definitions explicitly include bribery and encompass both the giving and receiving of bribes. Ocheje, observed that the corruption of public office has existed in Nigeria since the establishment of modern structures of public administration in the country by British Colonial Administration, however its escalation has coincided with the expansion of administrative structures and the full development of the public sector<sup>5</sup>. Marong stating his view, also submits that most of the statutory definitions of corruption, focus on bribery as corruption and mainly within the public sector whilst there is broad agreement that corruption is the abuse of public office for private gain.<sup>6</sup> Alejandro also noted that corruption does not only involve private sector involvement but also foreign enterprises involvement<sup>7</sup>. This article agree with this assertion that corruption also involves foreign enterprises, as it does not only occur in the public sector.

The most popular and probably simplest definition of corruption was given by Tanzi as the abuse of public power for private benefit<sup>8</sup>. This definition in my view is not altogether acceptable because people get involved in corrupt practices, not necessarily for benefits but for acts of nepotism and favoritism. Berg, stated that: “corruption is the abuse of public power for private benefit, while the private benefit is often in the form of money or in-kind from client to the agent, this is call bribery”.<sup>9</sup>

This definition encapsulates bribery as corruption. Bribery is one of the most common manifestation of corruption in Nigeria. It is further defined as the act of soliciting or accepting promises, gifts, offers to accomplish or to abstain from accomplishing an act of office or employment that is not subject to a salary.<sup>10</sup> In other words, corruption could be said to constitute the combined effect of monopoly of power plus discretion in decision-making in the absence of accountability. This means that officials will have the opportunity to collect corruption benefits as a function of their degree of monopoly over a service or activity, their discretion in deciding who should get how much and the degree to which their activities are accountable.

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<sup>4</sup> The Oxford English Dictionary

<sup>5</sup> P. D. Ocheje, Law and Social Change: A Socio-Legal Analysis of Nigeria s Corrupt Practices and other Related Offences Act 2000 Journal of Africa Law, 45, (2) (2001) p. 174

<sup>6</sup> B.M Marong, Toward a Normative Consensus Against Corruption: Legal Effects of the Principles to Combat Corruption in Africa (2002) p. 99-109

<sup>7</sup> A. Posadas, Combating Corruption Under International Laws , (10 Duke J. of Comp & Int l Ltd) p. 345

<sup>8</sup> V. Tanzi, Corruption Around the World: Causes, Consequences, Scope and Cures IMF Staff paper 45(4) 1998) p. 559

<sup>9</sup> B. Elrond, How should Corruption be measured? MSc Economics Extended Essay. (London School of Economics & Political Science 2001) p. 4

<sup>10</sup> H. Sarassoro “Integrity as Moral Code of Conduct for Public Servant: Comparative Study of Africa Criminal Law (cited Ivorie Ghana.Mali Zaire) a Doctorate thesis (law) University of P.

Again, Bauraman J. (as he then was) in *Biobaku v Police*<sup>11</sup> defined the word corruptly “as...receiving or offering of some benefit as a reward or inducement to sway or deflect the receiver from the honest and impartial discharge of his duties”.

According to Adeyemi, the term corruption means: “An offence which aims mainly at the conduct of public officials who take advantage of their position within public administration for the purpose of private gain...<sup>12</sup>” The above definitions are too restrictive, because they exclude persons not in public service from this social malady. This is one of the principal lacunas inherent in the criminal code.<sup>13</sup> Bello posits that corruption “represents that aspect of human behavior which is looked upon as obnoxious mean, degrading and offensive to the higher norms of any respectable human society”<sup>14</sup>

Corruption has also been described as the misuse of office for personal gain. The office is a position of trust, where one receives authority in order to act on behalf of an institution, be it private, public, or nonprofit. Corruption can entail acts of omission or commission. It can involve legal activities or illegal activities<sup>15</sup>. Corruption may involve cash or economic benefits, power or influence, or even less-tangible interest<sup>16</sup>.

### **Analysis of the Legal and Institutional Framework for the Fight against Corruption and Financial Crimes in Nigeria.**

There are several legislations against corruption in Nigeria and this is because the rate of corruption is very high in the country. We shall be considering these legislation one after the other.

#### **The Constitution of the Federal Republic of Nigeria 1999 (as amended)**

The Constitution contains provisions aimed at preventing corruption in Nigeria, section 15(5)<sup>17</sup> under the fundamental objectives and directive principles of state policy require the state to abolish corrupt practices and abuse of power.<sup>18</sup> Similarly, section 13 of the same constitution states that all organs of the government are required to conform to and observe the provisions of the chapter on fundamental objectives and directive principles of state policy.

The constitution also require public officials to declare their assets and liabilities, sections 140 (1) and 185 (1) states that a person elected to the office of President shall not begin to perform

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<sup>11</sup> (1951) 20 N.L.R. 20

<sup>12</sup> A.A. Adeyemi “Economic Crimes in a developing society” a paper delivered in a conference of Attorney Generals held in Abuja, 11-13rd October 1988, 19

<sup>13</sup> U.U. Chukwumaeze and K.C. Okorie, *The Constitutionality of the Corrupt Practices and Other Related Offences Act 2000 in A – D 2000 in A.D. Badaiki, (Ed) Landmarks in Legal Development Ability Press Lagos, 2003*

<sup>14</sup> E.B. Bello, *Evolving a Legal Framework for Combating Corruption and other Financial Crimes in Nigeria: In Perspective on Corruption and other Economic Crimes in Nigeria (FMJ, Lagos 1991) p. 178*

<sup>15</sup> E. O Ayoola, *Corruption: The Past, the Present and the Future, Any Hope for Sanity? (2002) Paper Presented at the Faculty of Law, University of Ilorin p. 4*

<sup>16</sup> Okonkwo and Naish, *Criminal Law in Nigeria (2<sup>nd</sup> edn, Spectrum Law Books, 2005) 357*

<sup>17</sup> Constitution of the Federal Republic of Nigeria 1999 (as amended)

<sup>18</sup> *Ibid*, s.15(5) s

the functions of that office until he has declared his assets and liabilities as prescribed in this Constitution and he has taken and subscribed the Oath of Allegiance and the Oath of Office prescribed in the Seventh Schedule to this Constitution. Similarly, a person elected to the office of the Governor of a State shall not begin to perform the functions of that office until he has declared his assets and liabilities as prescribed in the Constitution and has subsequently taken and subscribed the Oath of Allegiance and Oath of Office prescribed in the seventh schedule to this constitution.

Similarly, sections 149 and 194 states that a Minister of the Government of the Federation shall not enter upon the duties of his office, unless he has declared his assets and liabilities as prescribed in this Constitution and has subsequently taken and subscribed the Oath of Allegiance and the Oath of Office for the due execution of the duties of his office prescribed in the Seventh Schedule to this constitution. Further, a Commissioner of the Government of a State shall not commence the duties of his office unless he has declared his assets and liabilities as prescribed in this Constitution and has subsequently taken and subscribed the Oath of Allegiance for the due execution of the duties of his office prescribed in the Seventh Schedule to this constitution.

On gifts and benefits, (the Fifth Schedule, Part 1, Section 6 of)<sup>19</sup> states that a public officer shall not ask for or accept property or benefits of any kind for himself or any other person on account of anything done or omitted to be done by him in the discharge of his duties. For the purposes of sub-paragraph (1) of this paragraph, the receipt by a public officer of any gifts or benefits from commercial firms, business enterprises or persons who have contracts with the government shall be presumed to have been received in contravention of the said subparagraph unless the contrary is proved.

It further states that a public officer shall only accept personal gifts or benefits from relatives or personal friends to such extent and on such occasions as are recognized by custom, provided that any gift or donation to a public officer on any public or ceremonial occasion shall be treated as a gift to the appropriate institution represented by the public officer and accordingly, the mere acceptance or receipt of any such gift shall not be treated as a contravention of this provision.

On bribing public officers and the abuse of office, the CFRN<sup>20</sup> states that no person shall offer a public officer any property, gift or benefit of any kind as an inducement or bribe for the granting of any favour or the discharge in his favour of the public officer's duties. A public officer shall not do or direct to be done, in abuse of his office, any arbitrary act prejudicial to

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<sup>19</sup> CFRN, 5<sup>th</sup> Schedule, Part 1

<sup>20</sup> Sections 8,9,10 of the Fifth Schedule, Part 1

the rights of any other person knowing that such act is unlawful or contrary to any government policy. A public officer shall not be a member of, belong to, or take part in any society the membership of which is incompatible with the functions or dignity of his office.

On the issue of punishment for corrupt practices, Section 18(1), part 1, schedule 5 states that where the Code of Conduct Tribunal finds a public officer guilty of contravention of any of the provisions of this Code it shall impose upon that officer any of the punishments specified under sub-paragraph (2) of this paragraph and such other punishment as may be prescribed by the National Assembly. Sub-paragraph (2) of this paragraph states that the punishment which the Code of Conduct Tribunal may impose shall include any of the following; vacation of office or seat in any legislative house, as the case may be; disqualification from membership of a legislative house and from the holding of any public office for a period not exceeding ten years; and seizure and forfeiture to the State of any property acquired in abuse or corruption of office.

Consequently, the Constitution contains several provisions that subjects the government to accountability and transparency. However, it must be noted that some of the constitutional provisions have had the effect of protecting some public officials from any civil proceedings or criminal prosecution relating to acts or practice of corruption. Most significant in this light is the immunity provisions of section 308 of the Constitution.<sup>21</sup> To recap, section 308 (1)<sup>22</sup> offers a leeway to the executives to get away with anything. What it confers on them is that they are free from criminal and civil prosecution, no matter what offence they committed whilst in office. They cannot be compelled to appear in court, be arrested, prosecuted or imprisoned if they commit any criminal or civil offence whilst they enjoy the privilege of being in office.

There are however a few exceptions to the immunity clause as decided by case laws. Immunity of governors from civil proceedings does not mean that the person protected cannot be investigated for alleged crime as decided in the case of *Fawehinmi v I.G.P.*<sup>23</sup> Another exception is that state governors are not immuned from legal proceedings in respect of election petition as decided in *Alliance for Democracy v. Fayose.*<sup>24</sup> Obviously, the immunity clause does not apply to investigations and election petition matters. The immunity clause is a constitutional provision right that is vested in the constitution and cannot be taken away or interfered with by any other legislation except the constitution.<sup>25</sup> In the light of the above, anti-corruption commissions cannot interfere or take away a constitutional provision which

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<sup>21</sup> CFRN, 308

<sup>22</sup> *Ibid*

<sup>23</sup> (2002) 5 SC FWLR (Pt.1) 63 at 81-82

<sup>24</sup> (2004) ALL FWLR (Pt.218) 951 at 956-960.

<sup>25</sup> (2003) FWLR (Pt.118) 1385 at pp. 1404 -1405

provides for the immunity of the president, vice president, state governors and other public officers from civil and criminal proceedings while in office.

The idea in respect of section 308 is to ensure that the beneficiary, the head of government or executive concentrates fully on the business of governance and is not distracted by civil or criminal suits against him in the law courts. However, it is believed that the removal of this much abused immunity clause would be a step in the right direction because in a corruption-ridden society like Nigeria, the immunity clause has proved to be more evil than good because it has been abused by irresponsible public officers.

It has been argued in the past as to whether the National Assembly had legislative powers over anti-corruption statutes or not. The general legislative powers of the National Assembly are contained in section 4,<sup>26</sup> to the effect, the section states that the legislative powers of the Federal Republic of Nigeria shall be vested in the National Assembly which consists of the Senate and the House of Representatives.<sup>27</sup> The National Assembly shall have powers to make laws for the peace, order and good government of the Federation or any part thereof with respect to any matter included in the exclusive legislative list set out in part 1 of the second schedule to the constitution.<sup>28</sup>

Now, the power of the National Assembly to make laws for the peace, order and good government of the Federation with respect to any matter included in the Exclusive Legislative List shall, save as otherwise provided in the constitution, be to the exclusion of the Houses of Assembly of States. The Constitution does not provide for the sharing of legislative powers between the National Assembly and the Houses of Assembly of States in respect of matters in the Exclusive Legislative List. The Constitution further stated that in addition and without prejudice to the powers conferred by section 4(2), the National Assembly shall have powers to make laws with respect to; any matter in the concurrent legislative list set out in the first column of Part II of the Second Schedule to the Constitution to the extent prescribed in the second column opposite thereto and any other matter with respect to which it is empowered to make laws in accordance with the provisions of the Constitution.

Also, Section 4(6) of the Constitution provides that the legislative powers of a state of the federation shall be vested in the House of Assembly of the State which shall have power to make laws for the peace, order and good government of a State or any part thereof with respect to the any matter not included in the Exclusive Legislative List set out in Part I of the Second Schedule to the Constitution and any matter included in the Concurrent Legislative List set out

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<sup>26</sup> Constitution of the Federal Republic of Nigeria 1999 (as amended), s.4

<sup>27</sup> *Ibid*, s. 4(1)

<sup>28</sup> *Ibid*, s.4 (2).

in the first column of Part II to the Second Schedule to the extent prescribed with respect to which it is empowered to make laws in accordance with the provisions of the Constitution.<sup>29</sup>

In view of the foregoing, the Supreme Court decided to deliberate whether the National Assembly has the constitutional power to legislate on corruption in the light of the federal arrangement in the 1999 Constitution. The fact in issue before the Court was the constitutionality of the Corrupt Practices and Other Related Offences Act, 2000 in the case of *Attorney-General of Ondo State v. Attorney-General of the Federation*.<sup>30</sup> By an originating summons, the plaintiff asked for the following six reliefs:

- A determination of the question whether or not the Corrupt Practices and Other Related Offences Act, 2000, is valid and in force as a law enacted by the National Assembly and in force in every State of the Federal Republic of Nigeria (including Ondo State).
- A determination of the question whether or not the Attorney-General of the Federation (1<sup>st</sup> defendant) or any person authorized by him can lawfully initiate legal proceedings in any Court of law in Ondo State in respect of any of the criminal offences created by any of the provisions of the said Corrupt Practices and Other Related Offences Act, 2000.
- A declaration that the Corrupt Practices and Other Related Offences Act, 2000, is not in force as law in Ondo State.
- A declaration that it is not lawful for the Attorney-General of the Federation (1<sup>st</sup> defendant) or any person authorized by him to initiate legal proceedings in any Court of law in Ondo State in respect of the criminal offences purported to be created by the provisions of the Corrupt Practices and Other Related Offences Act, 2000.
- An order of perpetual injunction restraining the Federal Government, its functionaries or agencies (including the Independent Corrupt Practices Commission) from executing, applying or enforcing the provisions of the Corrupt Practices and Other Related Offences Act, 2000 in Ondo State whether by interfering with the activities of any person in Ondo State (including any public officer or functionary or officer or servant of the Government of Ondo State) in exercise of powers purported to be conferred by or under the provisions of the said Act or otherwise howsoever.
- An order of perpetual injunction restraining the Attorney-General of the Federation including his officers, servants and agents whosoever or howsoever from exercising any of the powers vested in him by the Constitution of the Federal Republic of Nigeria 1999 (as amended), or by any other law in respect of any of the criminal offences created by any of the provisions contained in the Corrupt Practices and Other Related Offences Act, 2000.

<sup>29</sup> Constitution of the Federal Republic of Nigeria 1999 ( as amended) S.4(7)

<sup>30</sup> (2002) 9 NWLR (Pt. 772) 222



In resolving the conflict, the Supreme Court referred to and construed relevant provisions of the 1999 Constitution, the Corrupt Practices and Other Related Offences Act, 2000 and the Interpretation Act of 1964.<sup>31</sup> The Court held that where an enactment is in relation to a matter within the enumerated classes of subjects expressly assigned to the National Assembly by section 15(5) and Item 60(a)<sup>32</sup> on the Exclusive Legislative List, the National Assembly may by that enactment provide for matters which, although are within the legislative, or even executive, competence of the states, are necessarily incidental or ancillary to effective legislation by the National Assembly in relation to that enumerated matter.

The Court also stated that it is the construction of the constitutional provisions under which powers are allocated to the different governments that determines whether an Act of the Federal or National Government has gone beyond limits to interfere with the affairs of a State in matters reserved to it under the Constitution. The Court further stated that going by the definitions of “State” and “Government” in section 318(1) of the CFRN 1999, the directive under section 15(5) of the Constitution states that “the State shall abolish all corrupt practices and abuse of government” applies to all the three tiers of government. In that case, the power to legislate in order to prohibit corrupt practices and abuse of power is concurrent and can be exercised by the Federal and State Governments by virtue of section 49(2), 4(4)(b) and 4(7)(c) of the Constitution.<sup>33</sup>

The Court added that although the power to legislate on the subject of corruption and abuse of office is given to the National Assembly and State House of Assembly, when both exercise the power, the legislation by the National Assembly will prevail by virtue of section 4(5) of the Constitution. Since by virtue of section 4(2) of the 1999 Constitution the National Assembly has the power to make laws for the peace, order and good government of the Federation with respect to any matter included in the Exclusive Legislative List, it follows that the National Assembly is empowered to legislate under Item 60(a) of the Exclusive Legislative List for the power to make laws in respect to “any other matter which it is empowered to make laws in accordance with the provisions of this Constitution.” Reading these provisions of the Constitution together and construed liberally and broadly the Court noted that it can easily be seen that the National Assembly possesses the power both “incidental” and “implied” to promulgate the Corrupt Practices and Other Related Offences Act, 2000, to enable the State, which for this purpose means the Federal Republic of Nigeria, to implement provisions of Item 68 read together with section 15(5) of the Constitution which confers power on the National Assembly to enact the Act.<sup>34</sup>

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<sup>31</sup> Cap. 192, Laws of the Federation of Nigeria (1990).

<sup>32</sup> Constitution of the Federal Republic of Nigeria 1999 ( as amended)

<sup>33</sup> Constitution of the Federal Republic of Nigeria 1999 ( as amended)

<sup>34</sup> The Supreme Court also considered the same issue in *Chief Olafisoye v Federal Republic of Nigeria*, (2004) 4NWLR (Pt. 864) 580

## **Code of Conduct Act, 1989**

The Code of Conduct Bureau was set up by the Federal Government under the Code of Conduct Bureau and Tribunal Act.<sup>35</sup> Under Sections 172 and 209 of the Constitution, persons in both Federal and State public services are required to conform to and observe the Code of Conduct.<sup>36</sup> The Code also makes it mandatory for public officers to declare their assets immediately after taking office and at the end of his or her tenure,<sup>37</sup> it requires a public officer to abstain from putting himself in a position where his personal interests will conflict with his official duties.<sup>38</sup> It prohibits a public officer, except where he is employed on a part-time basis, from engaging or participating in the management or running of any private business, profession, or trade, except farming.<sup>39</sup>

However, this provision is essentially unenforced as the country's wage policy appears to be fictional, and employees accept it with a tacit understanding that they will pursue other income generating opportunities. In *Okoye v. Santilli*,<sup>40</sup> the Supreme Court held that a public officer is precluded by the Code of Conduct from engaging in any other business, in violation of Section 20(1) of the Code of Conduct Bureau Act.

For the purpose of clarification, in *Nwankwo v. Nwankwo*,<sup>41</sup> the Supreme Court clarified the meaning of engaging in business when it held that the provision of paragraph 2(b) of part 1 of the Fifth Schedule to the 1979 Constitution is not intended to prevent any public officer from acquiring an interest in a business (e.g., a partnership). However, it did prohibit a public officer from engaging or participating in the management and running of any private business, profession or trade (to hold a managerial or other position in such an undertaking or solely to run the same). Even though the Code of Conduct Bureau Act has a broad mandate its enforcement measures have routinely been mostly at the level of asset declaration.

## **Independent Corrupt Practices and other Related Offences Commission Act 2000**

The Supreme Court of Nigeria held that the legislature can in terms of a constitutional duty on all organs of government abolish all corrupt practices and abuse of power and to create effective institutions for this purpose, the National Assembly enacted the ICPC Act, which established the Independent Corrupt Practices and Other Related Offences Commission.<sup>42</sup> The Corrupt Practices and other Related Offences Act (ICPC Act) of Nigeria was adopted on 13 June 2000.

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<sup>35</sup> Laws of the Federation of Nigeria Cap 56 (1990).

<sup>36</sup> Constitution of the Federal Republic of Nigeria (as amended) s. 172, 209.

<sup>37</sup> Para 11 of the Code of Conduct Fifth Schedule Part I

<sup>38</sup> Fifth Schedule, Part I, Art 1

<sup>39</sup> Constitution of the Federal Republic of Nigeria , ( as amended) Fifth Schedule, Part I, s. 112 s

<sup>40</sup> *Okoye v. Santilli*, [1994]4 N.W.L.R. (pt 338) 256 at 289

<sup>41</sup> *Nwankwo v. Nwankwo*, [1995] 5 N.W.L.R. (pt 394) 153

<sup>42</sup> Corrupt Practices and Other Related Offences Act Cap C 31 LFN 2004

It renders both receiving and offering a bribe a criminal offence. It prohibits and prescribes punishment for corrupt practices and other related offences.

While the appointment of the Chairman and members of the Commission is vested in the President subject to Senate confirmation,<sup>43</sup> section 3(8) of the ICPC Act provides that the President can only remove the chairman or a member upon an address supported by two-thirds majority of the Senate praying that the member or Chairman be removed for inability to function arising from ill-health or misconduct. This removal process is one of the distinguishing elements between ICPC and EFCC, clearly making the removal process of ICPC more transparent and independent than the process employed by EFCC. Sections 3-19 of the Act relates to presumption of innocence in the offences of corruption including bribery, gratification, and fraudulent concealment of illicit benefit by a public officer. The legal obligation on suspects to give information that may eventually be used against them in a criminal trial gives rise to a perception that the Act runs *ultra vires* of constitutional safeguards. For instance, section 53 of the Act states that in any proceedings against any person for an offence under sections 3 to 19, and it is proved that gratification has been accepted or agreed to be accepted, obtained or attempted to be obtained, solicited, given or agreed to be solicited or given, promised or offered, by or to the accused, the gratification shall be presumed to have been corruptly accepted or agreed to be accepted, obtained or attempted to be obtained, solicited, given or agreed to be solicited or given, promised or offered as an inducement or a reward for or on account of the matters set out in the particulars of the offence, until the contrary is proved.

Section 53(1) goes contrary to section 36(5) of the Nigerian constitution which clearly states that every person who is charged with a criminal offence shall be presumed innocent until he is proved guilty. A fundamental principle of the Nigerian criminal jurisprudence is the presumption of innocence, an offender or accused person is presumed innocent until proven guilty, the onus for proving the guilt of the accused person beyond reasonable doubt rests on the Prosecution. Hence, section 53 of the ICPC Act runs *ultra vires* of this constitutional safeguard and should be amended.

Furthermore, it shows that once the elements of an offence under sections 3-19 are proved it will be presumed that the offence has indeed been committed; therefore the burden shifts to the accused person to prove his innocence. What is really at issue here is the evidential burden which shifts constantly between an accused person and the prosecutor throughout a proceeding. This should not be the case because evidential burden has been described as the obligation to show if called upon to do so, that there is sufficient evidence to raise an issue as to the existence

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<sup>43</sup> Section 3(6) and (7) (terms of 5 and 4 years respectively subject to renewal once)

or non-existence of a fact in issue, due regard being the standard of proof demanded of the party under such obligation".<sup>44</sup>

Analyzing section 40 of the act reveals the lack of safeguard regarding the information which a suspect is obliged to give to an investigating officer and this is very disturbing. Section 40 states that subject to such limitation as is provided under this Act, every person required by an officer of the Commission to give any information on any subject which is the duty of such officer to inquire into under this Act, which also is in that person's statutory power to give, shall be legally bound to give information, failing which he shall be guilty of an offence on conviction liable to imprisonment for six months or a fine of ten thousand naira.

Under the constitution<sup>45</sup> and the Criminal Procedure rules, a suspect not to say an accused person has the right not to be compelled to incriminate one self. Therefore, Section 40 of the Act is ultra vires to the constitution and should be amended. The presumption of innocence is a crucial part of the common law adversarial system of adjudication which is obtainable in Nigeria, it seems that barring some procedural refinement of section 40 by the investigating officers will make this section vulnerable to challenge on constitutional grounds.

### **The Issue of Protection of Whistle Blowers under the Act**

Section 64 of the Act states that where any complaint made by any officer of the Commission states that the complaint is made in consequence of information received by the officer making the complaint, the information referred to in the complaint and the identity of the person from whom such information is received shall be secret between the officer who made the complaint and the person who gave the information, and everything contained in such information. The identity of the person who gave the information and all other circumstances relating to the information, including the place where it was given, shall not be disclosed or be ordered or required to be disclosed in public but only to the trial judge and the defence lawyer in attendance in any civil, criminal or other proceedings in any Court or tribunal. Obviously, this provision limits this secret to the judge and defence lawyer only which is good for the sake of protecting the identity of informants. However, it is also important to protect the integrity of the process in order to prevent the process from degenerating into an instrument of personal vendetta.

Section 64(3) further provides that “any person who gives information leading to the investigation of a suspect for corruption knowing the information to be false shall be guilty of an offence and shall on conviction be liable to imprisonment for a term not exceeding ten years

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<sup>44</sup> Tapper, Collin, Cross & Tapper on Evidence, pg. 132. Oxford University Press. (2010).

<sup>45</sup> CFRN, s. 35(2)

and shall also be liable to a fine not exceeding one hundred thousand naira." Whilst this provision discourages people from bearing false witness, it is believed this punishment is too stiff and may discourage people from stepping forward to report corruption cases. In addition, it is so unrealistic to sentence any person to ten years imprisonment for knowingly giving false information, whilst section 8 (1) (ii) prescribes punishment for official corruption as seven years imprisonment.

### **Conclusion**

The struggle against corruption has become the struggle of our time, and must continue if Nigeria is to emerge from the shackles of poverty and stunted growth. The level of corruption in the country had clearly become intolerable. It is generally acknowledged that constitutional democracy is the basis for good governance as good governance is the antidote for corruption.

The scale of corruption occurring in the corridors of power led to the creation of anti-corruption agencies such as the EFCC (Economic and Financial Crimes Commission) the ICPC (Independent Corrupt Practices and Other Related Offences Commission and the Code of Conduct Bureau amongst others. However, these agencies have made almost no headway in fighting corruption. The culture of corrupt enrichment, the orchestrated thievery among the political office holders has rendered the national economy in a state of coma. These institutions should be strengthened for more effectiveness in their operations.

### **Recommendations**

- 1) Even though the Constitution has done a fantastic job in promulgating provisions that will help in preventing corruption, the Constitution still contains some structural weaknesses. The first lacuna discovered with the Constitutional provision on corruption is in section 15(5) where the Constitution failed to enumerate what it means by corrupt practices, because of the complexities associated with corruption, it is been interpreted and perceived differently by individuals. Hence, what one party may perceive as corruption may not be corruption to another party. Therefore, the failure of the Constitution to state what its interpretation of corrupt practices is a lacuna that needs be addressed.
- 2) S. 308 of the CFRN 1999 (as amended) should be amended. The immunity clause for certain government officials should be removed.
- 3) There should be proper funding for these institutions to be effective.