

**STRENGTHENING OF ANTI CORRUPTION COMMISSIONS AND LAWS IN  
NIGERIA**

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University of Pittsburgh, 2011

This S.J.D. dissertation explores the role of law in challenging and curbing public corruption in Nigeria through the use of anti corruption agencies and laws. A comparative approach is used that draws upon development from other jurisdictions to illuminate issues in the Nigerian context. More broadly, this S.J.D. dissertation examined and analyzed the major anti corruption agencies and laws in Nigeria (Economic and Financial Crimes Commission, Independent Corrupt Practices and Other Related Offences Commission, Code of Conduct Bureau) and their approach towards corruption and democratic process. I also examined the role Freedom of Information Law plays in curbing corruption and promoting transparency, twelve years after the Freedom of Information Bill was first presented to the Nigerian National Assembly, it was finally passed into law May, 2011.

The main text of this dissertation is comprised of an introductory chapter that defines corruption and related concepts. The next chapter sets the tone of Nigeria as a nation leading into the Nigerian legal system and their jurisdiction in hearing corruption cases. Chapter five introduces the anti corruption agencies in Nigeria, past and present. Chapter six deals with United States of America's Foreign Corrupt Practices Act (FCPA), its effects on Nigeria and the controversy caused by the exception of FCPA Act called facilitation payment. The last chapter analyzes the present anticorruption agencies and their laws, proffering recommendations and also the Freedom of Information law in Nigeria while drawing developments from India's Right to Information Act and South Africa's Promotion of Access to Information Act.

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## PREFACE

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## 1.0 INTRODUCTION

### 1.1 OVERVIEW OF PROBLEM AND METHODOLOGY

*“The most immediate source of the disconnect between Nigeria’s wealth and its poverty is a failure of governance at the local, state, and federal level, and some of that is due, as you know so well, to corruption, others of it to a lack of capacity or mismanagement.” “We think its good business to eliminate corrupt practices. It is better for competition, it’s better for the trade and investment environment, it’s better for Nigeria’s reputation as a place to do business without heavy transaction costs that corruption call on a company to make. So we will do what we can to prosecute those who cross the line who have any American connection, and we want to see reinstatement of a vigorous corruption commission”.<sup>1</sup>*

Some years ago in Nigeria, I was watching the local news on television and there was the President of Nigeria at that time in the midst of elementary school children celebrating children’s day which is celebrated on May 27<sup>th</sup> of every year. The President asked a few of the elementary school children what they wanted their career paths to be when they grow up and to my chagrin, one child said “I want to be the President of Nigeria” another child said “I want to be appointed a minister of government” another said “I want to be a politician so I can make plenty and plenty of money”. I sat there asking myself what has happened to occupations like being a doctor, lawyer, teacher, nurse, engineer e.t.c. Even the young already have this mindset that one has to be a public office holder to be successful or to be rich

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<sup>1</sup> See Hillary Clinton, U.S. Sec’y of State, Address on her visit to Nigeria (August 2009), available at <http://www.state.gov/secretary/rm/2009a/08/127830.htm>.

Corruption is so widespread that each country has developed its own terminology to describe these practices; egunje in Nigeria, mordida in Mexico<sup>2</sup>, arreglo in Philippines<sup>3</sup>, baksheesh in Egypt<sup>4</sup>, dash in Kenya<sup>5</sup>, pot-de-vin in France<sup>6</sup> steekpenning in The Netherlands<sup>7</sup>, tangente in Italy<sup>8</sup>. All these phrases or slangs as it were, are used to refer to bribe such as money or a favor, offered or given to a person in a position of trust to influence that person's views or conduct. Corruption is not a novel concern in the world today. Volumes of literature have already been written about this intriguing topic globally and tons of conferences have been and are still been organized to address this menace. It is an everyday occurrence in countries throughout the world, whether developed or under developed.

Corruption has become a global phenomenon and no country is completely corrupt free. However, corruption is apparent in some countries than others because those countries with less corruption have learnt to manage corruption than others by putting the necessary checks and balances in place and curbing the opportunities of corruption while others have either not figured corruption out or lack the political will to do same. The use of public power and resources in a manner that advances individual, factional, ethnic, religious or other limited interests at the expense of more broad based social, national or global needs is corruption because power and public resources are appropriated towards private purposes and gains. Theft, bribery, extortion, patronage, nepotism, and other practices grouped together as corruption.

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<sup>2</sup> [http://www.mexicomatters.net/retirementmexico/04\\_bribeslamordidainmexico.php](http://www.mexicomatters.net/retirementmexico/04_bribeslamordidainmexico.php).

<sup>3</sup> Robert Klitgaard, Controlling Corruption, U.C. Press 19 (1988).

<sup>4</sup> [http://www.publicradio.org/columns/marketplace/middleeast/2008/03/baksheeshor\\_bribery.html](http://www.publicradio.org/columns/marketplace/middleeast/2008/03/baksheeshor_bribery.html).

<sup>5</sup> <http://www.aidworkers.net/?q=node/238>.

<sup>6</sup> <http://www.allwords.com/word-bribe.html>.

<sup>7</sup> Id.

<sup>8</sup> Id.



In Nigeria, corruption has become a part and parcel of the society, which (corruption) appears to be out of control.<sup>9</sup> The present chairman of the Economic and Financial Crimes Commission, Mrs. Farida Waziri, recently voiced out her concerns at the level of corruption in Nigeria by stating that the “endemic corruption cases in the country has overwhelmed the commission’s workforce”. She said with a population of one hundred and forty million, the commission’s one thousand five hundred operatives finds the task of prosecuting corruption cases daunting.<sup>10</sup> From my experience, research and interviews, I can attest to the fact that corruption in Nigeria is indeed out of control and one of the greatest challenges of our generation, which will not be very easy to tackle.<sup>11</sup>

Public corruption has long been a fact of life in Nigeria as shall be discussed in later chapters, elections are often fraught with fraud, intimidation, and violence, politicians embezzle money from infrastructural services and programmes. Corruption can be found in almost every facet of the society but it is most imbedded in the public sector of the country which will be my area of focus. Throughout the existence of Nigeria as a sovereign nation, it has experienced corruption which has been traced to traditional and colonial power structures. The military overthrew the government of the first republic in 1965 claiming that it wanted to rid the country of corruption but the military regimes also proved to be corrupt. The story still remains the same today; endemic, entrenched, systemic corruption is the order of the day in the Federal Republic of Nigeria. In depth discussion is contained in chapter one of this dissertation.

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<sup>9</sup> Nuhu Ribadu is a visiting Fellow at St. Anthony’s College, University of Oxford, visiting Fellow at the Center for Global Development and former Executive Chairman, Economic and Financial Crimes Commission (EFCC) of Nigeria. Testimony before the House Financial Services Committee: Capital Loss and Corruption: The Example of Nigeria (May 19, 2009).

<sup>10</sup> The Punch Newspaper, *We are overwhelmed by Corruption Cases* (May 22, 2010).

<sup>11</sup> See Appendix 2 for list of pending corruption cases in Court.

Countries suffering from corruption cannot make the best use of their human and natural resources and are likely to remain vulnerable to and dependent upon outside interests and markets.<sup>12</sup> Evidently, corruption is a cost to Nigeria in many ways like the subversion of development plans, the diversion of human and natural resources that may have been invested in a productive way, as well as upsetting the normal operation of markets. Nigeria has an impressive array of structures, institutions and laws aimed at combating corruption, The Code of Conduct Bureau (CCB), Economic and Financial Crime Commission (EFCC) and the Independent Corrupt Practices and other Related Offences Commission (ICPC) are anti corruption commissions in Nigeria. However, these institutions fall short of the standards and requirements of an effective anti-corruption regime as demanded by the anti-corruption conventions,<sup>13</sup> such as the lack of independence and non partisanship of the officers, lack of access to information, enforcement capabilities, funding and a proactive community. These lapses I shall discuss further in later chapters of my research.

My dissertation focuses on the public and government sphere, my focus on public sector corruption is justified by the statistical evidence which demonstrates a correlation between the extent of the government involvement in the economy and corruption. Having said that, it is important to note that public authority is not the only reason for corruption in Nigeria. I shall be examining the anti corruption commissions and relevant anticorruption laws we have in Nigeria.

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<sup>12</sup> Johnston M, Political Corruption and Public Policy in America, Monterey, CA: Brooks- Cole (1982).

<sup>13</sup> See the African Union Convention on Preventing and Combating Corruption and Related Offences & the United Nations Convention against Corruption. The African Union Convention on Preventing and Combating Corruption (AU Convention) was adopted in Maputo on 11 July 2003. It represents regional consensus on what African states should do in the areas of prevention, criminalization, international cooperation and asset recovery. The United Nations Convention against Corruption was adopted by the United Nations General Assembly on 31 October 2003 (Resolution 58/4). To combat corruption it includes measures on prevention, criminalization, international cooperation and asset recovery. The treaty entered into force on 14 December 2005, following the 30th ratification by Ecuador. Nigeria is a signatory to this Convention.

I shall also examine other aspects of the society that contribute to widespread corruption. My dissertation will be a combination of detailed explication and analysis of jurisdictions such as Hong Kong, Indonesia, South Africa India and the United States.

The number of indices focused on corruption measurement has grown over the years of which Nigeria constantly ranges amongst the most corrupt countries in the world. They range from some of the most established and widely used indicators like Transparency International's (TI) Corruption Perceptions Index (CPI)<sup>14</sup> and the World Bank's Worldwide Governance Indicators (WGI)<sup>15</sup>, to a newer generation of measurement and assessment tools like the Mo Ibrahim's Index of African Governance<sup>16</sup> and the Global Integrity Report.<sup>17</sup> An immediate problem for any comparative empirical work is that governance quality and particularly corruption cannot be directly measured and so alternative indicators have to be constructed using subjective judgments. These indicators have been accused of been biased and subjective as pointed out by individuals I have spoken to. However, just as it is difficult to define corruption across different cultures and political environments, it is also not easy to measure its extent.

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<sup>14</sup> [http://www.transparency.org/policy\\_research/surveys\\_indices/cpi/2010](http://www.transparency.org/policy_research/surveys_indices/cpi/2010)

<sup>15</sup> The WGI consist of six composite indicators of broad dimensions of governance covering over 200 countries since 1996: Voice and Accountability, Political Stability and Absence of Violence/Terrorism, Government Effectiveness, Regulatory Quality, Rule of Law, and Control of Corruption. These indicators are based on several hundred variables obtained from 31 different data sources, capturing governance perceptions as reported by survey respondents, nongovernmental organizations, commercial business information providers, and public sector organizations worldwide. in percentile rank terms ranging from 0 (lowest) to 100 (highest) among all countries worldwide, Nigeria's aggregate governance indicators from 2000 – 2009 are 7,(there was no indicator for 2001),2,5,7,9,11,15,21 and 15 respectively. Index is available at <http://info.worldbank.org/governance/wgi/index.asp>

<sup>16</sup> Under this index, 2010, Nigeria's total score was 43 in a scale of 0 - 100. Fundamentally, the Min–Max method involves re-scaling the raw data values to a scale of 0–100, for every indicator, for every country, and for every year. Index available at <http://www.moibrahimfoundation.org/en/section/the-ibrahim-index>

<sup>17</sup> In 2008, Nigeria's overall rating was 64 of 100 which was regarded as weak. Each country assessment contained in the Global Integrity Report comprises two core elements: a qualitative Reporter's Notebook and a quantitative Integrity Indicators scorecard, the data from which is aggregated and used to generate the cross-country Global Integrity Index. An Integrity Indicators scorecard assesses the existence, effectiveness, and citizen access to key governance and anti-corruption mechanisms through more than 300 actionable indicators. It examines issues such as transparency of the public procurement process, media freedom, asset disclosure requirements, and conflicts of interest regulations. Scorecards take into account both existing legal measures on the books and de facto realities of practical implementation in each country. They are scored by a lead in-country researcher and blindly reviewed by a panel of peer reviewers, a mix of other in-country experts as well as outside experts. Index available at <http://report.globalintegrity.org/Nigeria/2008>

Instead, the most common measures work indirectly, based not on registering specific corrupt acts but people's perceptions of the extent of corruption.

As already stated, one of the most widely cited examples is the 'Corruption Perception Index' (CPI) produced by Transparency International (TI) an international organization and Nigeria has consistently ranked low in the Corruption Perceptions Index ranking. The annual Corruption Perceptions Index (CPI) first released in 1995, is the best known of Transparency International's tools for measuring the level of corruption in countries. It ranks one hundred and eighty countries by their perceived levels of corruption as determined by expert assessments and opinion surveys.<sup>18</sup> TI gathers data from sources that span the last two years and the CPI is calculated using data from thirteen sources originated from eleven independent institutions. All sources measure the overall extent of corruption (frequency and/or size of bribes) in the public and political sectors and all sources provide a ranking of countries which include an assessment of multiple countries.<sup>19</sup>

Evaluation of the extent of corruption in countries is done by country experts, nonresident and residents consisting of the following sources; Asian Development Bank, African Development Bank, Bertelsmann Transformation Index, Country Policy and Institutional Assessment, Economist Intelligence Unit, Freedom House, Global Insight and Merchant International Group. Additional sources are resident business leaders evaluating their own country consisting of the following sources.<sup>20</sup> Institute for Management Development (IMD), Political and Economic Risk Consultancy and The World Economic Forum.

To determine the mean value for a country, standardization is carried out via a matching percentiles technique and this uses the ranks of countries reported by each individual source.

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<sup>18</sup> [http://www.transparency.org/policy\\_research/surveys\\_indices/cpi](http://www.transparency.org/policy_research/surveys_indices/cpi).

<sup>19</sup> Id.

<sup>20</sup> Id.

This method is useful for combining sources that have a different distribution. While there is some information loss in this technique, it allows all reported scores to remain within the bounds of the CPI, that is to say, to remain between zero and ten. A beta-transformation is then performed on scores. This increases the standard deviation among all countries included in the CPI and avoids the process by which the matching percentiles technique results in a smaller standard deviation from year to year. All of the standardized values for a country are then averaged, to determine a country's score. The CPI score and rank are accompanied by the number of sources, high-low range, standard deviation and confidence range for each country.<sup>21</sup>

For the purpose of my dissertation, I shall be using the Transparency International's Corruption Perceptions Index. The mainstream of this line of thought is due to the fact that this metric of measuring corruption is a perception based indicator, they rely on the subjective opinions as well as perceptions of levels of corruption in a given country among experts and citizens. The use of this indicator has been largely embraced by Nigerians in watching the corruption scale in Nigeria. In addition, based on my first hand experience of systematic corruption in Nigeria, it is my believe that the ranking of Nigeria by Transparency International and other corruption indexes is not far from what is actually obtainable in Nigeria.

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<sup>21</sup> Id.

**Table 1: Nigeria’s Global Ranking and Corruption Perception Index Scores for the past three years by Transparency International**

Global Rank& CPI Score 2010	Global Rank& CPI Score 2009	Global Rank& CPI Score 2008
<ul style="list-style-type: none"> <li>• <b>134</b></li> <li>• <b>2.4</b></li> </ul>	<ul style="list-style-type: none"> <li>• <b>130</b></li> <li>• <b>2.5</b></li> </ul>	<ul style="list-style-type: none"> <li>• <b>121</b></li> <li>• <b>2.7</b></li> </ul>

**1.2 RESEARCH METHODOLOGY**

The research methodology for this dissertation involved library and field research. In order to develop my analysis, I conducted interviews with the heads of the anti- corruption agencies in Nigeria; the Code of Conduct Bureau, Independent Corrupt Practices and other related offences Commission, Economic and Financial Crime Commission, anticorruption experts, civil society actors, and academia specializations in the area of corruption in Nigeria and U.S. I also conducted interviews with international development actors within the World Bank, International development Organizations have played a dominant role in the anticorruption war in Nigeria sponsoring programs and projects towards curbing corruption and promoting transparency.

World Bank projects help improve transparency in the public’s financial management, also build local and central government capacity to deliver services, regulate the economy more

effectively. It helps combat corruption in procurement, promote civil society participation and oversight to strengthen accountability at country and project levels, address governance issues coupled with corruption risks in sectors such as infrastructure, health, education, and natural resources.<sup>22</sup>

### **1.3 JUSTIFICATION OF STUDY**

It is trite that corruption is a global phenomenon. However, I believe that combating corruption entails changing the opportunities and/or incentives that foster it plus tightening loose ends of anti corruption laws already in place and enforcing thus. Coercive measures that seek to raise the cost of corrupt behavior by increasing the certainty as well as severity of punishment need to be taken, legal sanctions and decrees predominate among the coercive measures. My work is unique because in Nigeria there is hardly any scholarship that seeks to strengthen the anti corruption commissions and laws, moreover history has shown that there have been various anti corruption regimes that have recorded little or no success in the past.

It is worthy to note that with prevailing conditions such as ethnic and religious conflict, conflict over natural resources and bad governance in Nigeria, corruption will be difficult to

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<sup>22</sup><http://web.worldbank.org/external/default/main?menuPK=368929&pagePK=141143&piPK=141103&theSitePK=368896>.

evade, let alone control. The shortages of consumer goods, lack of access to good education and employment opportunities mean that playing by the rules is to invite failure and disappointments. Where instability exists, corruption prevails. Take for instance in Nigeria, the members of the police force, staff of some government institution, teachers at the elementary and secondary schools, university professors are poorly paid, which means that these groups of persons will be susceptible to corruption in order to meet their daily economic needs.

Corruption is responsible for the perpetual collapse of infrastructure and institutions, it is behind the underdevelopment and cyclical failure of democracy in Nigeria.<sup>23</sup> Corruption stands in the way of people having access to goods and services that they need to maintain a decent standard of living. In Nigeria today, some political factions (a comprehensive list of all the political parties in Nigeria can be found at the Independent National Commission website),<sup>24</sup> have been involved in capturing the apparatus of government so as to employ the latter to generate benefits for themselves.<sup>25</sup>

As argued by former United Nations High Commissioner for Human Rights, Mary Robinson, she posited that “analyzing corruption in the light of its impact on human rights could well strengthen public understanding of the evils of corruption and lead to a stronger sense of public rejection”.<sup>26</sup> I believe that an analysis of corruption that borders on human rights will emphasize its harm to individuals by putting a human face to the ills of corruption thereby strengthening public support for anticorruption. When people become more aware of the damage corruption does to public and individual interests plus the harm that even minor corruption can cause, they are more likely to support campaigns and programmes to prevent it.

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<sup>23</sup> In the history of Nigeria, there has been various collapses of institutions due to corruption. I shall expatiate in later chapters.

<sup>24</sup> See <http://www.inecnigeria.org/political/index.html>.

<sup>25</sup> The People’s Democratic Party (PDP) is known to be the most influential and corrupt party in Nigeria. There have been cases of PDP hijacking states during election time.

<sup>26</sup> Transparency International (TI), Global Corruption Report, Berlin (2004).



Corruption makes it possible for human rights violators to go unpunished by enjoying impunity, people do not have access to justice, 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 clinics lack supplies due to corrupt public contracting procedures. Schools cannot offer their students a sound 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 people from fulfilling their political, civil, social, cultural and economic rights.<sup>27</sup> It is high time we refocus and give the issue of corruption the attention it rightly deserves, making corruption history is the surest way of solving most of the problems of Nigeria history.

Against this backdrop, my dissertation draws best practices from different jurisdictions to come up with a Nigerian specific model. My research will be a great contribution to jurisprudence because it combines legal, historical, social and political perspectives in its final analysis. I looked at legal frame works, the past, the future looking for that missing link that is constantly preventing anti corruption framework in Nigeria from succeeding. This kind of interdisciplinary inquiry is very important in discerning the underlying limitations and restraint in the fight against corruption that has eaten so deep into the Nigeria society.

Promoting accountability, transparency, human rights and rule of law in Nigeria, one of Africa's most powerful and populous nations, would prompt positive development throughout the continent because Nigeria has contributed and is still contributing to the growth of Africa through its aid and assistance to other African countries in need by providing financial and

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<sup>27</sup> Int'l Covenant on Civil and Political Rights, entered into force on 23 March, 1976, in accordance with Article 49.

military assistance as needed. The comparative aspects of my dissertation would foster international cooperation and knowledge sharing.

## 2.0 CORRUPTION AND RELATED CONCEPTS

*“The deterioration of every government begins with the decay of the principles on which it was founded”<sup>28</sup>*

### 2.1 INTRODUCTION

Corruption has attracted a great deal of attention all over the world. In developed and developing countries, large or small, market-oriented or other- wise, governments have fallen because of accusations of corruption and gladly the amount of attention now paid to corruption is enormous. Corruption around the world is believed to be endemic, pervasive and a significant contributor to slow economic growth, it stifles investment and inhibits the provision of public services. It has increased inequality to such an extent that international organizations like the

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<sup>28</sup>C.L. de Montesquieu, available at <http://www.davar.net/QUOTES/GOVERN.HTM>.

World Bank have identified corruption as ‘the single greatest obstacle to economic and social development’.<sup>29</sup>

In Nigeria, the level of corruption is incomprehensible and it exists in almost all spheres of government. During the military era, corruption was a topic that was not discussed in the open even though most people knew it existed. However, after the democratic transition, people and organizations felt more comfortable and started to challenge the state of corruption in the country, because of the increase in recent years in the number of countries with democratic governments, free and active media has created an environment in which discussion of corruption is no longer forbidden.

## **2.2 DEFINING CORRUPTION**

There is no universally accepted definition of corruption. Hence, what amounts to corruption varies from one country to another, one legal system to another, communities and individuals. The term corruption has an assortment of meanings but for the purpose of my research, my focus shall be on public corruption which in broad terms is referred to as the abuse of public office for individual gain. Dictionary definitions of corruption vary; the Webster’s dictionary defines corruption as “inducement (as of a political official) by means of improper considerations (as bribery) to commit a violation of duty”.<sup>30</sup> The Oxford dictionary definitions are broadly similar, but with stronger echoes of other meanings, in the Oxford version, corrupt

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<sup>29</sup> <http://www.worldbank.org/publicsector/anticorrupt/index.ctm>.

<sup>30</sup> Webster’s Third New International Dictionary

means “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>31</sup> Both definitions explicitly include bribery and encompass both the giving and receiving of bribes.

At the home front, the 1999 Constitution establishes a Code of Conduct for public officers<sup>32</sup> and made it a political objective<sup>33</sup> for the state to abolish all corrupt practices and abuse of power. My main contention however with this constitutional definition is that it does not define or explain what can be termed as corrupt practices and this is a lacuna that should be addressed because like I have already pointed out corrupt practices defer amongst individuals and having the constitution spell it out will erase any misconception.

I believe that corruption should be described rather than defined, by putting a human face to corruption and personalizing issues drives home the ills and evil corruption causes. In essence, I shall attempt to describe corruption. Imagine where government official loot government accounts for their own benefit and leave ordinary people to suffer the brunt of lack of necessary infrastructures like access to good education, health care, good roads, electricity and water. Imagine where a person cannot get the services they are entitled to unless they give bribes. Imagine not able to get a good job after graduation from college because you do not know a highly placed person. Imagine being scared of the police who are supposed to be the guardian of the society because of well too known police corruption. Imagine having bridges to nowhere because the government contractor designated to carry out the project squandered the funds allocated for the project. Imagine the many deaths that occur every day because the hospital are

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<sup>31</sup> The Oxford English Dictionary

<sup>32</sup> Constitution, Art. 66, 107, 172, 173, 209, 292 & 318 (1999 ) (Nigeria) & Fifth Schedule Part I of the Constitution. (1999 ) (Nigeria).

<sup>33</sup>Constitution, Art. 15(5) & 60(a) (1999 ) (Nigeria).

under equipped, underfunded with striking doctors who have not been paid their salary in months; indeed these are everyday scenarios in Nigeria due to corruption.

According to Nye,<sup>34</sup> corruption is defined as “behavior which deviates from the formal duties of public role. This includes such behavior as bribery (use of a reward to pervert the judgment of a person in a position of trust), nepotism (bestowal of patronage by reason of ascriptive relationship rather than merit), and misappropriation (illegal appropriation of public resources for private- regarding uses)”.<sup>35</sup> I particularly like Nye’s definition of corruption because it includes acts like nepotism which is often overlooked and in some cases not referred to as corruption as it is excusable in some cultures.

In Nigeria, Nepotism is very common, it is not unusual to show favoritism in hiring practices by choosing a relative or friend over other more qualified candidates. However, some can argue that political patronage does not have to be based on personal relationships but on political contributions, either in the past or future to the person making the appointment, or, granting the benefits.

Another author Alam in his book called “Anatomy of Corruption: An Approach to the Political Economy of Underdevelopment”<sup>36</sup> sees corruption as a deviation from the norms or practices of modern bureaucracy. I can relate to this definition because based on my personal experiences and the experiences of almost everyone I interviewed in Nigeria during the course of my research asserted that some government agencies they had dealt with in the past do not follow formal protocol or due process. Bureaucracy is essential and necessary for the operation of large organizations but it has been used to encourage inefficiency and rigidity in the Nigerian

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<sup>34</sup> Nye is a university distinguished service professor, the Sultan of Oman Professor of International Relations and the former Dean of the Kennedy School, Harvard University.

<sup>35</sup>See J.S Nye, Corruption and Political Development: A Cost- Benefit Analysis, The American Political Science Review, 61, 2.at 419 (1967).

<sup>36</sup>See the American Journal of Economics and Sociology 48, 4 at 441 -456 (1989).

public service. Because the Nigerian society has been excessively corrupt, the bureaucrats too have grown corruptible and corrupt. Thus in Nigeria, corruption is a permanent integral feature of bureaucracy and therefore not unusual to find the bureaucrats bending rules and jumping official procedures and protocols in order to achieve selfish ends.<sup>37</sup>

### 2.3 PROGRESSION OF CORRUPTION IN NIGERIA

No nation can make progress when its leaders are corrupt and unwilling to accept their mistakes like past Nigerian leaders. The former Executive Chairman of Nigeria's anti corruption Commission the Economic and Financial Crimes Commission, Mr. Nuhu Ribadu estimated that Nigeria lost about three hundred and eighty billion dollars to corruption and waste by those in government between 1960 and 1999,<sup>38</sup> a figure he came up with by looking through records kept by the Nigerian central bank and the ministry of finance,<sup>39</sup> he stated that Nigeria has nothing to show for the missing money and that probably half of it went into stealing.<sup>40</sup>

Credible, popular, and accountable leadership is the fundamental prerequisite for unity, stability, and progress. When leaders manipulate information and statistics, wage a war against popular groups, their organization and condone corruption, waste, and inefficiency, the nation is bound to experience socioeconomic and political deterioration.<sup>41</sup> If corruption is to be controlled, corrupt officials have to be exposed and punished frequently and severely then the expected costs

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<sup>37</sup> M. A. O. Aluko and A.A. Adesopo, An Appraisal of the Two Faces of Bureaucracy in Relation to the Nigerian Society, *J. Soc. Sci.*, 8(1): 13-21 (2004).

<sup>38</sup> *Nigerian leaders stole \$380 billion*; BBC News online (London), Oct 20, 2006 available at <http://news.bbc.uk/2/hi/Africa/6069230.stm>

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> See Julius Ihonvbere, *Nigeria: The politics of Adjustment and Democracy* at 111(1994).

of corruption will decrease, there should be no opportunities for corruption and a very high risk of detection. The enticements for a bureaucrat to accept a bribe depends on economy-wide outcomes which, in turn, depend on the number of other bureaucrats accept bribes.

Where an officeholder realizes that they will be exposed, disgraced out of office and severely punished, that officeholder may rethink before they commit any acts of corruption. In Nigeria today, officeholders do not perceive such threat, they go about their corrupt ways undetected and if or when they get caught, most of them basically receive a slap on the wrist.<sup>42</sup> Brazil passed a groundbreaking anti corruption law on June 2010 referred to as Ficha Limpa which means clean slate, this law would bar anybody who has any corruption charges (or even allegations) pending against them from running for any political office (in municipal, state or federal elections) for eight years, the law further bars candidates who have been expelled from any professional organizations.<sup>43</sup> This law is worth emulating by Nigeria.

The Nigerian experience since receiving political independence has been one of animosity and mutual suspicion between its leadership and its citizens. Politicians, aided by sections of the intellectual class have generally treated the masses as illiterate, ignorant, as objects of manipulation and exploitation in the political process. Elections in Nigeria have been fraught with widespread rigging and violence by political fractions through the masses.<sup>44</sup> Corruption in Nigeria undermines democratic institutions, retards economic development and contributes to government instability.

Corruption attacks the foundation of democratic institutions by distorting electoral

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<sup>42</sup> See case study 1, 2, 3 in appendix 3.

<sup>43</sup> See Brazilian Complementary Law n. 135 of June 4th, 2010.

<sup>44</sup> The Carter Center and National Democratic Institute for International Affairs, Final Report, Observing the 1998-1999 Nigeria Elections at 12 (Nov. 1999) available at <http://www.cartercenter.org/documents/1152.pdf>.



processes, perverting the rule of law, creates bureaucratic bottlenecks whose only reason for existence is the soliciting of bribes.<sup>45</sup> Here the argument is that corruption has impeded the ability of the government to deal effectively and efficiently with poverty, it has also helped to further concentrate income and wealth in the hands of a selected few which exacerbated the conflict between the rich and the impoverished.

## **2.4 CAUSES OF CORRUPTION IN NIGERIA**

When democracy is lost, freedom level declines. Most of the failed and deeply troubled democracies in the world fall into the bottom half of states in controlling corruption. They are in the top ten percent of most corrupt and in addition, their states are simply not very effective. They are politically unstable with significant levels of politically motivated violence or a recent history of such that has not been put to rest, or a more general diffuse sense that the government is fragile and could be overthrown. Executive power is seriously abused, several of these countries have Presidents with grandiose political projects that they believe require them to concentrate and aggrandize power.<sup>46</sup>

Corruption causes are numerous and complex, the absence of an efficient, professional and committed civil service has been cited as an important contributor to corruption in Nigeria including a rise in the opportunities of corruption. Badly governed democracy, abuse of power,

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<sup>45</sup> Statement by United Nations Office on Drugs and Crime's Action against Corruption and Economic Crime. Available at <http://www.unodc.org/unodc/en/corruption/index.html>.

<sup>46</sup> Larry Diamond, *Democratic Governance and Performance of Democracy*, speech at the conference on Democracy that delivers; improving the quality of democratic governance and economic growth, Center for international private enterprise, Washington D.C (Oct. 27, 2009).

lack of tough anti corruption bodies and lack of political will, are all missing links needed for a democracy to thrive and to combat corruption. By rise in the opportunities of corruption I mean for instance registration of a company in Nigeria involves so many steps, many involving contacts with officials with discretionary powers. By badly governed democracy I mean the extreme lawlessness and unaccountability experienced regularly in Nigeria. By abuse of power I mean disregard for the law and manipulation of the justice system.

Critics argue that civil servants in African countries see public service as an opportunity to generate wealth for themselves, their families and their friends, this is very well the story in Nigeria. Obsession with materialism, compulsion for a shortcut to affluence, glorification and approbation of ill-gotten wealth by the general public, are among the reasons for the persistence of corruption in Nigeria.<sup>47</sup> In Nigeria one is respected by the amount of money they have so people thrive to become rich by all means. The inability or failure of Nigeria to secure efficient, professional, honest and honorable civil servants has been advanced as an explanation for the pervasiveness of corruption this is because of the role nepotism and connections play.

The lack of ethical standards throughout the agencies of government and business organizations in Nigeria is a serious drawback. According to Bowman, ethics is action, the way we practice our values is a guidance system to be used in making decisions. The issue of ethics in public sector encompasses a broad range, including a stress on obedience to authority, on the necessity of logic in moral reasoning, and on the necessity of putting moral judgment into practice.<sup>48</sup> The issue of ethics in public sector is not emphasized enough; ethics is the standards of behavior that tells us what we ought to do in our personal and professional lives which apply

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<sup>47</sup> Ndiulor, Tony Price *Nigeria is paying for Corruption*, The Guardian Online(Nigeria) March 17, 1999

<sup>48</sup> Bowman, James S Introduction: Ethical Theory and practice in Public Management, in Ethical Frontier in Public Management: Seeking New Strategies for Resolving Ethical Dilemmas; James S. Bowman, editor, San Francisco: Jossey Base (1991)

to all individuals, organizations, and society as a whole. It is imperative to uphold ethics in the public sector as a guide to what is acceptable and unacceptable behavior.

High ethical standards are important in the public sector because they are important to credibility and lead to increase support for government agencies and political leaders. Unfortunately, many officeholders in Nigeria whether appointed or elected do not have a clear conception of the ethical demands of their position even though these standards have been clearly quoted in the Nigerian constitution and by the Code of Conduct bureau.<sup>49</sup> A viable, efficiently performing state is critical to wealth creation, economic growth and to achieve these objectives recruitment into the public sector must be based on merit and not on political or rent seeking considerations.<sup>50</sup> To build upon the thoughts of Mr. Collier, when the government appoints more competent individuals to oversee different sectors, it is going to bring about economic growth because such individual would have the necessary know how that is essential for wealth creation and productivity.

In Nigeria, a significant number of people in top civil service positions are either political appointees or individuals with strong connections. There is a popular saying in Nigeria that as long as one keeps ones “god fathers happy, they will remain in position”.<sup>51</sup> In essence, most public offices have been hijacked by these self proclaimed god fathers<sup>52</sup> and Nigerians have witnessed in bewilderment how some self proclaimed god fathers hijacked their states. My

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<sup>49</sup> Constitution, Art. 172, Third Schedule, Part I, Federal Executive Bodies (Established by Section 153)(1999) (Nigeria).

<sup>50</sup> Paul Collier, The Bottom Billion: Why the Poorest Countries are Failing and What can be Done about it Oxford University Press at 3- 4 (2007).

<sup>51</sup> Jibrin Ibrahim, *The Rise of Nigeria's Political Godfathers*, BBC Focus on Africa Magazine(London), November 10, 2003 available at <http://news.bbc.co.uk/2/hi/africa/3156540.stm>.

<sup>52</sup> Godfathers are generally defined as men who have the power personally to determine both who gets nominated to contest elections and who wins in a state. Many regard them as a huge challenge to democracy in the country - although the godfathers themselves are staunchly supportive of the practice. Godfatherism is both a symptom and a cause of the violence and corruption that together permeate the political process in Nigeria. Public officials who owe their position to the efforts of a political godfather incur a debt that they are expected to repay without end throughout their tenure in office; Human Rights Watch, Criminal Politices; Violence, Godfather and Corruption in Nigeria 19, 16(A) (Oct. 2007).

interest in this dissertation concerns political godfathers<sup>53</sup> which consist of rich men whose contributions to campaign funds of some candidates have helped the latter to win elections. Governor Chimaroke Nnamani of Enugu, who had a running battle with his godfather, Senator Jim Nwobo, for over two years, defined godfather from his own personal experience as follows:

*“...an impervious guardian figure who provided the lifeline and direction to the godson, perceived to live a life of total submission, subservience and protection of the oracular personality located in the large, material frame of opulence, affluence and decisiveness, that is, if not ruthless... strictly speaking, a godfather is simply a self-seeking individual out there to use the government for his own purposes”<sup>54</sup>*

Political godfathers in Nigeria are political gatekeepers and they dictate who participates in politics and under what conditions, the role of such people is harmful to the advancement of popular and participatory democracy in Nigeria which promotes corruption. Trouble start to brew when what a godfather makes from his instrumental relationship with his clients falls below expectation and the godson becomes defiant to the wishes of his godfather, the godfather too becomes anxious when he realizes that the godson does not want him to have all he wanted from the government, such as jobs and contracts. To emphasize my line of argument, see appendix 3 for some case studies of godfather and son relationship gone bad.

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<sup>53</sup> The word godfather depicts different meanings to different people. In parts of Europe and America, godfather is associated with a mentor or a young person trying to become baptized in the Catholic Church is that will fit in as a mentor to that young person. In France, the term godfather of industry is used to depict corporate titans, that is, businessmen with the most clout, and an intriguing class of people who keeps the economy running. The French godfathers can be broken down into two types: the first are those who manipulate the economy for their own benefit, and the second those that can be referred to as crisis fixers, social reformers, and populist advocates of the poor.<sup>53</sup>

<sup>54</sup> The Source, *Chimaroke Nnamani, The godfather phenomenon in democratic Nigeria: Silicon or real?* pg. 30-31 (June 2, 2003).

The lack of fear of detection and weakened scrutiny is another factor fostering corruption in Nigeria, there is good international evidence that civil liberties and a strong civil society such as a free press reduces corruption. This reduction in overall scrutiny of the political process enabled powerful politicians and officials to dismantle the more specific procedures for scrutiny which had been built into the system. The drafters of the Nigerian anti corruption instruments focused excessively on the role of law enforcement agencies, quasi – judicial bodies, prosecutors and judges in the fight against corruption, to the neglect of civil society organizations (non state actors).<sup>55</sup>

As Transparency International has noted, “any attempt to develop an anti – corruption strategy that fails to involve civil society neglects one of the most potentially useful and powerful tools available”.<sup>56</sup> This statement is true because Involving civil society builds trust between society and anti corruption institutions, it will enable civil society to acts as watch dogs for these institutions by reporting cases of corruption. Civil society can keep track on politicians and pressure them to comply with their commitments in terms of fighting corruption and the media will expose cases of corruption, they will also put pressure for investigations and sanctions.

In the United States, there are various Nongovernmental organizations whose focus is to promote transparency and integrity within the government. Such organizations like Transparency

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<sup>55</sup> See Anti – Corruption Act Art. 6(e) & (f) “It is the duty of the Independent Corrupt Practices and Other Related Offences Commission)... (e) to educate the public on and against bribery, corruption and related offences; and (f) to enlist and foster public support in combating corruption.” Art. 5(1)(n) of the EFCC Act also provides: “The Economic and Financial Crime Commission shall be responsible for carrying out and sustaining rigorous public and enlightenment campaign against economic and financial crimes within and outside Nigeria.”

<sup>56</sup> TI Source Book, Confronting Corruption: The Elements of a National Integrity System (2000) available at [www.transparency.org/publications/sourcebook](http://www.transparency.org/publications/sourcebook).

International –USA,<sup>57</sup> Revenue Watch Institute,<sup>58</sup> Publish What You Pay,<sup>59</sup> Freedom House,<sup>60</sup> Trace International,<sup>61</sup> InterAction,<sup>62</sup> Democracy 21,<sup>63</sup> Global Witness,<sup>64</sup> Global Integrity,<sup>65</sup> Government Accountability Project<sup>66</sup> and Project on Government Oversight.<sup>67</sup> These organizations have made combating corruption within the government and system their main focus. Civil society plays a pivotal role in fighting corruption and as such, should be included in the process because they can pressurize and draw attention to any state actor whom for whatever reason is unwilling to implement anti – corruption laws.

Without active support from the general public, particularly in a system like Nigeria where there is a general distrust of government, any initiative to tackle pervasive corruption is likely to struggle for legitimacy. The absence of comprehensive national strategies to combat corrupt, exclusion of civil society, as well as a lack of real political will to implement reform is the foremost predicament in Nigeria. Civil society plays the role of a critic that advocates for those underrepresented interests of the people. It can mobilize the people and can reach the minds of ordinary citizens who may find it hard to believe that their governments are making a genuine effort to tackle corruption. Above all it is essential to raise public awareness, to awaken society to the disastrous effects of corruption and to get across the message that combating it is possible.

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<sup>57</sup> <http://www.transparency-usa.org/>

<sup>58</sup> <http://www.revenuewatch.org/>

<sup>59</sup> <http://www.publishwhatyoupay.org/>

<sup>60</sup> <http://www.freedomhouse.org/>

<sup>61</sup> <https://secure.traceinternational.org/Default.asp?>

<sup>62</sup> <http://www.interaction.org/>

<sup>63</sup> <http://www.democracy21.org/>

<sup>64</sup> <http://www.globalwitness.org/>

<sup>65</sup> <http://www.globalintegrity.org/>

<sup>66</sup> <http://www.whistleblower.org/>

<sup>67</sup> <http://www.pogo.org/>

Civil society is a guarantor that the interests of those people governments claim to represent are not being neglected. It is the manifold groups making up civil society which can remind governments and ensure that corruption has to be fought in the interest of those that can least afford to defend themselves against its brutal attacks like the poor, uneducated, and the weak. Finally, civil society is the watchdog, the whistleblower and the vanguard to warrant that the government and – to a lesser extent – the private sector respect their borders. To take you one step further along my line of argument, allow me to finally mention a few cases where civil society has succeeded in facilitating a process in which it joined forces with governments, what these examples show is that civil society can have an impact in the area of raising public awareness as well as in lobbying for concrete change or in helping to initiate and carry out a process of reforming national integrity systems.

A vibrant civil society put up a stiff resistance against military rule in Nigeria, notwithstanding the harassment and intimidation of the leaders of the pro-democracy movement, Nigerians were mobilized to fight for the termination of military dictatorship. The battle was eventually won on May 29, 1999, when democratic rule was restored. Due to the sustained campaign for freedom of expression, the Court of Appeal declared sedition illegal and unconstitutional in the case of *Arthur Nwankwo v. The State*.<sup>68</sup> In this case, the appellant, a governorship candidate had accused the Jim Nwobodo regime in Anambra State of massive corruption, was convicted and sentenced to one year imprisonment. In setting aside the conviction the Court of Appeal (Per Olatawura JCA) held that:

*“It is my view that the law of sedition which has derogated from the freedom of speech guaranteed under this Constitution is inconsistent with the 1979 Constitution*

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<sup>68</sup> 5 NCCR 228 (1985) (Nigeria).

*more so when this cannot lead to a public disorder as envisaged under Section 41(1) (a) of the 1979 Constitution.<sup>69</sup> We are no longer the illiterates or the mob society our colonial masters had in mind when the law was promulgated. The whole of CAP XXXIII which deals with Defamation is sufficient guarantee against defamatory libel. The safeguard provided under Section 50(2) is inadequate more so where the truth of what is published is no defense. To retain Section 51 of the Criminal Code, in its present form, that is even if not inconsistent with the freedom of expression guaranteed by our Constitution will be a deadly weapon and to be used at will by a corrupt government or a tyrant.”*

On the 3<sup>rd</sup> of March 1998, in the heat of a brutal draconian leadership a group of civil right activist under the leadership of a vibrant fearless lawyer Olisa Agbakoba decided to organize a five million man march to oppose a staged Government rally calling on General Abacha who at that time was the Nigerian military ruler to continue in office. The government unleashed untold brutality on the marchers and their leader was beaten and detained. Two months later this same group under the umbrella of United Action for Democracy (UAD) and under the leadership of the same fearless lawyer led a twenty city strike against the continued military rule in Nigeria.<sup>70</sup> As he was returning from a West African Human Rights meeting in 1998, Olisa Agbakoba was arrested, imprisoned and was only released after the death of Abacha.<sup>71</sup> Olisa Agbakoba drew the attention of other civil society groups and the international community to the plight of Nigerians. This goes to show that where governments fail to act or

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<sup>69</sup> Nothing in section 34, 35, 36, 37, and 38 of this Constitution shall invalidate any law that is reasonably justifiable in a democratic society - in the interest of defense, public safety, public order, public morality or public health.

<sup>70</sup> Personal interview with Olisa Agbakoba at the office of Olisa Agbakoba and Associates, Lagos, Nigeria (May 2009).

<sup>71</sup> Id.



are reluctant to take on new challenges, civil society stands ready to act. Hence, the role of civil society is priceless in curbing public corruption.

## 2.5 THE CONSEQUENCES OF CORRUPTION

The negative consequences of corruption, especially in developing countries can generally be categorized into economic, political, and social. The negative effects of corruption on the economy are as follows: Corruption distorts incentives; In a corrupt environment, able individuals allocate their energies to rent seeking and to corrupt practices, not to productive activities.<sup>72</sup>The authors of “Corruption and Development in Africa from Country Case-Studies”, Hope and Chiculo<sup>73</sup> argue that rent seeking activities tend to have the effect of inflating the cost of doing business. Hope and Chiculo point out that kickbacks and illegal commissions which have to be paid to public officials are simply added to the final costs of contracts, equipment, supplies and so on. The immediate consequence of such a situation is that entrepreneurs and potential entrepreneurs withdraw from engaging in investment and the affected economy loses the multiplier benefits that would have been forthcoming with those investments.<sup>74</sup>

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<sup>72</sup> See Tanzi, V., Corruption around the World: Causes, Consequences, Scope, and Cure, International Monetary Fund Staff Papers 45(4) Washington, DC at 36 (1998).

<sup>73</sup> See Hope, K.R. and Chiculo, C.B. (eds) Corruption and Development in Africa from Country Case-Studies, London: Macmillan Press (2000).

<sup>74</sup> Id.

To build upon this point made by Hope and Chiculo and focusing on my interactions with Nigerians and foreigners who do business in Nigeria, the cost of illegal commission are always included in the final budget for proposed contract because the payment of kickbacks are inevitable when doing business there. The reason for this is to enable the contractor break even and make massive profit.<sup>75</sup> For those who want to keep doing business under these conditions continue while others withdraw, as a consequence corruption reduces investment, reduces the rate of growth, reduces expenditure on education and health.<sup>76</sup>

Corruption acts as arbitrary tax due to its unpredictable nature creates high excess burdens resulting from the cost of searching for those to whom the bribe must be paid and the cost of negotiating as well as paying the bribe.<sup>77</sup> Corruption reduces or distorts the fundamental role of government in such areas as enforcement of contracts and protection of property right. When a citizen can buy his her way out of a commitment or out of a contractual obligation, or when one is prevented from exercising one's property rights because of corruption the fundamental role of the government is distorted and growth may be negatively affected.<sup>78</sup> Corruption slows economic growth, the first investigation of the impact of corruption on investment in cross-sectional study of countries found that corruption negatively impacts on the rate of investment on GDP.<sup>79</sup>

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<sup>75</sup> See chapter five of research for landmark cases of facilitation payments by United States corporations to Nigerian officials.

<sup>76</sup> See Tanzi, V. and Davoodi, H.R. Corruption, Public Investment and Growth, IMF Working Paper, No. 97/139 (Oct. 1997).

<sup>77</sup> Id.

<sup>78</sup> Id.

<sup>79</sup> Mauro, P. *Corruption and Growth*, Quarterly Journal of Economics CX at 681–712 (1995). Cited in J.G. Lambsdorff, TI working paper, *Corruption in Empirical Research*.

Mauro in his writing called “Corruption and Growth”<sup>80</sup> also collaborated the fact that corruption lowers expenditures on education, arguing that other expenditures offer public servants better opportunities to collect bribes. In a cross-section of thirty seven countries, a significant positive impact of corruption on inequality was found, while taking into account various other exogenous variables.<sup>81</sup> Theft, embezzlement and fraud by public officials reduce the availability of government funds for development-related activity.

The efforts to deal with corruption around the world is not a new phenomenon, policymakers around the world have recognized its global nature and are now making efforts to coordinate their anti – corruption programs.<sup>82</sup> During the last several years, many international institutions, government and nongovernmental alike have developed an interest in dealing with corruption and millions of dollars have being pumped into achieving that through various programs. Amongst such organizations notably are the United Nations (UN), the Organization for American States (OAS), the International Chamber of Commerce, Transparency International, Berlin Germany, the World Economic Forum (WEF), World Bank, Interpol and the Organization for Economic Cooperation and Development (OECD).<sup>83</sup>

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<sup>80</sup> Mauro, P. *Corruption and the Composition of Government Expenditure*, Journal of Public Economics 69: at 263–279 (1998).

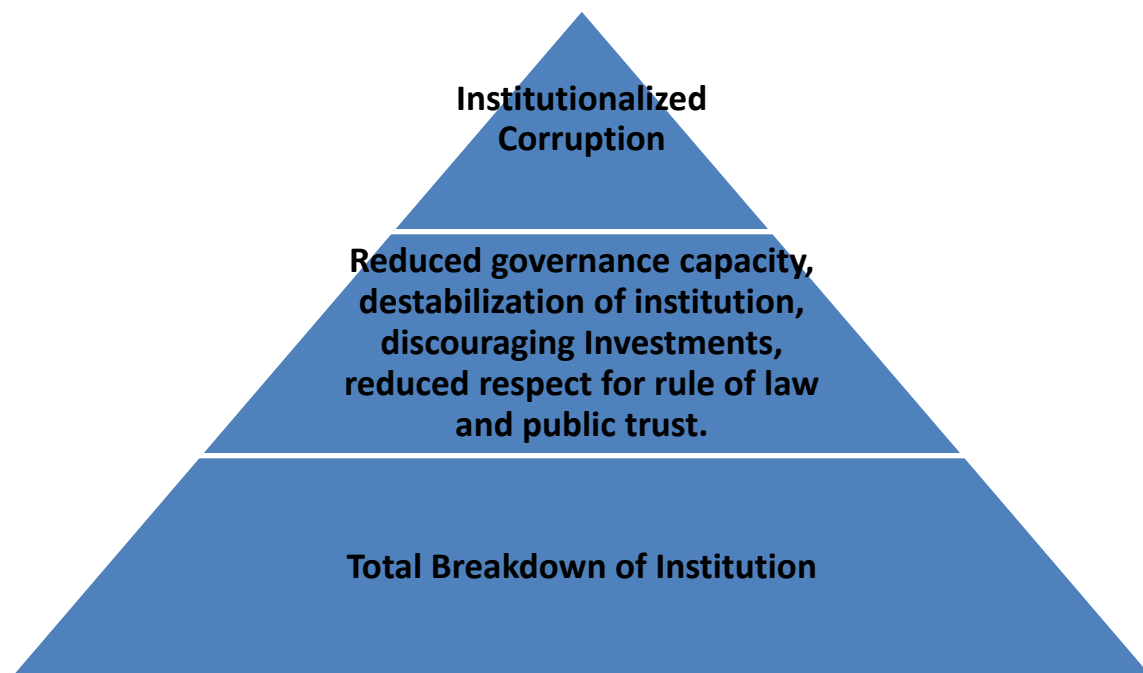
<sup>81</sup> Gubta, S., Davoodi, H. and Alonso-Terme, R. *Does Corruption Affect Income Inequality and Poverty?* International Monetary Fund Working Paper, No. 98/76( May 1998).

<sup>82</sup> The primary anti-corruption instrument of the United Nations (UN) is the Convention Against Corruption (UNCAC), adopted by General Assembly resolution 58/4 of 31 October 2003. It entered into force in late 2005. At the UN Office on Drugs and Crime the UNCAC sits alongside other measures as part of its Global Programme Against Corruption (GPAC). These include: an annual Anti-Corruption Day (held on December 9) and an Anti-Corruption Toolkit.

<sup>83</sup> Mbaku , *supra* note 137 at 117.

Since its founding, Transparency International (TI) has taken a very active role in the global struggle against bribery and other forms of corruption by raising global awareness on the destructive effects of overseas bribery on third world societies.<sup>84</sup> Similarly, the World Bank, International Monetary Fund (IMF) and the United Nations now have anti – corruption policies which allow them to suspend loans and/or grants to government that are unwilling or unable to adequately address the problem of venality in their public sectors. Such developments are expected to have a positive impact on the struggle against corruption in Africa because these organizations have consistently included recommendations on corruption and good-governance in its policy advice to states.<sup>85</sup>

**Figure 1.** Pyramid of Corruption



<sup>84</sup> [http://www.transparency.org/about\\_us](http://www.transparency.org/about_us).

<sup>85</sup> See Center for Applied Studies in International Negotiations, Global anti corruption efforts: The Role of Nongovernmental Organizations at 9 (June 2007).

## **2.6 CULTURAL ANALYSIS OF CORRUPTION; ANALYZING THE NIGERIAN CUSTOMARY LAW AND ISLAMIC LAW (SHARIA)**

Nigeria is a land of over two hundred and fifty ethnic groups, each of these ethnic groups brings with it a distinct set of cultures and tradition that reflects the complexity of the country which makes up what is referred to as the Nigerian culture. Long before independence, these various ethnic groups in Nigeria had their own established way of life and culture, however, as the country progressively became independent the Nigerian culture was also progressively evolving to accommodate western influence of religion, language, civilization and economic changes, the line between culture and modernization is rapidly getting fuzzy especially in the southern part of Nigeria. In the northern part of the country, Islam has greatly influenced what is allowed and what is not allowed in the society and thereby has shaped the lifestyle and culture of the people.

Customary law is the starting-point of Nigeria's legal history, before the emergence of colonial rule customary law enjoyed massive application in the geographical territory, composed of erstwhile politically and legally independent nationalities. The different regions of Nigeria are under different customary law systems, which may overlap in certain specific matters. For instance, the Ibo customary law applies to the Ibos in eastern Nigeria, the Yoruba customary law to the Yorubas in western Nigeria and Islamic law is regarded as customary law by the Hausas

and Fulani in northern Nigeria.<sup>86</sup> Even within a particular nationality or region, like the Ibos in eastern Nigeria, variations are noticeable in the customary laws of its various communities or groups.

Customary law refers to a body of customs, practices and norms which are largely unwritten or handed down from generation to generation by oral tradition, because of this, proof of these customs are sometimes very difficult and great reliance is placed on the testimonies of chiefs, elders and other people deemed to be conversant with the custom. Additionally, customary law has proved very flexible and adaptable to changing circumstances. This fact was given judicial recognition in *Lewis v. Bankole*.<sup>87</sup>

In *Owonyin v Omotosho*, Bairamian FJ described customary law as “a mirror of accepted usage”.<sup>88</sup> Thus, the acceptance of the customary practices is a crucial factor in any inquiry of a custom's validity. This fact was given judicial recognition in the well known case of *Eshugbayi Eleko v. Government of Nigeria*.<sup>89</sup> In this case, Lord Atkin said that it is the assent of the native community that gives a custom its validity. This view of customary law as a system of norms emanating from the common consciousness of traditional African society is no doubt the generally accepted understanding of customary law.

The Supreme Court in *Zaidan v. Mohssen*<sup>90</sup> also defined customary law from the Nigerian perspective as any system of law not being common law and not being a law enacted by any competent legislature in Nigeria but which is enforceable and binding within Nigeria as between the parties subject to its way. In a similar streak, *Obaseki J.S.C. in Oyewumi v.*

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<sup>86</sup> See *Adesubokan v. Yunusa*, 1 ALL N.L.R. 225 (S.C. Nigeria) [1971]. Also see *The Relevance of the Judiciary in the Polity – In Historical Perspective*. Lagos: Nigerian Institute of Advanced Legal Studies (1987) at 31.

<sup>87</sup> 1 N.L.R. 81 at 100-101 (1908), *Osbourne, C. J.* said "One of the most striking features of West African native law and custom is its flexibility; it appears to have been always subject to motives of expediency, and it shows unquestionable adaptability to altered circumstances without entirely losing its character."

<sup>88</sup> 1 All NLR 304(1961) (Nigeria).

<sup>89</sup> A.C. 622 (1932) (Nigeria).

<sup>90</sup> 11 S.C. 1 (1973) (Nigeria).

Ogunesan<sup>91</sup> defined it as “the organic or living law of the indigenous people of Nigeria regulating their lives and transactions”. It is indeed reasonable for me to argue that since our anti corruption commissions have not produce the desired results, an appeal to the enduring values of our customary laws may have more valuable effects because corruption is also a social problem.

Recently, in *Bilewu Oyewumi v. Amos Owoade Oginesa*<sup>92</sup> the judge gave a more detailed definition of customary law as” the organic or living law of the Indigenous people of Nigeria, regulating their lives and transactions. It is organic in that it is not static, it is regulatory in that it controls the lives and transactions of the community subject to it. It is said that custom is the mirror of the culture of the people, I would say that customary law goes further to impart justice to the lives of those subject to it. Similarly, in *Aku v. Aneku*,<sup>93</sup> the Nigerian Court of Appeal defined customary law as “the unrecorded tradition and history of the people which has ‘grown’ with the ‘growth’ of the people to stability and eventually becomes an intrinsic part of their culture. It is a usage or practice of the people which by common adoption, acquiescence, by long and unvarying habit has become compulsory and has acquired the force of a law with respect to place or the subject matter to which it relates”.

At this point, I must differentiate between a custom and a customary law to make a clear distinction between the two in order to avoid both phrases been used interchangeably. A custom is a rule of conduct and when such a rule of conduct attains a binding or obligatory character it becomes customary law.<sup>94</sup> It is the assent of the community that gives a rule of conduct its obligatory nature and entails that it is supported by a sanction and enforceability which ordinary means that a breach of custom does not occasion any injury to the infringer, because it is not

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<sup>91</sup> 3 N.W.L.R. (Pt.137) 182 at 207 (1990) (Nigeria).

<sup>92</sup> 3 N.W.L R 182, Pt. 196 at 207 (1990) (Nigeria).

<sup>93</sup> 8 N.W.L.R, Pt. 209 at 280 (1991) (Nigeria).

<sup>94</sup> Sir Carleton Kemp Allen, Law In The Making, 67 -70 ,Oxford University Press (1964)

backed by sanction, but a breach of customary law attracts the imposition of the appropriate traditional sanction.

Customary Courts are set up by the Laws enacted by the Houses of Assemblies of the thirty-six states in Nigeria,<sup>95</sup> the courts which are specie of indigenous courts were established to administer the customary law of the communities in which they are situated. It should be noted however, that the 1999 Constitution of Nigeria has empowered each state of the federation to establish its own Customary Court of Appeal.<sup>96</sup> The various Customary Court Laws expressly provide for the establishment of Customary Courts in each state and direct such courts to administer customary laws of the various communities comprising each state.<sup>97</sup>

I will like to illustrate the various conceptual aspects of customs as it applies to the typology of corruption using the Ibos which is one of the two hundred and fifty ethnic groups in Nigeria as a case study. The Igbo people constitute one of the major ethnic groups in Nigeria. According to the colonial geography the Ibos occupy mainly the eastern part of the country, they are today found in high concentration in Anambra, Abia, Enugu, Ebonyi and Imo states of Nigeria. Due to the lack of the unification of customary law there is obviously no codification of its laws therefore every ethnic group has its own customs or customary laws as it were. It is my opinion that the codification of these laws will bring about reliability and certainty of the legal system, in addition it will definitely clarify the multiply systems of customary law.

Every society has its own means of controlling the social behavior of its citizens in order to reach its desired goals, thus law provides, among other things the penal technique by which those who are found guilty of acts prohibited by the society are punished. The Ibo society of

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<sup>95</sup> Examples of such Laws include the Customary Court Edict of Imo State of 1984 and Customary Law (Cap 41) Laws of Oyo State of 2002.

<sup>96</sup> Constitution, Art. 280 (1999 ) (Nigeria).

<sup>97</sup> Id.



Nigeria has in its body of customary laws a rich penal system, though largely unwritten, this legal regime integrated the Igbo society into its development.<sup>98</sup> The key ingredients of the Ibo traditional justice system include consensus among the members of each Ibo community and their general acceptance of the law making, law application (case management) and enforcement procedures applied to them. The consensus and general acceptance are grounded on the Ibo faithfulness to their history which is manifested by the fact that they continue to borrow norms, rules, regulations, and laws from previous generations.<sup>99</sup>

The Ibos recognize two main classes of offences; the first group of offences is often identified as abomination (alu) which consists of acts regarded as violations against the divine laws like murder, incest to theft. The second group of offences comprises the natural crimes such as other forms of stealing, failure to join in the community projects, and disobedience to other man-made laws.<sup>100</sup> The Ibo retributive and penal justice is demonstrated in the punishments meted to the respective offenders which include death penalty in very extreme cases, ostracism, banishment, restitution, fine, compensation, forfeiture, seizure of valuable property and caricature, above all the Ibo criminal and penal justice systems are premised on the important value of reconciliation and peace-making.<sup>101</sup>

Now, with reference to corruption, the Ibos like most other traditional society have clear views about what acts are corrupt and unacceptable. The most severe of such acts are called "mpu" that is an act that is so mindless that it bankrupt's moral virtues and deserves total condemnation, ostracism or severe punishment. The corrupt act is discouraged through a

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<sup>98</sup> See Ikenga K. E. Oraegbuna, Crime and Punishment In Ibo Customary Law: The Challenge of Nigerian Criminal Jurisprudence, 1.

<sup>99</sup> See Simon Ottenberg, Leadership and Authority in an African Society: The Afikpo Village-Group, University of Washington Press, 246 – 269 (1971).

<sup>100</sup> See Ikenga K. E. Oraegbunam, The Principles and Practice of Justice in Ibo Jurisprudence, 63. Available at <http://www.ajol.info/index.php/og/article/viewFile/52335/40960>

<sup>101</sup> Id.

ritualistic approach of communal dissent, community does not just express the view that the act is unjust it makes it clear that the act destroys the basis of the community such that the perpetrator is removed from the spiritual fellowship and protection of the community. The guilty person will need reconciliation through self purgation in a ritualistic manner and restitution so as to enter back into fellowship.<sup>102</sup>

In an article,<sup>103</sup> J.P. Olivier de Sardan revisited the social mechanisms and the processes of legitimization of corruption in Africa. He pinpointed certain social norms widely represented in modern Africa which seem to communicate with or influence the practices of corruption. He contended that while these norms, in and of themselves, have nothing to do with corruption, they do provide a favorable ground for generalizing and trivializing corruption like gift giving. In line with Sardan's article, the giving of a gift as a symbol of appreciation is a common practice among Nigerians, gifts are sometimes given in anticipation of a favor and to refuse or neglect to give a gift when deserved is not only considered to be a sign of miserliness it also carries a risk of attracting misfortune.

Sardan pointed out that the multiple forms and uses of "gift" in everyday life blurs the distinction between charity and corrupt practice; as gifts multiplies, room is created for the drowning of illicit gifts within the mass and in essence, gifts are sometimes misconstrued as bribes Sardan states.<sup>104</sup>To clarify the characteristic between gift and bribe, the Nigerian constitution has helped in making a clear-cut distinction on when receiving gifts by a public officer is acceptable. Section 6<sup>105</sup> states that a public officer shall not ask for or accept property

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<sup>102</sup> Phone interview with Dr. Sam Amadi, a consummate attorney and an ibo indigene from Anambra State, Nigeria, August 20, 2011.

<sup>103</sup> J. P. Oliver de Sardan, A Moral Economy of Corruption in Africa? (1999).

<sup>104</sup> Id.

<sup>105</sup> Constitution, Art 6, fifth Schedule, Part 1 (1999) (Nigeria).

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.

It further states that 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 section unless the contrary is proved. Finally, 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.

Jabbara, the author of “Bureaucratic Corruption in the Third World: Causes and Remedies”, stated that corruption arises from clashes between traditional cultural values and the norms that were imported from the developed countries with modernization.<sup>106</sup> Jabbara successfully hit the nail on the head which brings me back to differentiating between our cultural norm of gift giving and bribes which the Nigerian constitution clearly differentiated as already noted. In Nigeria, it is customary that the rights of the individual are usually subordinate to those of the extended family and loyalty to the family is considered more important than individual rights or personal accountability. Such particularistic attachments are quite strong in many African societies and are said to have a significant impact on corruption.

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<sup>106</sup> Jabbara, J.G., *Bureaucratic Corruption in the Third World: Causes and Remedies*, Indian Journal of Public Administration 35, 2 at 1 – 24 (1982).

A successful civil servant is expected to share the benefits of his position in the modern sector with members of his extended family and the ethnic group he belongs to.<sup>107</sup> Extended family assistance and high level of community spirit encourage those who are economically better placed to act as their brothers' keepers through financial and other support to relatives and community members. Thus, the average person's financial and other forms of resources must be seen to assist others in his immediate community and even beyond. This often determines the status given to any individual and in particular the level of political support due to a person. Culture ceases to be one once it has a negative effect on the society, this kind of cultural practices described above breeds corruption and should not be encouraged, people should learn to live within their means. Some civil servants have admitted to being corrupt to enable them meet up with family obligations, corruption in Nigeria cannot be radically separated from the culture because it is inherent in the culture.

Corruption thrives in Nigeria because the society sanctions it, no Nigerian official would be ashamed let alone condemned by his people because he or she is accused of being corrupt. In fact any government official or politician who is in a position to enrich himself corruptly but failed to do so will in fact, be ostracized by his people upon leaving office. He would be regarded as a fool. The widespread corruption is a reflection of the profound changes in the value-system, in the past the value-system was founded on honesty, hard work, trust, good name and selfless service. Cultures change, but they change relatively slowly. Where cultural orientations are concerned, there are no quick fixes, our value system in Nigeria needs to be reassessed, a value

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<sup>107</sup> On a personal account, a family member of mine amongst many others was made the Commissioner of Education in Kaduna State in 1992; my state of origin in Nigeria. Many years later, he decided to run for the governor of the state but lost out at the primaries. The reason he lost out was the fact that when he was Commissioner, he did not share the benefits of his position with his "people". He did not assist his people get jobs, he did not give kick backs etc., rather, he enriched only himself. The fact remains that he will never be able to win an election in the state because he was not corrupt enough. This is also the same pressure suffered by many public holders in Nigeria.

system which glorifies and endorses corruption is very troubling, civil service codes need to be reviewed to include those cultural values that we have always had in Nigeria, high school and college curriculums should teach cultural reorientation to its students.<sup>108</sup> Gift giving is a formal valued aspect of African tradition, it is essentially a self-perpetuating system of belief and grounded in a society's value system, it is safe to say that people hide underneath the umbrella of customary gift giving to endorse corruption. It should be noted, however, that although gift-giving and tributes to leaders may lead to corruption, not every gift-giving should be constituted with corruption.

Now, I shall discuss the cultural analysis of corruption from the Islamic Law's (Sharia) point of view. The word Sharia literally means 'the way to the watering place' described by Muslims as a way of life.<sup>109</sup> Sharia is a system of Islamic law based on four main sources: the Qur'an, which is God's revelation to the Prophet Muhammad, the Sunna, also referred to as actions of the Prophet, described in the Hadith, the Qiyas which is the process of analogical reasoning based on understanding of the principles of the Qur'an or the Hadith and the Ijma, also known as the consensus of opinion among Islamic scholars.<sup>110</sup>

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<sup>108</sup> The general directives of cultural policy provided by the Department of Culture in Nigeria states that the rights and various attempts of the people of Nigeria to develop their culture have been given consideration in the Nigerian Constitution. However, neither the systematized cultural policy, nor the set of main aims of cultural policies within the states have been presented. Some of the clearly set directions of cultural policies are: Analysis, understanding of the Nigerian cultural life, cultural values and cultural needs and expectations of people; affirmation of the authentic cultural values and cultural heritage; building up of a national cultural identity and parallel affirmation of cultural identities of different ethnic groups; development of cultural infrastructure and introduction of new technologies in cultural activities; establishment of links between culture and education, as well as between education and different cultural industries particularly mass media.

<sup>109</sup> Abdur Rahman I Doi, *Shari'ah: The Islamic Law*, op cit, 2 and Ado-Kurawa, op cit, 22, 'Shari'ah' has an important symbolic meaning to desert peoples where water is a matter of life and death. It symbolizes access to water on a daily basis.

<sup>110</sup> Awd Ahmad Idris, *Al-Wajizfil Usul al-Fiqh* (Beirut: Dar wa Maktab Al-Hilaal, 1992), 88-90 and Abd Wahab Khallaf, *Ilm Usul al-Fiqh* (Kuwait: Dar al-Qalam, 1996), 20-2.

Unlike customary law, Islamic law is principally written, justice is a central value in Islamic teaching and is considered to be the foundation for all God's creation.<sup>111</sup> According to the teachings of the Quran,<sup>112</sup> any actions and deeds of humankind that flout justice is an act of corruption on earth, and the Quranic teachings focus on promoting and enforcing a code of ethics and morality for human behavior.<sup>113</sup> In the Qur'an and Sunna, corruption refers to a range of behavioral digressions that threaten the social, economic and ecological balance.<sup>114</sup> Such acts are explained at various places in the Qur'an in plain language, in terms of being just or unjust, with reference to their detrimental impact on social organization and/or in relation to the universally respected standards of moral virtue.<sup>115</sup>

From the angle of Sharia, bribery is taken extremely seriously in Islam. For example, the Hadith<sup>116</sup> states that *"Damned is the bribe-giver (or 'corrupter'), the bribe-taker (or 'corrupted') and he who goes between them"*, which illustrates the severity with which bribery and corruption is viewed. In terms of generation and creation of wealth, fair trade and the creation of wealth for the benefit of all is positively encouraged in Islam – but even more important is the sharing of that wealth: *"O ye who believe! Give of the good things which ye have honorably earned."*<sup>117</sup>

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<sup>111</sup> Surty, M. *'Islam, the Qur'anic Overview'* UK, QAF: Qur'anic Arabic Foundation (2007).

<sup>112</sup> Verses (Y) quoted or cited from a Chapter (X) in the Quran will be referenced in one of the following formats: (Chapter X, Verse Y), (Quran X:Y), (Verse X:Y) or (X:Y)

<sup>113</sup> In the Quran, many verses promote universal values, which should define the relationship that humans have with God and all creation, among which are: justice and equality, which are important for human happiness, peace, progress and prosperity. Verses that relate to the ecosystem and justice (verse 10:5, verse 21:33, verse 36:40), verses that relate to human behavior, governance and ethics (verse 55: 7-9).

<sup>114</sup> See chapter 11 verse 85; chapter 28 verse 4, chapter 29 verse 28-30; chapter 30 verse 41; chapter 89 verse 12.

<sup>115</sup> Zafar Iqbal and Mervyn K. Lewis, *Governance and Corruption: Can Islamic Societies and the West Learn from Each Other?* *The American Journal of Islamic Social Sciences* 19:2.

<sup>116</sup> *Sayings of the Prophet Muhammad, Peace Be Upon Him (PBUH).*

<sup>117</sup> Surat Al Baqarah, verse 267.

In understanding corruption in terms of the abuse of public office for private gain, the Qur'an in chapter 2 verse 188 prohibits rulers, judges, decision-makers and parties to a conflict from facilitating the unjustified appropriation of the property of others or public property by obtaining a favorable ruling in exchange for bribery. It calls such behavior "batil" meaning false or deceptive on the one hand and "ithm" meaning criminal, sinful, and inappropriate on the other hand. In the realm of ethics and morals in business, there are repeated injunctions in the Quran to "weigh with accurate scales", the Quran warns against those who do not weigh fairly. Here the "weighing" applies not only to scales in the sense of merchandise, but also in the sense of passing of judgment.<sup>118</sup> These values that have been stated in the Quran and Hadith obviously legitimize the Islamic approach to corruption but don't determine how corruption is dealt with in practice.

In Nigeria, there are cases on the application of Sharia in the area of personal-status laws, however, there is very limited information on how Sharia law and Courts deal with specific cases of corruption. On this note, from the angle of customary and Islamic law, we must start to address the foundation of the Nigerian family system and culture by teaching the core value of integrity from the family level to university school level. A person who has been raised with good family values may afford to reject opportunities arising from unjust enrichment offers and corrupt opportunities.

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<sup>118</sup> For example in Surat Al Rahman, verses 7 and 8.

### **3.0 THE NATION CALLED NIGERIA; A RENDEZVOUS OF HISTORY**

*Developing nations must root out the corruption that is an obstacle to progress, for opportunity cannot thrive where individuals are oppressed and businesses have to pay bribes. That is why we support honest police and independent judges; civil society and a vibrant private sector.*<sup>119</sup>

#### **3.1 INTRODUCTION**

In this chapter, I shall be discussing the history of Nigeria and its evolution to its present state. A background of Nigeria will help in understanding the foundation of the country, setting, mindset and systems. It will also assist in painting the picture of how public corruption has evolved to its current state and what went wrong along the way. The history of public corruption in Nigeria is as old as Nigeria itself even before it became independent in 1960. Nigeria was a creation of the British, prior to the end of the nineteenth century, It is a country in West Africa.<sup>120</sup>

According to the 2006 census, the population of Nigeria has been estimated to be about one hundred and forty one million. Nigeria consists of four regions officially known as; Northern

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<sup>119</sup> See Barrack Obama, U.S. President, Address before the United Nations General Assembly, (Sept. 23, 2009).

<sup>120</sup> Encyclopedia Britannica 449-508(16<sup>th</sup> ed.1973).



Nigeria; Eastern Nigeria; Western Nigeria and Mid - West Nigeria. English is the official language in Nigeria with three official ethnic languages namely Hausa, Ibo and Yoruba. There are more than two hundred and fifty ethnic groups and five hundred and twenty one different languages. The main religions in Nigeria are Christianity and Islam. Islam is most prevalent in northern part of the country with a sizeable Christian minority and Christianity is most prevalent in eastern, western and mid western Nigeria, a few numbers of Nigerians however practice traditional African religion such as idol worshipping. Though the Nigerian constitution prohibits state and local governments from declaring an official religion,<sup>121</sup> a number of states have recently adopted various forms of the Islamic criminal and civil law known as Sharia.<sup>122</sup>

There is a high degree of tension between Christians and Muslims with a record of violence against both groups and these religious and ethnic tensions have continued to brew in different parts of Nigeria,<sup>123</sup> thousands have died over the past years in clashes between different ethnic and religious groups and separatist bids for independence. Since 1999, violence between Christians and Muslims has become increasingly common.<sup>124</sup> Nigeria is divided into thirty-six states and one federal capital territory, which are further sub-divided into seven hundred and seventy four Local Government Areas (LGAs). Nigeria is ranked thirty seventh in the world in terms of Gross Domestic Product (GDP) as of 2007, it is also the United States' largest trading partner in Sub-Saharan Africa and supplies a fifth of its oil, eleven percent of oil imports comes from Nigeria.

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<sup>121</sup> Constitution, Art 10 (1999) (Nigeria).

<sup>122</sup> The States that have adopted Sharia law in Nigeria are Bauchi, Borno, Gombe, Jigawa, Kaduna, Kano, Katsina, Kebbi, Niger, Sokoto, Yobe, and Zamfara.

<sup>123</sup> The States where religious and ethnic tension have been experienced are in Nigeria till date are Adamawa, Anambra, Bauchi, Benue, Delta, Kaduna, , Kano, Lagos, Osun, Plateau.

<sup>124</sup> See <http://www.unhcr.org/refworld/pdfid/49b91f0c2.pdf>.

It has the seventh-largest trade surplus with the U.S. of any country worldwide. The United States is Nigeria's largest foreign investor.<sup>125</sup> Nigeria is the twelfth largest producer of petroleum in the world and the eighth largest exporter, it has the tenth largest proven reserves. Petroleum plays a large role in the Nigerian economy, accounting for forty percent of GDP and eighty percent of government earnings. However, agitation for better resource control in the Niger Delta, its main oil producing region, has led to disruptions in oil production and currently prevents the country from exporting at one hundred percent capacity.

Nigeria is the most populous country in Africa and the eighth most populous country in the world.<sup>126</sup> Health care and general living conditions in for the average Nigerian is very poor. Life expectancy is forty seven years (average male/female) and just over half the population have access to potable water and appropriate sanitation; the percentage of children under five has gone up rather than down between 1990 and 2003, infant mortality is 97.1 deaths per one thousand live births.<sup>127</sup> Education is also in a state of neglect, though education is provided free by the government, the attendance rate for secondary education is only twenty nine percent (average male thirty two percent, female twenty seven percent). The education system has been described as "dysfunctional" due largely to decaying institutional infrastructure coupled with frequent strikes by teachers for poor working conditions and inadequate salary. Sixty eight percent of the population is literate, and the rate for men (75.7%) is higher than that for women (60.6%).<sup>128</sup>

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<sup>125</sup> See <http://www.state.gov/r/pa/ei/bgn/2836.htm>.

<sup>126</sup> See <http://www.worldreport-ind.com/nigeria/index.htm>.

<sup>127</sup> Federal Research Division, Country Profile-Nigeria, United States Library of Congress.

<sup>128</sup> Id.

## 3.2 THE NIGERIAN SETTING

### 3.2.1 Southwestern Nigeria

Ife is located amid dense forests in the southwest of contemporary Nigeria, it remains the heart of the Yoruba civilization. Order was kept through policy coordination between Obas also known as kings and senior chiefs, with the Oni of Ife and the Alafin of Oyo being the most respected leaders in that region.<sup>129</sup> In the 1700s, the power of Oyo Empire weakened due to internal strife and increasing European intrusions. In the early 1800s, Fulani invaders from the north extended the influence of Islam to Ilorin and Oyo, without completely subjugating the latter, thus fostering internal political and economic struggles between Yoruba groups that still resonate.<sup>130</sup>

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<sup>129</sup> Stephen Wright, Nigeria: Struggle for Stability and Status, West view Press (1998).

<sup>130</sup> Id.

### 3.2.2 Southeastern Nigeria

In the southeast of contemporary Nigeria, a related though more vague, social group, were the Ibo people. Amongst the Ibos, ancestors controlled village life and it remained the task of the head of the household to converse with these ancestors to maintain political as well as social order. Village government was maintained by family heads or elders sitting together in consultation with the senior elder, or Okpara,<sup>131</sup> who chaired meetings. The region lacked centralized authority, such localized democracy made the imposition of colonial authority and indirect rule over the Ibos a very difficult matter.<sup>132</sup>

### 3.2.3 Northern Nigeria

In the northern part of the country, a thousand years or more of Islamic influence and Sahelian trade had fashioned very different, though no less distinguished, civilizations in the Bidad as – Sudan (Arabic for the “land of the blacks”).<sup>133</sup> In the “Scramble for Africa” at the end of the nineteenth century, strong independent identities and oral histories were ignored in the pursuit of an empire, European technology and ambition overcame the resistance of these

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<sup>131</sup> Okpara means first born son in Ibo language.

<sup>132</sup> Id.

<sup>133</sup> Wilfrid D. Hambly, Culture Areas of Nigeria, Chicago: Field Museum Press (1935).

peoples to colonial incorporation. Existing states were destroyed and the new state of Nigeria was created.<sup>134</sup>

On January 1, 1901 Nigeria became a British protectorate, part of the British Empire, the foremost world power at the time.<sup>135</sup> In the early years of British rule, there were complaints that emirs in the north and chiefs elsewhere were difficult to trust with money, that guards stole money and fled, even the local clerks were considered unreliable.<sup>136</sup> Colonial rule provided the conditions for the chiefs and kings to continue to receive bribes, those who assisted the British in conquering the country and maintaining their control were rewarded with regular salaries for incorporation to the colonial system. Before the British administration, the chiefs and kings were the wealthiest and most privileged in society, thanks to a good revenue base. Colonial rule undermined or destroyed the indigenous revenue base.<sup>137</sup>

### **3.2.4 Post-Independence**

On October 1, 1960, Nigeria gained its independence from the United Kingdom. The new republic incorporated a number of people with aspirations of their own sovereign nations. The nation parted with its British legacy in 1963 by declaring itself a Federal Republic.<sup>138</sup> As time went by, Nigeria experienced a major civil war popularly called the Nigerian –Biafra war between 6<sup>th</sup> July, 1967 till the 13<sup>th</sup> January, 1970, an oil boom between 1971 till 1977, various structural adjustment programs, five successful coups 1966, 1975, 1976, 1983, 1985

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<sup>134</sup> Id.

<sup>135</sup> Report on the Administration of the Niger Coast Protectorate August 1891 to August 1894, Cmnd. 7595 (1895) in Akintunde Obilade, The Nigerian Legal System, 4 (2007) Spectrum Books Limited, Ibadan, Nigeria.

<sup>136</sup> Toyin Falola, Corruption in the Nigerian Public Service in John Mbaku, Corruption and the Crises of Institutional Reforms in Africa, 137-138 (1998).

<sup>137</sup> E.A Keay & H Thomas, West African Government for Nigerian Students, 143(3<sup>rd</sup> ed. 1977) London: Hutchinson.

<sup>138</sup> Id.

respectively, two civilian governments and twenty - nine years of military rule which ended in 1999. Remaining in power after independence, civil servants continued to use their power in order to advance individual and group interests.

### **3.3 PRESENT DAY NIGERIA**

The story of Nigeria is harrowing as far as democratic transition is concerned. During the oil boom of the 1970s, Nigeria joined the Organization of Petroleum Exporting Countries (OPEC) and billions of dollars generated by production in the oil-rich Niger Delta flowed into the coffers of the Nigerian state. As oil production and revenue rose, the Nigerian government created a dangerous situation as it became increasingly dependent on oil revenues and the international commodity markets for budgetary and economic concerns eschewing economic stability that spelled doom to federalism in Nigeria.<sup>139</sup>

Nigeria re-achieved democracy in 1999 when Obasanjo took office as the head of the first elected democratic government in Nigeria since he relinquished power in 1979, ending almost twenty nine -years of military rule of Nigeria's fifty one years of existence as an independent state. The elections which brought Obasanjo to power in 1999 and again in 2003 were condemned as not free and fair, the 1999 elections was marred by violence and intimidation, as well as widespread of fraud and rigging same can also be said about the 2003 elections. Violence

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<sup>139</sup> Watts Michael, State, Oil and Agriculture in Nigeria (1987) Institute of International Studies Press U. C. Berkeley

became such an accepted part of political competition and a form of retaliation in some part of Nigeria during the 2003 elections that politicians did not even attempt to conceal it.<sup>140</sup>

President Obasanjo's government showed remarkable improvements in attempts to tackle government corruption and to hasten development by establishing the Economic and Financial Crimes Commission (EFCC).<sup>141</sup> While Obasanjo showed willingness to fight corruption, he was also accused of corruption by his peers and the media. Umaru Yar'Adua, of the People's Democratic Party, came into power in the general election of 2007, again, an election that was witnessed and condemned by the international community as being massively flawed. Yar'Adua died in office on the May 6<sup>th</sup>, 2010 after a prolonged illness and his Vice President Jonathan Goodluck was sworn in as President. On April 18<sup>th</sup>, 2011, Jonathan Goodluck was elected as President for another term of four years.

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<sup>140</sup> [www.hrw.org/reports/2004/nigeria0604/](http://www.hrw.org/reports/2004/nigeria0604/)

<sup>141</sup> The Obasanjo's government pioneered the campaign against corruption and it was during his dispensation that the Economic and Financial Crimes Commission was established to help tackle corruption.

## 4.0 NIGERIA LEGAL SYSTEM

*“In the 21st century, capable, reliable and transparent institutions are the key to success - strong parliaments and honest police forces; independent judges and journalists; a vibrant private sector and civil society. Those are the things that give life to democracy, because that is what matters in peoples' lives”.*<sup>142</sup>

### 4.1 INTRODUCTION

One of the fundamental rights of humankind is the expectation of reciprocity of treatment in the conduct of one’s affairs and this translates into being just and fair, and to be treated in court with justice and fairness. In discharging this obligation, the streams of justice must be kept pure and unadulterated. The right to be treated fairly is recognized in international human rights treaties. The Universal Declaration of Human Rights<sup>143</sup> stipulates that every human being is entitled in full equality to a fair and public hearing by an independent and impartial tribunal in the determination of his rights and obligations of any criminal charge against him.

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<sup>142</sup> See Barrack Obama, U.S. President, Address on his visit to Ghana at Fort Slave (July 2009), available at [http://www.npr.org/blogs/thetwo-way/2009/07/President\\_obama\\_tells\\_africans.html](http://www.npr.org/blogs/thetwo-way/2009/07/President_obama_tells_africans.html)

<sup>143</sup> Article 10.



The common thread of the Universal Declaration of Human Rights and its relevance to my dissertation is the function and impartiality of courts or tribunals. The objective of every court in the judicial system of any nation is to administer justice by protecting the rights of its citizens. Preservation of the integrity of the judicial system is a sine qua non of its effectiveness, and this can be tarnished by corruption. Judicial corruption or the abuse of judicial power for private gain is no longer an isolated conduct,<sup>144</sup> it is disturbingly a recurrent feature of the Nigerian judicial system. Judicial corruption often involves a vicious dynamic in which judges trade in justice for favors and personal gains.

Corruption seems to be the systemic disease of the Nigerian judiciary and has generated complaints from all segments of the society, including social commentators,<sup>145</sup> lawyers,<sup>146</sup> judges,<sup>147</sup> and even former President Olusegun Obasanjo.<sup>148</sup> A study conducted in 2002 by A.J. Owonikoko reported that since 1999, more than fifty-five cases of corrupt practices have been processed by the National Judicial Council, the body charged with enforcing discipline in the judiciary.<sup>149</sup> In 2004, many more allegations of judicial corruption were investigated by the

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<sup>144</sup>Pette Langseth, Judicial Integrity and its Capacity to Enhance the Public Interest 20 (2002), <http://www.unodc.org/pdf/crime/gpacpublications/cicp8.pdf> (describing judicial corruption as the use of adjudication authority for the private benefit of court personnel in particular and/or public officials in general). Judicial corruption is not limited to giving and receiving bribes. It includes the use of official position to gain an advantage or to secure a benefit.

<sup>145</sup>A. J. Owonikoko, *Law and Human Rights: Tackling Corruption in the Administration of Justice*, VANGUARD (Nig.), (Apr. 3, 2003), available at Westlaw: Africa News database (“Such perception makes the average Nigerian believe that the judiciary is corrupt, and so they expect that corruption is part of the pricing component of our justice system.”). See generally Francis A. Okongwu, *Nigeria’s Judiciary Requires Sanitation*, DAILY CHAMPION (July 13, 2004), available at Westlaw: Africa News database.

<sup>146</sup>Joseph Chu’ma Otteh, *Restoring the Nigerian Judiciary to its Pride of Place*, THIS DAY (Apr. 13, 2004).

<sup>147</sup>See Lillian Okenwa, *Corruption in the Judiciary Threatens Democracy*, THIS DAY (Jan. 25, 2003).

<sup>148</sup>President Obasanjo, in a paper delivered at Berlin to mark the 10th Anniversary Celebration of Transparency International, stated that “The persisting perception of the public is that it is still battling with the widespread corruption that made prosecution and the judicial process less than effective under the military.” Olusegun Obasanjo, President, Republic of Nigeria, *Nigeria: From Pond of Corruption to Island of Integrity*, Address at the 10th Anniversary Celebration of Transparency International, Berlin 7 (Nov. 7, 2003) (transcript available at <http://www.dawodu.com/obas35.htm>).

<sup>149</sup>Owonikoko, *supra*, note 67.

National Judicial Council which led to the disbarment of some top judicial officers in the Court of Appeal.<sup>150</sup>

Recently, on February 22, 2011, the Nigerian Bar Association named a thirteen member panel of senior lawyers to investigate the corruption charges against the Chief Justice of Nigeria, Justice Aloysius Katsina-Alu and the President of the Court of Appeal, Justice Isa Salami. The NBA probe panel, chaired by a former President of the lawyers' body, Chief Thompson Okpoko (SAN), was also mandated to look into the corruption that have allegedly pervaded the entire judicial system. It will equally consider the matter of legal practitioners who allegedly promote corruption in the system, the NBA panel represents a major step in unraveling the crisis of confidence in the Nigerian judicial system.<sup>151</sup>

At this point however, I shall briefly discuss some institutional problems associated with the Nigerian judicial system;

- **Justice delayed is justice denied:** The right to a fair trial in Nigeria is guaranteed by the Constitution, which provides in Section 36(1) that “In the determination of their civil rights and obligations, including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal

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<sup>150</sup> See Lillian Okenwa, *Election Petition: NJC Probes Appeal Court Judges*, THIS DAY (June 7, 2004), available at <http://www.thisdayonline.com/archive/2004/06/07/20040607news02.html> (“The National Judicial Council has commenced investigation into the allegation of perversion of justice and unethical conduct leveled against the President of the Court of Appeal, Justice Umaru Abdullahi, seven other Justices of the court, and the Registrar, Enugu Court of Appeal.”); See Kola & Oladunjoye Aramide, *Anambra: Judicial Body Probes Enugu Judge*, THIS DAY (Jan. 20, 2004), available at <http://www.thisdayonline.com/archive/2004/01/20/20040120news03.html> (reporting that the Vice Chair-man of the National Judicial Council, Supreme Court Justice Belgore, informed the press that “the council has initiated an investigation into the complaint against Justice Stanley Nnaji . . . .”); See Lillian Okenwa, *Supreme Court Justices, Tribunal Members Under Probe*, THIS DAY (Nig.), (Apr. 21, 2004), available at <http://www.thisdayonline.com/archive/2004/04/21/20040421news01.html> (reporting that the Supreme Court invited Interpol to investigate allegations by Derivation Front, a non-governmental organization, that some Justices of the Supreme Court collected a five billion Naira bribe from one of the parties in a case involving the governor of Delta State).

<sup>151</sup> *Corruption: NBA begins probe of CJN, Salami*, The Punch (February 23, 2011).

established by law.”<sup>152</sup> Unfortunately, trials in Nigeria are neither speedy nor heard within a reasonable time.<sup>153</sup> Studies conducted by a human rights organization identifies delay as one of the major obstacles to the search for justice through the courts.<sup>154</sup>

Dr. Jedrzel George Frynas, a Professor at Coventry University, United Kingdom conducted a survey on the problems of access to courts in Nigeria and top on his list was the issue of delay as one of the impediments exasperating access to the courts. He stated that;

*“Delay in the disposal of cases is perceived as the fourth most important problem of access to courts in Nigeria. This appears to be due primarily to the congestion in the courts, which manifests itself through the high number of pending cases. Cases in Nigerian courts including appeals may take over ten years before reaching a final verdict. Sometimes the original litigants will have died by the time the judgment is made”.*<sup>155</sup>

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<sup>152</sup> Constitution, art. 36 (1999) (Nigeria).

<sup>153</sup> See generally Niki Tobi, *Delay in the Administration of Justice*, in *Justice In the Judicial Process: Essays In Honor of Honorable Justice Eugene Ubaezonu*, (2002).

<sup>154</sup> HURILAWS, *Legislative Agenda for Good Governance in Nigeria 1999– 2004*, at 9 (1999). HURILAWS found that extreme delay in litigation in the courts is routine. On the average, hearing in a case at first instance in a Nigerian superior court can take as long as 5–6 years with another 3–4 years consumed in appellate proceedings.

<sup>155</sup> Jedrzej George Frynas, *Problems of Access to Courts in Nigeria: Results of a Survey of Legal Practitioners*, 10 SOC. & LEGAL STUD. 397, 410 (2001).

To curb the delays in court proceedings, the 1999 Constitution imposed a time limit for judgments to be delivered after hearing the addresses of counsel.<sup>156</sup> Judges are now required to deliver judgment not later than ninety days after the conclusion of evidence and final address by counsel.<sup>157</sup> However, the Supreme Court in *Egbo v. Agbara*<sup>158</sup> manage to render this provision powerless by ruling that failure to deliver a judgment within the ninety-day period specified by the Constitution is not fatal where the case is entirely documentary or rests mainly on interpretation of some document where the credibility or demeanor of witnesses is not involved.<sup>159</sup> It is because of these delays in prosecuting cases that one of my recommendations to be discussed later is for the establishment of special courts to prosecute corruption cases.

- **Inadequate and dilapidated infrastructure:** Justice can hardly be speedy when judges lack adequate facilities to enable them to function effectively and efficiently.<sup>160</sup> Infrastructural deficiencies in Nigeria undermine the search for a fair trial and poor infrastructure permits corruption.<sup>161</sup> Absence of modern

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<sup>156</sup> Constitution, art. 294(1) (1999) (Nigeria) states that every court established under this Constitution shall deliver its decision in writing not later than ninety days after the conclusion of evidence and final addresses and furnish all parties to the cause or matter determined with duly authenticated copies of the decision within seven days of the delivery thereof.

<sup>157</sup> Id.

<sup>158</sup> 1 N.W.L.R. 293 (1997) (Nigeria).

<sup>159</sup> Justice Iguh, delivering the lead judgment stated that in a case for instance, which is entirely documentary or rests mainly on the interpretation of some documents without the demeanour or credibility of witnesses coming into play, delay cannot be any matter of great moment. So, too, where credibility of witnesses is not involved, delay may not be material. It therefore seems to me that delay, *per se* is not sufficient reason for the interference with the judgment of a trial court. For the complaint to succeed, it has to be further established that the delay occasioned a miscarriage of justice in that the trial judge did not take a proper advantage of having seen or heard the witnesses testify or that he had lost his impressions of the trial due to such inordinate delay

<sup>160</sup> Former President Olusegun Obasanjo accurately captured the deplorable state of the judiciary in his address to the 1999 All Nigeria Judges' Conference: "We are in sympathy with the judiciary. The conditions under which you have had to work over the years are appalling, deplorable and intolerable. Courtrooms are old and dilapidated. There are no good libraries, and court proceedings, including judgments and rulings are taken in long hand. Basic facilities like stationery, file jackets are not available. Litigants are compelled to purchase files for their cases. In most cases, your residential accommodations are poor and poorly furnished. Some of you have no serviceable vehicles. Some are obliged to commute to and from your offices by public transport. You are frustrated by these unsavory conditions under which you perform your duties.

<sup>161</sup> Statement by late Chief Gani Fawehinmi, one of Nigeria's leading lawyers and foremost human rights activist, during his investiture with the rank of Senior Advocate of Nigeria, pointed out the problems of inadequate facilities in the judiciary: "As a result of long-hand notes, there is little or no access to record of proceedings to court users,

facilities provides an enabling environment for corrupt and unethical court officials to tamper with evidence even court records.<sup>162</sup> Allegations of tampering with court records forced the Court of Appeal to order that a handwritten judgment delivered on the matter must be tendered for scrutiny.<sup>163</sup> The task of taking notes by judges in long hand is painfully cumbersome due to lack of stenographers. Judges struggle with recording all the evidence in long hand, while trying to get impressions on the demeanor of the witnesses, listening to legal arguments, objections and interjections from Nigerian lawyers.<sup>164</sup> It is little wonder that most cases take years to hear. The problems of the judiciary, especially corruption and manipulation, exact substantial and enduring costs on the citizens, the legal profession, the judiciary and the Nation.

The judiciary is in dire need of reform, an honest, competent and efficient judiciary will benefit all. More importantly, an honest judiciary will help Nigeria consolidate and deepen its democracy. For the purpose of my dissertation, I shall not be focusing much on judicial corruption, rather, I shall be discussing a brief historical perspective of corruption in Nigeria, the Nigerian legal system in its entirety and whether or not they have jurisdiction to hear corruption cases with reference to domestic legislations against corruption and some institutional problems predominated with the judiciary as regards to prosecution of cases before the Courts.

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which in turn promotes corruption and other forms of manipulations. The judicial officers control their records and can therefore control outcomes to larger extents . . . Mechanizing judicial record taking and record keeping will not only address delays in court proceedings but also promote transparency and integrity in the judicial process.

<sup>162</sup> See Chino Obiagwu, *Anniversary Special: Judiciary Score Card 1999–2003*, Vanguard (May 30, 2003).

<sup>163</sup> See Charles Onyekamuo, *Anambra: Appeal Court Requests Handwritten Judgment*, THIS DAY (Feb. 11, 2004).

<sup>164</sup> See Mobolaji Sanusi, *Why We Oppose Anti-Graft Commission—Senator Udo Odoma*, Vanguard (Jan. 7, 2003), available at Westlaw: Africa News database.

## **4.2 FROM THE BEGINNING THERE WAS CORRUPTION! A BRIEF HISTORICAL PERSPECTIVE**

Corruption of public office has arguably existed in Nigeria since the establishment of modern structures of public administration in the country by the British colonial government.<sup>165</sup> Its escalation coincided with the expansion of administrative structures and the full development of the public sector associated with political independence in 1960.<sup>166</sup> I have decided to discuss where grand corruption commenced in Nigeria to put to rest debates as to whether corruption was introduced into the Nigeria society by democratically elected governments or military regimes. My analysis commences from 1956 before Nigeria became independent till 1999 when the then President General Abubakar Abdulsalam handed over to a democratic government ending twenty nine years of military rule.

Corruption in public life manifested in 1950's when the first panel of inquiry was set up to look into African Continental Bank (ACB). The charges were that Dr. Azikiwe, the first President of Nigeria abused his office by allowing public funds to be invested in ACB which Dr.

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<sup>165</sup> For example, it was reported that in Lagos demand for bribes and the acceptance of gratification were, in 1952, common practices among nurses in hospitals, police officers of the Motor Traffic Unit, pay clerks, produce examiners, etc: Commission of Inquiry in to the Administration of Lagos Town Council, 1953 (The Storey Report, Lagos, 1954); see also, for similar revelations, Report of the Commission of Enquiry in to the Working of Port Harcourt Town Council, 1955 (Port Harcourt, 1956), and Report of the Tribunal appointed to inquire into allegations reflecting on the official conduct of the premier and certain persons holding ministerial and other public offices in the Eastern Region of Nigeria, London, 1957. See also R. Tignor, Political Corruption in Nigeria Before Independence, 31 *Journal of Modern African Studies* 175-202 (1993).

<sup>166</sup> See V. Eker, On the Origins of Corruption: Irregular Incentives in Nigeria 29 *Journal of Modern African Studies* (1981) 173-182.

Azikiwe had an interest in contravention. He was found guilty of misconduct under the Code of Conduct for Ministers which stated that a government officer was required to relinquish his holdings in private business when he assumed public office. The subsequent indictment of Dr. Azikiwe by the Justice Stafford Forster – Sutton Commission of enquiry on July 24, 1956 led him to transfer all his rights and interest in the bank to the Eastern Nigeria Government.<sup>167</sup>

In 1962, the Court of accountability and transparency held Chief Obafemi Awolowo a Nigerian nationalist, a political leader, and a principal participant in the struggle for Nigerian hostage when some aggrieved members of his party, Action Group (AG) sprung allegation of corruption against him on the floor of the federal parliament.<sup>168</sup> In pursuit of accountability, the aggrieved men informed that some government establishments had been employed in various ways to divert public money into unauthorized projects.<sup>169</sup> Following up such allegation, the Justice G.B. Coker commission was set up to look into the matter, Chief Obafemi Awolowo was indicted to the effect that there was evidence of reckless, indeed atrocious, criminal mismanagement and diversion of public funds.<sup>170</sup>

Turning to the northern region of Nigeria, the existence of political corruption in Muslim areas was recognized by all the nationalist parties, as well as by the British, but the latter, in league with their traditional allies, kept the issue from becoming excessively public and political.<sup>171</sup> In 1953, the Governor- General of Nigeria informed the Colonial Office that the Lieutenant- Governor of the North, Bryan Sharwood-Smith, was attempting to save the Native

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<sup>167</sup> See Dr. Godwin Chukwudum Nwaobi, Corruption And Bribery In The Nigerian Economy: An Empirical Investigation, Quantitative Economic Research Bureau Gwagwalada, Abuja Nigeria, West Africa, at 30. <http://129.3.20.41/eps/dev/papers/0401/0401003.pdf>.

<sup>168</sup> Nwankwo, Arthur, Nigeria: The Stolen Billion, Fourth Dimension Publishers Ltd., Enugu, (2000)

<sup>169</sup> Id.

<sup>170</sup> Id.

<sup>171</sup> Tignor, *supra* note 221 at 197.

Authority system by purging it of corrupt elements. He admitted that the administration of Bornu was a public scandal and expected far-reaching reforms in Kano.<sup>172</sup>

By 1954 the Northern Government had enacted the Customary Presents Order, designed to eradicate the practice of plying officials with gifts.<sup>173</sup> It had also created a new and more representative system of local government.<sup>174</sup>

Entering the 1960s, the startling pace of oil based economy from the late 1960s to the late 1970s, facilitated corruption in Nigeria, as oil revenues built up exports of agricultural product declined and production fell. In 1960, agriculture contributed eighty per cent of the value of exports but twenty years later, it produced only five per cent. During the 1970s, money was literally pouring in and out of government coffers, between 1967 and 1977 federal revenues increased twenty-two fold.<sup>175</sup> By March 1974, the nation was rocked by a cement scandal, the federal government placed an order for two million metric tons of cement with various firms in the United States, Romania and USSR. The supply was to be made through the National supply company. However, in a sudden change, the ministry of defense that ordered for 2.9 million metric tons for its construction projects placed an additional order for 16.23 million metric tons.

Despite the fact that the price for a ton of cement at that time stood at twenty five dollars and freight at fifteen dollars, Nigeria paid one hundred and fifteen dollars per ton, somebody therefore stood to gain seventy five dollars per ton for 16.23 million tons. Consequently, the state instituted Justice M.B. Belgore Panel to investigate the alleged irregularities and the probe seriously indicted the permanent secretary of the Ministry of Defense which led to his dismissal

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<sup>172</sup> Macpherson to Williamson, 4 March 1953.

<sup>173</sup> See C. S. Whitaker, Jr., The Politics of Tradition: continuity and change in Northern Nigeria, 1946-1966, Princeton, 102 (1970).

<sup>174</sup> See A. D. Yahaya, The Native Authority System in Northern Nigeria, 1950-1970: A study in political relations with particular reference to the Zaria Native Authority at 36 (1980).

<sup>175</sup> Williams, *supra* note 192 at 67.



along with other officers. Surprisingly, criminal proceedings were never brought against the dismissed men.<sup>176</sup>

In an atmosphere of moral and social decay, the plot to overthrow Gowon thickened and eventually, the coup took place on July 19, 1975. After consolidating his hold on power, Brigadier Murtala Mohammed set up a federal assets investigation panel on September 16, 1975 to probe the assets of all former governors, the administrator of East Central State and some Federal Commissioners who served in the Gowon's regime. On February 3, 1976, the panel released its report and all the governors with the exception of Mobolaji Johnson, the governor of Lagos State and Oluwole Rotimi, the governor of the Western State, who were acquitted were found guilty of gross abuse of office. The confiscated assets stood at about ten million naira.<sup>177</sup>

Towards the dying days of 1975, a disturbing three page circular said to have emanated from supreme headquarters in Lagos had facts about Brigadier Murtala Mohammed's government since Gowon's ousting on July 29, 1975. This circular alleged that looting and plunders of national wealth thought to be the hallmark of the Gowon's era had started in earnest. The circular also deposed that the Mohammed's regime was as corrupt as the Gowon's. Indeed, the failure of Dimka's coup paved the way for the emergence of Brigadier Olusegun Obasanjo as Head of state.<sup>178</sup> One of the first actions Brigadier Olusegun Obasanjo performed on coming into power was the promulgation of decree No11 of 1976 (Public officers Protection against False Accusation). Hence, making corrupt government officials above the law. This retroactive decree in all intent and purposes was a clever plan to provide cover and immunity for corrupt public servants and thus deter members of the public from exposing such public figures in his regime.<sup>179</sup>

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<sup>176</sup> Dr. Godwin, *supra* note 223 at 31

<sup>177</sup> Dr. Godwin, *supra* note 223 at 32.

<sup>178</sup> Id.

<sup>179</sup> Id

Alhaji Shehu Shagari was sworn in as the President of Nigeria on October 1, 1979. Indeed, the Shagari's scorecard was a parchment of corruption, a shocking and sad commentary on how unpatriotic leaders would sink a nation into an irredeemable abyss of destruction. Between 1979 and 1983, Nigeria earned about forty and half billion naira at the same time squandered it. The external reserve of N2.3 billion, it inherited in 1979 was wiped out and replaced with a staggering external debt of N 10.21 billion as the curtain fell on this criminally corrupt government. The life of Shagari as the civilian administration was terminated on 31<sup>st</sup> December 1983, paving way for Buhari/Idiagbon military administration. Politicians were held under the state security (Detention of persons), Decree 2 of 1984 and many were tried by the Recovery of Public Property Special Military Tribunals established by Decree 3. Some were convicted for various offences and duly sentenced, specifically, Justice Mohammed Bello's tribunal convicted fifty one politicians and placed refund orders on them for their ill-gotten wealth.<sup>180</sup>

On August 27, 1985, Ibrahim Badamasi Babangida came to power, as he unfolded his policies on the political and economic fronts, discerning observers of the nation sociopolitical condition observed that Nigeria was in for a period of deceit. In 1986, Babangida administration rejected the International Monetary Fund (IMF) bank loan but adopted most of the reforms contained in the package called the Structural Adjustment Program (SAP).<sup>181</sup> The transition to civil democracy kicked off in 1986 with the establishment of a political bureau. The June 12, 1993 Presidential elections and Chief Moshood Abiola's comprehensive electoral landslide win, its annulment by the then head of state General Babangida plunged the nation into chaos.

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<sup>180</sup> Id at 34.

<sup>181</sup> Id.

An Interim National Government was formed and Ernest Shoneken was sworn in as its interim President. In November 1993, Shoneken met with General Sani Abacha and other army staff thus ending Shoneken's important regime after 82 days.<sup>182</sup> In January 1994, General Abacha's administration instituted a panel under the chairmanship of respected economist, Dr. Pius Okigbo. The panel was expected to come up with practical solutions that would lead to the reform and reorganization of the Central Bank of Nigeria, grossly abused under Babangida's regime. The panel's report exposed the outrageous frittering away of \$12.4 billion income from oil using the conduit of special accounts.<sup>183</sup>

Abacha on the other hand was able to perpetuate one of the most comprehensive plunder and looting of the resources of the state in contemporary history through intimidation, brigand, and a plethora of conduits. At the center of his scam schemes was the Chagouri and Chagouri, an international consortium owned by five Lebanese brothers,<sup>184</sup> their substantial interest cut across oil aluminum, smelting, flour milling, commodity trading, fertilizer importation, and real estate. The company's total assets totaled at eighteen billion dollars.<sup>185</sup>

The sudden death of General Sani Abacha, on June 8, 1998,<sup>186</sup> pulled the nation from the brink of assured civil war and paved the way for the emergence of General Abdulsalami Abubakar as Head of state.<sup>187</sup> He pledged to return the nation to democratic rule in ten months, a pledge he fulfilled. Even in the face of mass evidence pointing to an extraordinary looting spree under the regime of Gen. Abubakar, he struggled to salvage an anticorruption crusade gone awry and the staggering evidence and circumstances made his unpopular. Three days before he left office, Abubakar signed a decree causing Abacha and some influential men under his

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<sup>182</sup> Id at 37.

<sup>183</sup> Id at 38.

<sup>184</sup> [http://www.nigeriatoday.com/chagouris\\_of\\_lebanon\\_are\\_back.htm](http://www.nigeriatoday.com/chagouris_of_lebanon_are_back.htm).

<sup>185</sup> <http://www.csmonitor.com/1997/1218/121897.opin.opin.1.html>.

<sup>186</sup> <http://news.bbc.co.uk/2/hi/africa/109265.stm>.

<sup>187</sup> <http://www.onlinenigeria.com/abubakar.asp>.

administration to forfeit varying sums of money and property running into billions of Naira. At the end of this military rule, one sad conclusion is that the nation was once again taken for a ride.<sup>188</sup>

Nigerian political scene is plagued with political instability and corruption, some of these behaviors associated with political instability include, but are not limited to, vote-rigging, registration of unqualified voters, falsification of election results, buying and selling votes, assassination of opposition elites, and the intimidation of supporters of the opposition.<sup>189</sup> Participation in politics is a long time investment and a way of securing a comfortable future for ones descendants, most political office contenders go through almost anything to get into office. The pervasive role of political violence in Nigeria leads to political instability which in turn helps exacerbate the nuances of corruption in the country and because of this instability, the focus of the leadership becomes narrow with the overriding consideration for personal survival rather than national development.

I have come to accept the fact through the course of my research that corruption in Nigeria cannot be completely eliminated but it can progressively be controlled and managed. Its population and economy, presence of natural resources and the lack of established rule of law, will make it difficult to completely eliminate corruption. Using Transparency International Corruption Perceptions Index of 2010 as a yardstick, the three squeaky clean countries, Denmark, New Zealand and Sweden<sup>190</sup> all have some elements in common; they have small sized economies, no natural resources, dependent on their ability to trade and engage with

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<sup>188</sup> [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=531402](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=531402).

<sup>189</sup> See the European Union Election Observation Mission (EUEOM) Final Report on the National Assembly, Presidential, Gubernatorial and State Houses of Assembly Elections in Nigeria available at [http://ec.europa.eu/comm/external\\_relations/human\\_rights/eu\\_election\\_ass\\_observ/nigeria/rep03.pdf](http://ec.europa.eu/comm/external_relations/human_rights/eu_election_ass_observ/nigeria/rep03.pdf) (accessed March 12, 2007).

<sup>190</sup> All three countries rated 9.3, 9.3 and 9.2 respectively by TI's Corruption Perceptions Index of 2010. Available at [http://www.transparency.org/policy\\_research/surveys\\_indices/cpi/2010/results](http://www.transparency.org/policy_research/surveys_indices/cpi/2010/results).

foreign countries and a well established rule of law. In other words, these countries have been able to manage corruption because of all these qualities that are obviously alien to Nigeria. Let me briefly discuss these said qualities.

Denmark has a population of a little over five and a half million people, this thoroughly modern market economy features a high-tech agricultural sector, state-of-the-art industry with world-leading firms in pharmaceuticals, maritime shipping and renewable energy, a high dependence on foreign trade.<sup>191</sup> Danish legislation and regulations conform to European Union standards on almost all issues.<sup>192</sup> New Zealand on the other hand, has an estimated population of approximately four and a half million people,<sup>193</sup> New Zealand economy historically has been based on a foundation of exports from its very efficient agricultural system and has a free market economy that can compete globally.<sup>194</sup> Sweden's population, stand at approximately 9.1 million people,<sup>195</sup> aided by peace and neutrality for the whole of the 20th century, Sweden has achieved an enviable standard of living under a mixed system of high-tech capitalism and extensive welfare benefits.<sup>196</sup> Sweden carries on a large foreign trade, the value of exports usually slightly exceeds that of imports.<sup>197</sup>

Corruption in Nigeria is a classic case of systemic corruption,<sup>198</sup> and systemic corruption occurs where corruption pervades the entire society and in the process becomes an accepted means of conducting everyday transactions. It affects institutions and influences individual behavior at all levels of a political and socio-economic system. The rule of law no longer exists

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<sup>191</sup> <https://www.cia.gov/library/publications/the-world-factbook/geos/da.html>.

<sup>192</sup> Id.

<sup>193</sup> <https://www.cia.gov/library/publications/the-world-factbook/geos/nz.html>.

<sup>194</sup> <http://www.state.gov/r/pa/ei/bgn/35852.htm#econ>

<sup>195</sup> <https://www.cia.gov/library/publications/the-world-factbook/geos/sw.html>

<sup>196</sup> Id.

<sup>197</sup> <http://www.infoplease.com/ce6/world/A0861384.html>

<sup>198</sup> S Ekwowusi *Curbing Corruption in Nigeria* Thisday Newspaper (Nigeria), 15 October 2000, quoted in NA Goodling *Nigeria's Crisis of Corruption; Can the U.N. Global Program hope to resolve this Dilemma?* 36 VAND. J. TRANSNAT'L L at 999 (2003)

as the institutions whose job it is to ensure compliance to the rules have been compromised by corruption.<sup>199</sup> In Nigeria, the Police Force has proved to be highly incompetent, there have been instances of members of the Police Force perpetrating crimes and letting known criminals walk away. The Police are known for harassing innocent citizens for bribes and setting up unauthorized road blocks to harass motorists,<sup>200</sup> they are known for their laxity and nonchalant attitude to pursue justice.

There have been some concerns among Nigerians about the integrity and uprightness of the Judiciary, It has been alleged also that Court papers disappeared from the Court room without any trace as seen in the prosecution of high profile persons, the judiciary is known for its laxity and time wasting. Going to Court to seek for redress in Nigeria is like walking on hot coal, it is painfully slow and a typical civil matter can drag for years hence, Nigerians have lost faith in the judicial system and has blamed it on the impunity enjoyed by the corrupt rich and powerful in Nigeria.<sup>201</sup>

Systemic corruption is so persistent and difficult to combat not only because of its inner workings but also because it is embedded in a wider political and economic situation that helps sustain it. In Nigeria, major institutions and processes of the state are routinely dominated and used by corrupt individuals as well as groups, this makes anti corruption task very difficult. I believe that systemic corruption is like cancer, like cancer I mean that corruption slowly starts to spread which eventually becomes widespread that it is difficult to battle.

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<sup>199</sup> Id

<sup>200</sup> See generally the Human Rights Watch Report “Everyone’s in on the Game” Corruption and Human Rights Abuses by the Nigeria Police Force (August 17, 2010).

<sup>201</sup> The Federal Court in Asaba Delta State in December 2009 said there was no clear evidence against James Ibori, governor from 1999 to 2007. The former governor of Nigeria's oil-rich Delta State has been cleared of 170 charges of corruption - involving the laundering of millions of dollars. In 1997 a UK Court froze assets allegedly belonging to him worth \$35m (£21m). His annual salary as a governor was less than \$25,000.

The current laws and institutions against corruption are not efficient enough and there is no way the operation of the current anti-corruption agencies in Nigeria namely the Code of Conduct Bureau (CCB), the Independent Corrupt Practices and other Related Offences Commission (ICPC) and the Economic and Financial Crime Commission (EFCC) would have any credibility in a situation where the corrupt enjoy impunity. Enforcement blossoms only where there is political will and this political will must come from the top of any government and the momentum for change must come from within the government. There are instances around the world where courageous leaders have made progress against corruption because the political will was there. For instance;

In 1974 when the Hong Kong's Independent Commission against Corruption was launched, one of its first steps was to capture and punish a former police commissioner, who symbolized impunity.<sup>202</sup> Within three years, the ICAC smashed all corruption syndicates in the government and prosecuted two hundred and forty seven government officials, including one hundred and forty three police officers.<sup>203</sup> This act sent a strong message that the government meant business as regards corruption.

Just after he assumed power in Colombia in 1998, President Andrés Pastrana's anti-corruption team flew to several regions and held hearings about supposedly corrupt mayors and governors. The team had the power to suspend people from these offices something that leaders in other countries may not have and the team used this power to send a signal not only to the local leaders but to the whole country. The President's anti-corruption team also went after a

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<sup>202</sup> <http://www.gov.hk/en/about/abouthk/factsheets/docs/icac.pdf>.

<sup>203</sup> See Tony Kwok Man-wai, former Deputy Commissioner and Head of Operations, Independent Commission Against Corruption (ICAC), Hong Kong, Formulating an Effective Anti-Corruption Strategy - The Experience of Hong Kong ICAC.

specific case of corruption in the Congress—choosing as the big fish people from the President’s own party.<sup>204</sup>

In 2001-2002, President Enrique Bolaños of Nicaragua went one step further when he put in jail the former President Arturo Alemán, under whom Bolaños had served as Vice President, on charges of corruption.<sup>205</sup> Political will is vital for any anti – corruption effort to succeed. The next part of my dissertation examines the evolution of the Nigerian legal system, sources of law and hierarchy of courts.

By virtue of colonization, the Nigerian legal system draws heavily from the English Common Law legal tradition, it is essentially based on and frequently carried or copied from English Common Law which forms a substantial part of Nigeria law. Each of Nigeria’s thirty six states including the Federal Capital Territory has its own legal system<sup>206</sup> with a general federal legal system applicable throughout the country. However, the complexity of Nigerian legal systems is further revealed by the application of local customs as law in each state thereby causing legal pluralism. Hence, a striking feature of our legal system is the unique co-existence of English law and customary laws.<sup>207</sup>

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<sup>204</sup> The American Enterprise Institute Working Paper Series on Development ,Addressing Corruption in Haiti, Policy Number 2, April 2010, pg. 19.

<sup>205</sup> Id.

<sup>206</sup> The thirty six states including the federal capital are Abuja, Anambra, Enugu, Akwa Ibom, Adamawa, Abia, Bauchi, Bayelsa, Benue, Borno, Cross River, Delta, Ebonyi, Edo, Ekiti, Gombe, Imo, Jigawa, Kaduna, Kano, Katsina, Kebbi, Kogi, Kwara, Lagos, Nasarawa, Niger, Ogun, Ondo, Osun, Oyo, Plateau, Rivers, Sokoto, Taraba, Yobe.

<sup>207</sup> Customary law is a system of law that reflects the culture, customs, values and habits of the people whose activities it regulates. It has been described as a mirror of accepted usage. Customary law is particularly dominant in the area of personal and family relations like marriage, divorce, guardianship and custody of children, and succession. Customary law can be established before the Courts either by proof of it to the Court by calling evidence, or by the Court taking judicial notice of a custom that is so obvious that it needs no further proof. Moreover, before a custom can be relied on by the Court, it must pass the three validity tests. Thus, it must not be repugnant to natural justice, equity and good conscience; it must not be contrary to public policy; and it must not be inconsistent with any law for the time being in force. See *Lewis v. Bankole* INLR 81 (1908) (Nigeria).



Plurality of laws permits a situation where one system applies to one transaction and another system to another. For example different laws and incidences apply to Christians and customary law marriages, as well as the devolution of property upon intestacy.<sup>208</sup> A customary law may also apply to a transaction and dispute may arise as to whether or not that law applies to the parties in the transaction, cases involving a native and a non-native often give rise to such a problem. Nevertheless, the approach of the Court has been that the customary law would apply where statutes so provide. In other cases, the test is which law serves justice better.<sup>209</sup>

However, these rules are not absolute and may be displaced where:

- (a) The parties expressly agree that the customary law shall not apply. Sometimes the yardstick for applying customary law may differ. For example in the Northern States and Lagos State, the test for the application of a customary law is “Nativity Test”. In the Eastern States, the test is “Nigerian descent test”. In the Western States, the High Court laws provide expressly where customary law should apply.
- (b) In every case, application of a customary law is displaced where the nature of the transaction does not admit customary law
- (c) Where the transaction is unknown to the customs of the people, customary law would not apply .Typical examples of these transactions are statutory marriage cases.

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<sup>208</sup>See *Cole v Cole*, 1 NWLR 15 (1898) (Nigeria), *Olowu v Olowu*, Suit No AB/51/71 H/Court of Western States, Abeokuta (1973) (Nigeria), *R v Princewill*, NNLR 54 (1963) (Nigeria).

<sup>209</sup>See *Lewis v Bankole*, INLR 81 (1908) (Nigeria), *Edet v Essien*, 11 NLR 47 (1932) (Nigeria), *Nelson v Nelson*, 13 WACA 248 (1951) (Nigeria), *Agidigbi v Agidigbi*, 2 NWLR Pt 221 98 (1992) (Nigeria).

### 4.3 SOURCES OF NIGERIAN LAW

The sources of Nigeria law are;

1. Nigerian legislation;
2. English law which consists of:
  - (a) Received English law comprising of:
    - (i) Common law
    - (ii) Doctrines of equity
    - (iii) Statutes of general application in force in England on January 1, 1900<sup>210</sup>
    - (iv) Statutes and subsidiary legislation on specified matters.
  - (b) English law made before October 1, 1960 and extending to Nigeria.
3. Customary law
4. Judicial precedents

#### 4.3.1 Nigerian Legislation

Nigerian legislation consists of statutes and subsidiary legislation. Statutes are laws enacted by the legislature which is the legislative arm of government and subsidiary legislation is law enacted in the exercise of power given by a statute.<sup>211</sup> Nigerian statutes consist of;

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<sup>210</sup> By virtue of section 4 of the Law of England (Application) Law and the States (Creation and Transitional Provisions) Decree 1976 (No. 12 of 1976).

- a. Ordinances,
- b. Acts,
- c. Laws.

**Ordinances** are laws that were passed by the Nigerian Constitutional order in council of 1954<sup>212</sup> introducing a federal Constitution into Nigeria. By virtue of section 57 of the Constitution of the Federation scheduled to the Order, any Ordinance in force on October 1, 1954 was to be deemed to be a law made by the Federal Legislature or a Regional Legislature or made separately by the Federal and Regional Legislatures, roughly in accordance with the distribution of legislative powers under the Constitution.<sup>213</sup> An **Act** is an enactment made or deemed to be made by the Federal Legislature before January 16, 1966.<sup>214</sup> In general, a **Law** is simply any enactment made by the Legislature of a region or having effect as if made by that legislature, or any subordinate legislation made under such an enactment.<sup>215</sup>

#### 4.3.2 Received English Law

The received English Law as a source of Nigerian law<sup>216</sup> consists of the common law, doctrine of equity, statutes and subsidiary legislations. English law extending to Nigeria is the law introduced into Nigeria directly by English legislation, this class of English law should be clearly distinguished from the received English law. The latter is introduced into Nigeria directly

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<sup>211</sup> Obilade, *supra* note 136 at 64.

<sup>212</sup> Id.

<sup>213</sup> Obilade *supra* note 136.

<sup>214</sup> A military revolution occurred in Nigeria on January 15, 1966, Federal Military Government (Supremacy and Enforcement of Powers) Decree 1970 (No. 28 of 1970), Preamble.

<sup>215</sup> Obilade, *supra* note 136 at 65.

<sup>216</sup> The received English Law as a source of Nigerian law excludes English received law received by been enacted or re enacted as Nigerian legislation. English law extending to Nigeria is the law introduced into Nigeria directly by English legislation.

by Nigerian legislation. English law extending to Nigeria consists of statutes<sup>217</sup> and subsidiary legislation made on or before October 1, 1960 and not yet repealed by an appropriate authority in Nigeria.<sup>218</sup>

### 4.3.3 Customary Law

Customary law consists of customs accepted by members of a community as binding amongst them. In Nigeria, customary law may be divided in terms of nature into two classes, namely, ethnic or non – Sharia customary law and Sharia law. Ethnic customary law in Nigeria is indigenous, each system of such customary law applies to members of a particular ethnic group. Ethnic customary law for the most part is unwritten, and of course, may adjust with the times. Sharia law on the other hand is religious law based on the Moslem faith and applicable to members of the faith.<sup>219</sup>

The diversity of customary law systems is an obstacle to uniformity of customary law systems in each state because of its unwritten nature and rules of customary law are subject to test of validity prescribed by statute. An applicable rule of customary law is not to be enforced by the Courts unless it passes the test and there are three such tests.<sup>220</sup> The first is that the customary law is not repugnant to natural justice, equity and good conscience; the second is that it is not incompatible either directly or by implication with any law<sup>221</sup> for the time being in force,

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<sup>217</sup> The statutes consisted of Acts of the U.K Parliament and prerogative Orders in Council. Prerogative Orders in Council are not subsidiary legislation. They are original laws made by the Crown as a legislature and are, therefore, statutes. Such Orders were made for the Colony of Lagos.

<sup>218</sup> Nigeria Independence Act 1960 (8 and 9 Eliz. 2, c.55). See [http://www.legislation.gov.uk/ukpga/1960/55/pdfs/ukpga\\_19600055\\_en.pdf](http://www.legislation.gov.uk/ukpga/1960/55/pdfs/ukpga_19600055_en.pdf).

<sup>219</sup> Obilade, *supra* note 76 at 83.

<sup>220</sup> Ibrahim v. Amalibini 1 G.L.R. 368 (1978) (Nigeria).

<sup>221</sup> In the relevant enactments in force in former Bendel, Ogun, Ondo and Oyo States, the words “written law” are used in the place of the word “law”, Article 12(1) of the High Court Law (W.R.N. Laws Cap.44 (1959). “Written

and the third is that it is not contrary to public policy. All the statutory provisions on the first two tests are similar in wording and all the statutory provisions on the test of public policy are identical in wording. Section 26(1) of the High Court Law of Lagos State<sup>222</sup> provides that the “High Court shall observe and enforce the observance of every customary law which is applicable and is not repugnant to natural justice, equity and good conscience nor incompatible either directly or by implication with any law for the time being in force.”<sup>223</sup>

The repugnancy doctrine was applied in *Edet v. Essien*,<sup>224</sup> where the plaintiff had paid the dowry for a woman and married her, she later left him and entered into a new marriage with another man, to whom she subsequently had two children. The plaintiff then alleged that, under a rule of Native law and custom, he was entitled to the custody of these children, since his dowry had not been repaid to him. It was held that such a rule of customary law was not conclusively proved and even if proved to exist, it was repugnant to natural justice, equity and good conscience.

In *Mariyamo v. Sadiku Ejo*,<sup>225</sup> the High Court held that the custom which entitled a man to a child born by his former wife ten months after the marriage was repugnant to natural justice, equity and good conscience. Similarly, in *Meribe v. Egwu*,<sup>226</sup> the Supreme Court held obiter that a “woman to woman” marriage under customary law was repugnant to natural justice, equity and good conscience. This was without a consideration of the customary benefit of such

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law” includes local legislation and excludes English statutes extending to Nigeria, Article 3 of the Interpretation Law W.R.N. Laws, Cap. 51 (1959).

<sup>222</sup> Lagos Laws Cap 52 (1973).

<sup>223</sup> High Court Law (N.N. Laws, Cap 40(1963) Article 34(1); High Court Law (E.N. Laws, Cap 61(1963), Article 20(1) High Court Law, W.R.N. Laws, Cap 44 (1959), Article 12(1) High Court Law (1964) No. 9 of M.W.N, Article 13(1) (1964).

<sup>224</sup> 11 N.L.R. 47(1932) (Nigeria).

<sup>225</sup> N.R.N.L.R. 81 (1961) (Nigeria).

<sup>226</sup> 1 ALL N.L.R. 266 at 275 (1976) (Nigeria).

arrangement, such as a wife marrying another wife for the husband, thus helping a barren woman to get a child indirectly, through the second woman.

Like questions of fact in any judicial inquiry, customary law may be proved by calling witnesses who are vast in the customary law. They become expert witnesses as far as that customary law is concerned and are usually chiefs or traditional rulers of the community whose customary law is at issue and by virtue of their customary offices or positions are expected to know the customary law of their people.<sup>227</sup> The Court is however not bound by such evidence.<sup>228</sup> For instance, in *Ricardo v. Abal*,<sup>229</sup> concerning priority of choice on partition of the deceased's estate in accordance with customary law, the Court commented as thus:

*“Now both of these witnesses were called by the plaintiff and knew, of course, what evidence they were expected to give. Nevertheless in the absence of any other evidence, I cannot reject their testimony on that ground, nor do I consider it inherently improbable. I quite believe that they have correctly described the proper procedure in cases of partition of family property, and it is not unreasonable to believe that priority of choice should be given to the eldest born, irrespective of sex”*

In addition, a party who wishes the Court to recognize and enforce a particular customary law may request the Court to take judicial notice of the law, instead of proving it as a fact.

Section 14(2) of the Evidence Act laid down conditions that must be fulfilled before judicial

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<sup>227</sup> In *Lewis v. Bankole*, 1 N.L.R. 100-101(1909) (Nigeria), there was a huge assemblage of famous traditional rulers and chiefs who served as expert witnesses in that case.

<sup>228</sup> In *Ewa Ekeng Inyang v. Efana Ekeng Ita* 9 N.L.R. at 84-85 (1929) (Nigeria). Berkeley, J. observed: “A good deal of evidence was given by both sides on this question of Native law and custom. This kind of so-called expert evidence must always be treated with very great caution. The evidence of these experts is invariably colored each by his own personal interests. The only way in which such testimony can be safely treated is to refrain from attempting to estimate individual credibility and to concentrate on drawing conclusions from the general trend of the evidence”.

<sup>229</sup> 7 N.L.R. 58 at 59 (1926) (Nigeria).

notice is taken of a custom, It states that a custom may be judicially noticed by the Court if it has been acted upon by a Court of superior or co-ordinate jurisdiction in the same area to an extent which justifies the Court to apply it in assuming that the persons or the class of persons concerned in that area look upon the same as binding in relation to circumstances similar to those under consideration.

Unlike customary law, Sharia law is principally in a written form. The version of Sharia law in force in Nigeria is the Sharia law of the Maliki School<sup>230</sup> which is being enforced in some states in Northern Nigeria where the population is predominantly Moslem. The scope of operation of Islamic law has been broadened since the introduction of the Sharia legal system in the present democratic dispensation and the principal feature of this new development is the introduction of religious based criminal offences, especially on matters of morality and the introduction of punishments sanctioned by the Quran.<sup>231</sup> Sharia law is not applicable to non Muslims.

At this point, I will like to point out the differences between Islamic law and customary law to avoid any misconceptions between both sets of laws, also to set the record straight that Islamic law is not and should not be regarded as customary law. As categorically stated in the pronouncement of Justice Wali in the Supreme Court case of *Alkamawa v Bello*,<sup>232</sup> “Islamic law was not customary law”. His Lordship in the concluding part of the judgment said:

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<sup>230</sup> The Sharia Court of Appeal Law (N.N. Laws 1963, Cap. 122), Article 14 empowers the Sharia Court of Appeal of each of the northern States to administer Moslem law of the Maliki School as customarily interpreted at the place where the trial at first instance took place.

<sup>231</sup> <http://www.nyulawglobal.org/globalex/nigeria.htm>

<sup>232</sup> 6 SCNJ 127 [1998] (Nigeria).

*“Islamic Law is not the same as customary Law as it does not belong to any particular tribe. It is a complete system of universal Law, more certain and permanent and more universal than the English Common Law”.*<sup>233</sup>

Under Islamic law, customary law is recognized as a separate law. Here, customary law may be applicable to non-Muslims living under the protection of an Islamic State and since Islam does not impose its laws or way of life on non-Muslims, they enjoy a large measure of judicial autonomy in the conduct of their civil affairs.<sup>234</sup> Justice Bairamian FJ described customary law in *Owonyin v Omotosho*,<sup>235</sup> as a mirror of accepted usage because the validity of a customary law depends on its acceptance by the community. In the case of Islamic law, it is the law that shapes the community and not the community that shapes the law.<sup>236</sup>

While the origin of customary law is the community, that of Islamic law is divine. Islamic Law unlike customary law has basic elements that do not change with time. In *Lewis v Bankole*,<sup>237</sup> Osborne C J described customary law as one of the most striking features of West African native custom. .. Is its flexibility, it appears to have been always subject to motives of expediency, and it shows unquestionable adaptability to altered circumstances without entirely losing its character.<sup>238</sup>

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<sup>233</sup> Id.

<sup>234</sup> Non Muslims pay jizya (tribute tax), in exchange for State protection. See Said Ramadan, *Islamic Law: Its Scope and Equity* (1970) and Muhib O Opeloye, *The Quranic Guidelines in Inter-Religious Relations: An Overview*, in, *Ile Ife* (1992) (Nigeria).

<sup>235</sup> 1 All NLR 304(1961) (Nigeria).

<sup>236</sup> See Oba., 'Law as an Instrument of Social Change: The Common Law and Islamic Law Perspectives' (paper presented at the Annual Award Luncheon of the National Association of Muslim Law Students (NAMLASS) held at Ilorin, Nigeria on 17 Feb 2001.

<sup>237</sup> 1 NLR 81(1908) (Nigeria).

<sup>238</sup> Id.



While a particular customary law is usually limited, more or less to particular ethnic groups and communities,<sup>239</sup> Islamic law is not an indigenous phenomenon in Nigeria. It transcends national, ethnic, racial and language barriers.<sup>240</sup> Unlike customary law which is unwritten and uncodified, Islamic law is written and its contents are ascertainable from written sources which include the Qur'an, Hadith and countless books written from the earliest era of Islam up to the modern era wherein, Islamic law matters are discussed and expound

**Table 2: DIFFERENCES BETWEEN CUSTOMARY LAW AND ISLAMIC LAW (SHARIA)**

<b>CUSTOMARY LAW</b>	<b>ISLAMIC LAW (SHARIA)</b>
<ul style="list-style-type: none"> <li>• Customary law is unwritten and uncodified.</li> </ul>	<ul style="list-style-type: none"> <li>• Islamic law is written.</li> </ul>
<ul style="list-style-type: none"> <li>• It applies to non Muslims.</li> </ul>	<ul style="list-style-type: none"> <li>• It applies to only Muslims.</li> </ul>
<ul style="list-style-type: none"> <li>• The community shapes the law.</li> </ul>	<ul style="list-style-type: none"> <li>• Islamic law shapes the community.</li> </ul>
<ul style="list-style-type: none"> <li>• The origin of customary law is the community.</li> </ul>	<ul style="list-style-type: none"> <li>• The origin of Islamic law is divine.</li> </ul>
<ul style="list-style-type: none"> <li>• Customary law changes with time, it is very flexible.</li> </ul>	<ul style="list-style-type: none"> <li>• Islamic law has basic elements that do not change with time.</li> </ul>
<ul style="list-style-type: none"> <li>• Customary law is limited to a particular ethnic group or community.</li> </ul>	<ul style="list-style-type: none"> <li>• Islamic law is not indigenous.</li> </ul>

<sup>239</sup> Saka Salau v Aderibigbe WNLR 80, (1963) (Nigeria), Nsirim v Nsirim 9 NWLR (Pt. 418) 144 (1995) (Nigeria); Usman v Umaru 7 NWLR (Pt. 254) 377 (1992) (Nigeria) and Obi v Obijindu 1 NWLR (Pt. 423) 240 (1996) (Nigeria).

<sup>240</sup> Kharie Zaidan v Fatima Mohsen UILR (Pt. II) 283 at 292 (1971) (Nigeria).

#### 4.3.4 Judicial Precedent

Judicial precedent or case law consists of law found in judicial decisions. A judicial precedent is the principle law on which a judicial decision is based. It is the ratio decidendi otherwise known as the reason for the decision. It is not everything said by a judge in the course of his judgment that constitutes a precedent, only the pronouncement on law in relation to the material facts before the judge constitutes a precedent.<sup>241</sup> The doctrine of judicial precedent as a common law doctrine applies to only those Courts which are empowered to administer adjective common law of which forms part of the doctrine.

Customary Courts, Sharia Courts of Appeal and area Courts are not empowered to apply adjective common law.<sup>242</sup> Therefore, the common law doctrine does not apply to them nor does any legislation provide for a precedent system in customary Courts. As a general rule under the doctrine of stare decisis, a Court is bound to follow decisions of a higher Court in the hierarchy. But a lower Court is not bound to follow a decision of a higher Court which has been overruled. Furthermore, a lower Court is not bound by a decision of a higher Court where that decision is in conflict with a decision of another Court which is above such higher Court in the hierarchy. In principle, a lower Court is entitled to choose which of the two conflicting decisions of a higher Court of equal standing it would follow.<sup>243</sup> It should be noted that a binding precedent may be abolished by legislation.<sup>244</sup>

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<sup>241</sup> Obilade, *supra* 76 at 111.

<sup>242</sup> S. 20(3) of the Area Court Edict 1968 (No. 4 of 1968).

<sup>243</sup> See *Chime v Elikwu* N.M.L.R. 71 (1965) (Nigeria).

<sup>244</sup> See *Lakanmi v Attorney General* 1 U.I.L.R. 201 (1971) (Nigeria).

## 4.4 GOVERNMENT BODIES

The system of government in the Federal Republic of Nigeria is modeled after the American Presidential system with the following arms of government:

- The Legislature
- The Executive
- The Judiciary

### 4.4.1 Legislature

The federal legislature is responsible for law making by following the law making procedures as specified in Sections 58 and 59 of the 1999 Constitution. The legislature is bicameral and is made up of the Senate and House of Representatives.<sup>245</sup> The Senate is made up of one hundred and nine elected members while the House of Representatives has three hundred and sixty members. The membership of the Senate is on the basis of equality of states with each state having three Senators. The Federal Capital Territory (FCT) is represented by one senator. The number of Representatives elected by each State is determined on the basis of population.<sup>246</sup> Each state also has its own law making organ known as the House of Assembly, the members elected into the Houses of Assembly represent the various state constituencies usually delineated on the basis of population.<sup>247</sup>

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<sup>245</sup> <http://www.nigeriacongress.org/senate.htm>

<sup>246</sup> Id.

<sup>247</sup> Id.

#### **4.4.2 Executive**

The executive power of the federation is vested in the President by virtue of Section 5(1) (a) of the 1999 Constitution, such powers can be administered directly or through the Vice-President or Ministers or officers of the Government. Similarly, in the states the executive power of a state is vested in the Governor and may be exercised directly by the Governor or through the Deputy Governor, Commissioners or other public officers.<sup>248</sup>

#### **4.4.3 Judiciary**

Nigeria operates the adversarial system of Court proceedings similar to what is obtainable in other common law countries. The 1999 Constitution makes provisions for the establishment and Constitution of the following Courts;<sup>249</sup> By virtue of Section 6 (1) of the Nigerian Constitution 1999, the following Courts are established in the Federal Republic of Nigeria:

1. The Supreme Court of Nigeria;
2. The Court of Appeal;
3. The Federal High Court;
4. The High Court of the Federal Capital Territory, Abuja;
5. The High Court of a State
6. The Sharia Court of Appeal of the Federal Capital Territory, Abuja;
7. The Sharia Court of Appeal of a State;

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<sup>248</sup> <http://www.nigeria-law.org/ConstitutionOfTheFederalRepublicOfNigeria.htm>

<sup>249</sup> Constitution, Chapter IV (1999) (Nigeria).

8. The Customary Court of Appeal of the Federal Capital Territory, Abuja;
9. The Customary Court of Appeal of a State.

#### **4.5 HIERARCHY OF COURTS IN NIGERIA**

The Courts established by the Constitution are the only superior Courts of record in Nigeria, the Constitution also empowers the National Assembly and the Houses of Assembly to establish Courts with subordinate jurisdiction to the High Courts.

##### **4.5.1 The Supreme Court of Nigeria**

The Supreme Court is the highest Court for Nigeria,<sup>250</sup> established in 1963 by the Nigerian Constitution.<sup>251</sup> This is the apex Court in the hierarchy of Courts and is situated in the Federal Capital Territory, Abuja. The decisions of the Supreme Court of Nigeria are binding on all other Courts. The common law doctrine does not apply to Customary Courts, area Courts or Sharia Courts of Appeal. In principle, by virtue of the appellate systems whereby decisions of these Courts can ultimately reach the Supreme Court, the Courts should follow decisions of the Supreme Courts.<sup>252</sup>

The Chief Justice of the Federation heads the Judiciary of Nigeria and presides over the Court. The Court has limited but exclusive original jurisdiction and its appellate jurisdiction is to determine appeals from the Court of Appeal and this is also to the exclusion of any other Court.

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<sup>250</sup> Constitution, Art 120 (1999) (Nigeria).

<sup>251</sup> Act No. 20 of (1963).

<sup>252</sup> See Obeya v Soluade N.N.L.R. 17 (1969) (Nigeria).

<sup>253</sup>The Court consists of the Chief Justice of Nigeria and such number of Justices not exceeding twenty one as may be prescribed by the National Assembly, presently there are seventeen justices at the Supreme Court.<sup>254</sup> The decision of the Supreme Court on any matter is final and is not subject to an appeal to any other body or person. This is however without prejudice to the power of the President or Governor of a State exercise of Prerogative of Mercy in appropriate cases. The decisions of the Court are binding on all other Courts in Nigeria.<sup>255</sup> The Supreme Court does not in any capacity entertain corruption cases.

#### **4.5.2 The Court of Appeal**

This Court, a superior Court of record was established on October 1, 1976<sup>256</sup> and is next in the hierarchy of Courts in Nigeria. Its decisions are binding on all other lower Courts. The Court of Appeal is bound by the decisions of the Supreme Court of Nigeria. It is composed of the President of the Court of Appeal and other Justices of the Court of Appeal not being less than forty-nine.<sup>257</sup> The Court has original and exclusive jurisdiction,<sup>258</sup> It also has appellate jurisdiction to hear appeals from decisions of the High Courts of the States and the Federal Capital Territory, Federal High Court, the Sharia Courts of Appeal of the States or of the Federal Capital Territory, Customary Courts of Appeal of the States or of the Federal Capital Territory as well as from decisions of a Court martial or other tribunals as specified by an Act of the National Assembly.<sup>259</sup> The Court is duly constituted by not less than three Justices for the purpose of

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<sup>253</sup> Constitution, Art. 232(1) (1999) (Nigeria).

<sup>254</sup> <http://www.nigeria-law.org/Supreme%20Court%20of%20Nigeria.htm>.

<sup>255</sup> Constitution, Art. 235 (1999) (Nigeria).

<sup>256</sup> No. 42 of (1962).

<sup>257</sup> Constitution, Art. 237(a) & (b) (1999) (Nigeria).

<sup>258</sup> Constitution, Art. 239 (1999) (Nigeria).

<sup>259</sup> Constitution, Art. 241(1) (1999) (Nigeria).

exercising any of its stated jurisdictions.<sup>260</sup> The Court of Appeal has the jurisdiction to hear appeals from the Federal High Court or High Court of a State on corruption matters.

### **4.5.3 The Federal High Court**

The Federal High Court comprises of a Chief Judge and such number of Judges as the National Assembly may prescribe.<sup>261</sup> The Court has limited but exclusive jurisdiction in civil and criminal causes or matters as set out in the Constitution,<sup>262</sup> It however has no appellate jurisdiction. In exercising its jurisdiction, the Court is duly constituted by one Judge of the Court.<sup>263</sup> Like the Court of Appeal, the Federal High Court is divided into Judicial Divisions for administrative convenience but has a wider geographical spread as these Divisions are currently situated in over seventeen states of the Federation with plans to establish a Division of the Court in all the States of the Federation.<sup>264</sup> The EFCC Act provides that the Federal High Court has jurisdiction to try offenders under the Act.<sup>265</sup>

### **4.5.4 High Court of the Federal Capital Territory, Abuja**

The High Court of the Federal Capital Territory, Abuja consists of a Chief Judge and such number of Judges as may be prescribed by an Act of the National Assembly.<sup>266</sup> Subject to the provisions of section 251 and any other provisions of the 1999 Nigerian Constitution and in addition to such other jurisdiction as may be conferred upon it by law, this Court shall have jurisdiction to hear and determine any civil proceedings in which the existence or extent of a

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<sup>260</sup> Constitution, Art. 247(1) (1999) (Nigeria).

<sup>261</sup> Constitution, Art. 249(1) & (2) (1999) (Nigeria).

<sup>262</sup> Constitution, Art. 251 (1999) (Nigeria).

<sup>263</sup> Constitution, Art. 253 (1999) (Nigeria).

<sup>264</sup> <http://www.fhc-ng.org/>.

<sup>265</sup> Section 18(1).

<sup>266</sup> Constitution, Art. 255 (1999) (Nigeria).

legal right, power, duty, liability privilege, interest, obligation or claim is in issue or to hear and determine any criminal proceedings involving or relating to any penalty, forfeiture, punishment or other liability in respect of an offence committed by any person.<sup>267</sup>

This Court shall be duly constituted if it consists of at least one Judge of that Court.<sup>268</sup> Subject to the provisions of any Act of the National Assembly, the Chief Judge of this Court may make rules for regulating the practice and procedure of the High Court of the Federal Capital Territory, Abuja.<sup>269</sup> The ICPC Act vest jurisdiction in the High Court of the Federal Capital Territory to hear corruption matters.<sup>270</sup>

#### **4.5.5 Sharia Court of Appeal of the Federal Capital Territory, Abuja**

This Court consists of a Grand Kadi of the Sharia Court of Appeal and such number of Kadis as may be prescribed by an Act of the National Assembly.<sup>271</sup> The Sharia Court of Appeal shall in addition to such other jurisdiction as may be conferred upon it by an Act of the National Assembly exercise such appellate and supervisory jurisdiction in civil proceedings involving questions of Islamic personal law.<sup>272</sup> For the purpose of exercising any jurisdiction conferred upon it by this Constitution or any Act of the National Assembly, this Court shall be duly constituted if it consists of at least three Kadis.<sup>273</sup> It is also important to note that since Islam does not impose its laws or way of life on non-Muslims, they enjoy a large measure of judicial autonomy in the conduct of their civil affairs.<sup>274</sup>

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<sup>267</sup> Constitution, Art. 257(1) (1999 ) (Nigeria).

<sup>268</sup> Constitution, Art. 258 (1999 ) (Nigeria).

<sup>269</sup> Constitution, Art. 259 (1999 ) (Nigeria).

<sup>270</sup> Section 61(3).

<sup>271</sup> Constitution, Art. 260 (1999 ) (Nigeria).

<sup>272</sup> Constitution, Art. 262(1) (1999 ) (Nigeria).

<sup>273</sup> Constitution, Art. 263 (1999 ) (Nigeria).

<sup>274</sup> S.O. Mohammad, op cit, 244-8 & Said Ramadan, op cit, 115-20, 146, 152-70.



#### **4.5.6 The Customary Court of Appeal of the Federal Capital Territory, Abuja**

This Court consists of a President and such number of Judges as may be prescribed by an Act of the National Assembly.<sup>275</sup> This Court shall, in addition to such other jurisdiction as may be conferred upon by an Act of The National Assembly exercise such appellate and supervisory jurisdiction in civil proceedings involving questions of customary law.<sup>276</sup> For the purpose of exercising any jurisdiction conferred upon it by this Constitution or any Act of the National Assembly, the Customary Court of Appeal is duly constituted if it consists of at least three Judges of that Court.<sup>277</sup>

#### **4.5.7 The High Court**

All high Courts are bound by the decisions of the Supreme Court of Nigeria and the Court of Appeal. There is a High Court in each State of the Federation and the Federal Capital Territory. A judge of a High Court in Nigeria sitting as a Court of first instance is not bound by the decisions of another judge of the High Court sitting as a Court of first instance.<sup>278</sup> Each Court is made up of a Chief Judge and such other number of judges as the State House of Assembly or the National Assembly (in the case of the High Court of the Federal Capital Territory) may prescribe.<sup>279</sup> The Court is duly constitutes by one judge, each High Court is divided into Judicial Divisions for administrative convenience.<sup>280</sup> The EFCC Act provides that the High Court of a

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<sup>275</sup> Constitution, Art. 265(1999 ) (Nigeria).

<sup>276</sup> Constitution, Art. 267 (1999 ) (Nigeria).

<sup>277</sup> Constitution, Art. 268 (1999 ) (Nigeria).

<sup>278</sup> *Supra* Note 128.

<sup>279</sup> Constitution, Art. 270 (1999 ) (Nigeria).

<sup>280</sup> Constitution, Art. 273 (1999 ) (Nigeria).

state has jurisdiction to try offenders under the Act<sup>281</sup> on corruption matters. The ICPC Act also vests jurisdiction in the State High Court to hear corruption matters.<sup>282</sup>

#### **4.5.8 The Sharia Court of Appeal of a State**

This Court shall consist of a Grandi Kadi of the Sharia Court of Appeal and such member of Kadi as may be prescribed by the House of Assembly of the State.<sup>283</sup> This Court shall, in addition to such other jurisdiction as may be conferred upon it by the law of the State, exercise such appellate and supervisory jurisdiction in civil proceedings involving questions of Islamic personal Law which the Court is competent to decide in accordance with the Provisions of the Constitution.<sup>284</sup> For the purpose of exercising any jurisdiction conferred upon it by this Constitution or any law, a Sharia Court of Appeal of a State shall be duly constituted if it consists of at least three Kadis.<sup>285</sup>

#### **4.5.9 The Customary Court of Appeal of a State**

There is a Customary Court of Appeal for any State that requires it.<sup>286</sup> This Court has appellate and supervisory jurisdiction in civil proceedings involving questions of customary law<sup>287</sup> comprises of a President and a number of Judges as the National Assembly or the State Houses of Assembly (as the case may be) may prescribe.<sup>288</sup> In addition to these Courts created by the Constitution, there also exist inferior Courts like the Magistrate Courts, District Courts, Area Courts and Customary Courts established in various states by state laws. These Courts are

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<sup>281</sup> Section 18(1).

<sup>282</sup> Section 61(3).

<sup>283</sup> Constitution, Art. 275 (1999 ) (Nigeria).

<sup>284</sup> Constitution, Art. 277 (1999 ) (Nigeria).

<sup>285</sup> Constitution, Art. 278 (1999 ) (Nigeria).

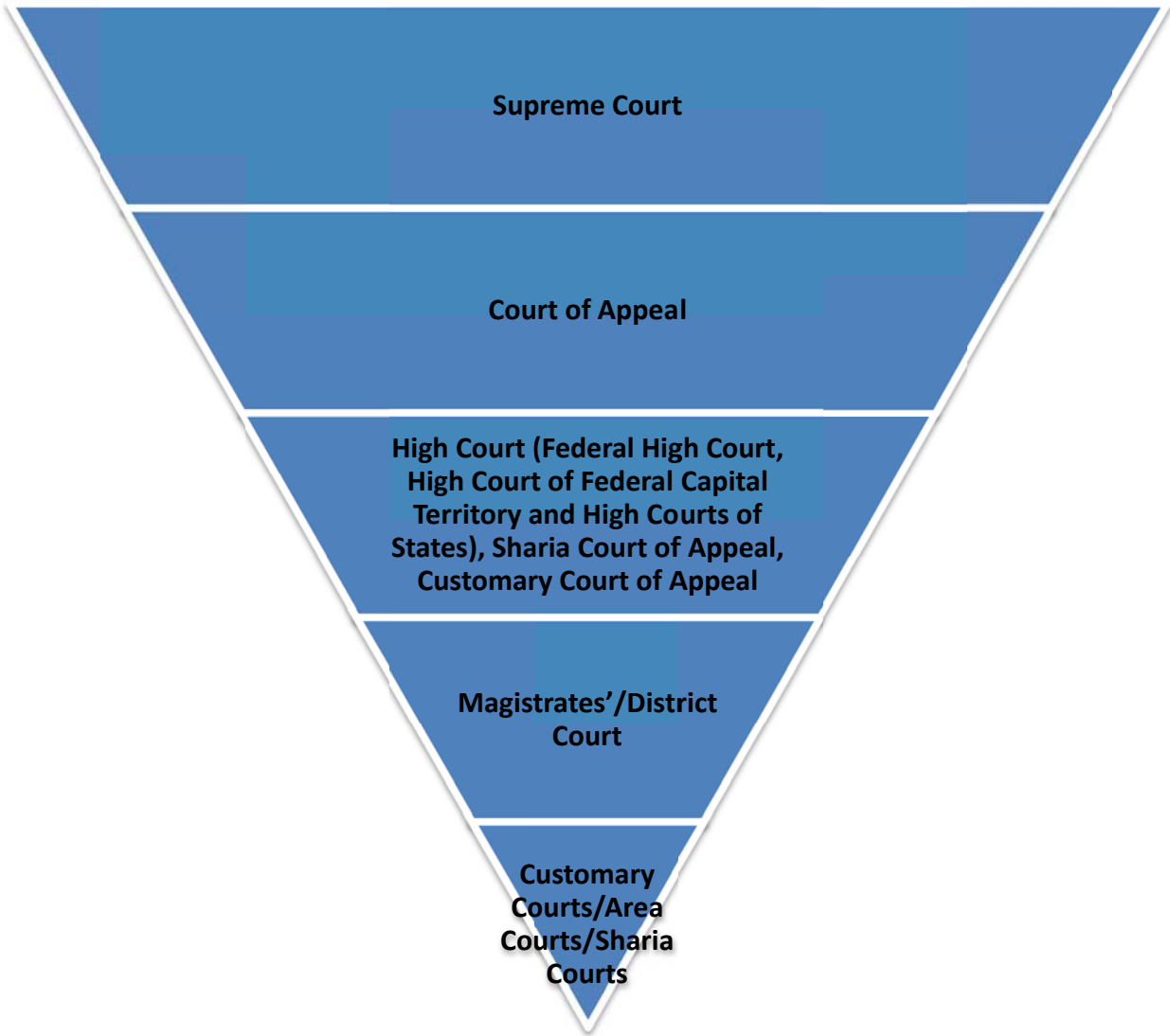
<sup>286</sup> Constitution, Art. 280(1999 ) (Nigeria).

<sup>287</sup> Constitution, Art. 282 (1999 ) (Nigeria).

<sup>288</sup> Constitution, Art. 280(2)(a)&(b) (1999 ) (Nigeria).

of limited jurisdiction as specified in their enabling laws and appeals from them lie to the High Court, Sharia Court of Appeal or Customary Court of Appeal as the case may be.

**Figure 2.** Courts hierarchy



## 4.6 PRIMARY AND SECONDARY SOURCES OF INFORMATION

Like all jurisdictions of the world, legal literature of Nigeria is made up of primary and secondary sources.<sup>289</sup>

### 4.6.1 Primary Sources

There are many law reports that have been published over the years, there is no government organ solely responsible for law reporting. However, individual law reports published on a commercial basis are thriving, even though the life-span of some of these publications is epileptic because of the high cost of production. The following is a list of law reports that have been published over the years;<sup>290</sup>

- Nigeria Law Report
- All Nigeria Law Reports
- Nigerian Monthly Law Reports
- Law Reports of Nigeria
- Federation of Nigeria Law Selected Judgments of the West African Court of Appeal (WACA)
- Western Region of Nigeria Law Reports
- Eastern Region of Nigeria Law Reports
- Northern Region of Nigeria Law Reports
- Sharia Law reports of Nigeria

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<sup>289</sup> <http://www.nyulawglobal.org/globalex/nigeria.htm>.

<sup>290</sup> Id.

- Customary law in Nigeria through the cases
- Quarterly Law Reports of Nigeria Nigerian Weekly Law Reports Nigerian Constitutional Law Reports
- Supreme Court of Nigeria Judgments
- Nigerian Supreme Court Cases
- Supreme Court Reports
- Nigerian Commercial Law Cases
- Nigerian Revenue Law Reports
- Failed Banks Tribunal of Nigeria Law Reports
- Weekly Reports of Nigeria
- Supreme Court Monthly
- Monthly Judgments of the Supreme Court of Nigeria
- Federation Weekly Law Reports
- All Federation Weekly Law Reports
- Nigerian Supreme Court Quarterly Law Reports
- Federal Reporter
- Election Petition Reports

#### **4.6.2 Secondary Sources**

Members of Nigerian academia, the bench, and the bar have written a lot of legal textbooks, for an exhaustive list of secondary sources, see appendix 2.

#### 4.7 JURISDICTIONAL CONFLICTS IN PROSECUTING CORRUPTION CASES

There are cases of conflicts of jurisdiction amongst the various agencies and institutions involved in anticorruption crusade, major conflicts of jurisdiction can be observed in the relations between or amongst Courts in the judiciary and law enforcement agencies. Civil and criminal cases jurisdictional conflict in corruption cases sometimes results in situations where criminal and civil elements of the acts that constitute the corruption lead to questions of criminal or civil jurisdiction of the trial Court. The landmark case on jurisdictional conflict amongst anticorruption commissions is the case of former governor of Bayelsa state, Diepreye Alamieyeseigha and the Code of Conduct Tribunal.

In 2007, Mr. Alamieyeseigha was convicted by a Federal High Court, Lagos Division, over allegation of money laundering after a plea-bargain was entered between him and the Economic and Financial Crimes Commission. Mr Alamieyeseigha was later arraigned before the Code of Conduct Tribunal on similar charges bordering on false declaration of assets and abuse of office. Accordingly, the case against Alamieyeseigha was withdrawn because the accused would have suffered double jeopardy if the Tribunal had tried him again.<sup>291</sup>

The old rule in *Smith v. Selwyn*<sup>292</sup> has continued to generate controversy as there are now two Court of Appeal cases namely *AG Federation & 4 Ors v. Dawodu & 7 Ors*<sup>293</sup> and *Ndibe v.*

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<sup>291</sup> *FG Drops Charges Against Almieyeseigha*, Punch Newspaper (December 14, 2007).

<sup>292</sup> 3KB 98 (1914). The common law rule in *Smith v. Selwyn* states that where a civil wrong is also a crime, prosecution of the criminal aspect must be initiated, or reasons for default of prosecution given, before any action filed by the plaintiff can be heard. Thus, it was the position that where a tort was also a crime, the filing of criminal proceedings against the wrongdoer, preceded the filing of a civil suit by the aggrieved party. This is known as the rule in *Smith v. Selwyn*. When the rule in *Smith v. Selwyn* was not observed, the civil action by the plaintiff could not proceed and it was bound to fail as long as the defendant had not been prosecuted or a reasonable excuse given for the lack of prosecution. However, the rule in *Smith v. Selwyn* which has been abolished in Britain, also no longer apply in Nigeria because the rule was a breach of the Nigerian Constitution (sections 6(6)(b), 17(2)(e), 46(1) and 315(3), which provisions forbid the blocking of access to Court.), Criminal Code Act (section 5) and the Interpretation Act (section 8).

<sup>293</sup> 2 NWLR pt 380, 712 (1995) (Nigeria). The fact in issue was whether the Court was right in dismissing the appellant's application for stay of proceedings in the civil suit pending the determination of the criminal charge

Ndibe<sup>294</sup> with opposing conclusions as to its continued applicability to Nigerian legal system. The differences also touch on the applicable rules of Court and procedure in *Alamieyeseigha v. Federal Republic of Nigeria*.<sup>295</sup>

Federal offences are to be prosecuted in Federal High Courts only and same for state law offences. There are situations however where Federal and State laws exist and the crime violates simultaneously both laws. By the principle of covering this field, such state laws are supposed to be in abeyance for as long as the federal legislation applies. Besides these Federal and State High Courts have a long history of jurisdictional conflicts bordering on such issues like the presence or lack of criminal jurisdiction of Federal High Courts, implication of the unlimited jurisdiction of the State High Courts under the 1999 Constitution and the implication of section 251 (1) of the 1999 Constitution on the jurisdiction of the State High Courts over matters involving Federal agencies.

Another area of jurisdictional conflict of the Courts as institution for enforcing anti-corruption laws is that involving Magistrate Court especially when it is dealing with indictable offences for which the accused must elect summary trial before the Court can be invested with jurisdiction. Going further, section 4 of Police Act<sup>296</sup> provides Police with omnibus powers to go into any crime investigation, corruption inclusive and by its general investigative powers, the

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against the 4th defendant. Based on the Rule in *Smith v Selwyn*. In dismissing the appeal, Per Akanbi PCA held that “modern thinking in our Courts today is that the rule in *Smith Vs Selwyn* can no longer be seen as furthering public justice, public policy or public interest. An attempt to apply the principle would amount to infraction of Section 236 of the 1979 constitution.

<sup>294</sup>5 NWLR pt 551, 632 (1990) (Nigeria). The appellant in this case filed a motion for a stay of proceedings pending the completion of the criminal prosecution. The High Court refused a stay of proceedings at that stage. On appeal, the Court of Appeal per Salami, JCA in a well reasoned and properly articulated judgment dismissed the appeal holding that it would be inequitable to do so in the circumstances of the case.

<sup>295</sup> 7 QCCR 1, (2006) (Nigeria). The fact in issue here was whether the trial Court was wrong in refusing to stay proceedings in the criminal charge against the appellant pending the hearing and determination of the civil suits filed by the appellant against the Attorney General of Federation and Chief Justice Bayelsa state respectively and whether the charge against the appellant was initiated in substantial compliance with provisions of the Criminal Procedure Act and the Federal High Court Act. The Court of Appeal held that the trial Court was right.

<sup>296</sup> <http://www.nigeria-law.org/LFN-1990.htm>

Police can handle virtually all provisions of laws, including but not restricted to Criminal Code and Penal Code, dealing with corruption.<sup>297</sup> Similarly, a fraud or corruption violating the provisions of EFCC or ICPC Act would naturally activate these bodies and trigger off investigation by any of these Commissions established under it.

There is therefore a fundamental problem of jurisdictional conflicts, overlapping powers, confusion and conflict about their functions that needs to be addressed between all anticorruption agencies. This is particularly important because of the constitutional requirement of the rule against double jeopardy which states that once a person has been investigated and prosecuted by one agency, it precludes other agencies from revisiting the subject of investigation again in any form or disguise. It is mandatory to state that the varied conflicts surrounding these laws, agencies and the institutions for their enforcement must be resolved if the anti-corruption crusade is to continue beneficially. Therefore, the issue of streamlining the operations of these agencies must be addressed.

## **4.8 LEGISLATIONS AGAINST CORRUPTION**

### **4.8.1 Domestic Legislation**

#### **4.8.1.1 Constitutional provisions on corruption; The Nigerian 1999 Constitution**

I shall be pointing out sections of the Constitution that relate to corruption. The Nigerian 1999 Constitution contains provisions aimed at preventing corruption in Nigeria, Section 15(5) of the 1999 Constitution under the fundamental objectives and directive principles of state policy

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<sup>297</sup> Section 53 of the Criminal Procedure Act empowers the Police to interpose and prevent the commission of any offence apparently under any law.



require the state to abolish corrupt practices and abuse of power.<sup>298</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.<sup>299</sup>

On declaration of assets and liabilities, Section 140 (1) and Section 185 (1) states that a person elected to the office of President shall not begin to perform 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 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.

Also, section 149 and Section 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 and the oath for the due execution of the duties of his office prescribed in the Seventh Schedule to this Constitution.

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<sup>298</sup> Constitution, Art. 15(5) (1999) (Nigeria).

<sup>299</sup> Constitution, Art. 13 (1999) (Nigeria).

On gifts and benefits, the fifth schedule, part 1, Section 6 of the Constitution 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 sub-paragraph 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, Sections 8,9,10 of the fifth schedule, part 1 state that no persons shall offer a public officer any property, gift or benefit of any kind as an inducement or bribe for the granting of any favor or the discharge in his favor 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 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 state 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.

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 issue I have 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.

Consequently, the 1999 Constitution contains several provisions that subject 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 official 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>300</sup> To recap, section 308 (1) of the 1999 Constitution offers a virtual carte blanche to the executives to get away with

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<sup>300</sup> Constitution, Art 308 (1999) (Nigeria).

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>301</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>302</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>303</sup> In light of the above, anti corruption commissions cannot interfere or take away a constitutional provision which 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 of the 1999 Constitution 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, I believe 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.

I decided to develop this analysis as to whether the National Assembly has legislative

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<sup>301</sup> 5 SC (Pt. 1) 63 at 81- 82, (2002) FWLR (Pt.108) 1355 at 1386 (SC).

<sup>302</sup> ALL FWLR (Pt.218) 951 at 956 -960 (2004).

<sup>303</sup> FWLR (Pt.118) 1385 at 1404 -1405 (CA) (2003).

powers over anti corruption statutes according to the 1999 Nigerian Constitution because there have been arguments 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 of the 1999 Constitution, 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>304</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>305</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.<sup>306</sup> 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

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<sup>304</sup> Constitution, Art. 4(1) (1999) (Nigeria).

<sup>305</sup> Id, at Art 4(2).

<sup>306</sup> Id, at 4(3).

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 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>307</sup>

Due to this confusion, the Supreme Court decided to deliberate as to 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>308</sup> By an originating summons filed, 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 (1st 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.

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<sup>307</sup> Id, at Art 4(7).

<sup>308</sup> 9 NWLR Pt. 772, 222 (2002).

- 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 1999 Constitution of the Federal Republic of Nigeria, 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.

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>309</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) on the Exclusive Legislative List of the 1999 Constitution. The National Assembly may by that enactment provide for matters which, although are within the

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<sup>309</sup> Cap. 192, Laws of the Federation of Nigeria (1990).

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.<sup>310</sup>

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 1999 Constitution, 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>311</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.”

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<sup>310</sup> *Supra*, note at 180

<sup>311</sup> *Id.*



In conclusion, the Court stated that the issue of corruption and abuse of power has become international, it is a declared state policy in Nigeria to combat it and so it has assumed a national issue of high priority which is considered best suited for the National Assembly to be addressed through a federal agency like the ICPC.<sup>312</sup> Reading these provisions of the 1999 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>313</sup>

#### **4.8.1.2 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>314</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>315</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>316</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>317</sup> It prohibits a public officer, except where he is employed on a part-time basis,

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<sup>312</sup> Id.

<sup>313</sup> Id. The Supreme Court also considered the same issue in *Chief Olafisoye v Federal Republic of Nigeria*, 4NWLR Pt. 864, 580 (2004).

<sup>314</sup> See Laws of the Federation of Nigeria Cap 56 (1990).

<sup>315</sup> Id. at Art. 172, 209.

<sup>316</sup> Para 11 of the Code of Conduct Fifth Schedule Part I

<sup>317</sup> Id. at Fifth Schedule, Part I, Art 1

from engaging or participating in the management or running of any private business, profession, or trade, except farming.<sup>318</sup>

However, this provision is essentially unenforced, 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. For instance, the new minimum wage in the public service is ₦18,000 per month (approximately \$120)<sup>319</sup> which is insufficient compared to the cost of living in Nigeria. In *Okoye v. Santilli*,<sup>320</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>321</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).<sup>322</sup> 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.

#### **4.8.1.3 Nigerian Criminal Code Law against Bribery**

Section 98, Criminal Code Act, Chapter 77; Laws of the Federation of Nigeria 1990 provides for corruption and abuse of office by Nigerian public officials.<sup>323</sup> The Act prohibits demanding and receiving of bribes by public officers, they also penalize persons who either give

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<sup>318</sup> Constitution, Fifth Schedule, Part I, Art 112 (1999) (Nigeria).

<sup>319</sup> The ₦18,000 minimum wage bill was signed into law by President Jonathan Goodluck in May, 2011.

<sup>320</sup> *Okoye v. Santilli*, [1994]4 N.W.L.R. (pt 338) 256,289 (Nigeria).

<sup>321</sup> *Nwankwo v. Nwankwo*, [1995] 5 N.W.L.R. (pt 394) 153 (Nigeria).

<sup>322</sup> *Id.*

<sup>323</sup> <http://www.nigeria-law.org/Criminal%20Code%20Act-PartIII-IV.htm#Chapter%2012>

or offers bribe to public officers and prohibits the activities of agents, relatives and other close associates of public officers who exploit their relationship with such officers to demand or receive gratification either for themselves or any other person.

Section 98 generally states that, any public official<sup>324</sup> who corruptly asks for, receives or obtains any property or benefit of any kind for himself or any other person or bribes, corruptly agrees or attempts to receive or obtain any property or benefit of any kind for himself or any other person is guilty of the felony of official corruption and is liable to imprisonment for seven years.<sup>325</sup> The Criminal Code Act has a very broad mandate that covers explicitly incidences of corruption and bribery and I particularly like the fact that the Act is not asymmetric in nature in that they penalize, exclusively or to a greater extent, the bribe-giver/payer, rather than the bribe-taker, it is important not to underestimate the impact of a clear and vigorous law by making it impartial between giver and taker.

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

The Supreme Court of Nigeria held<sup>326</sup> 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 established the Independent Corrupt Practices and Other Related Offences Commission.<sup>327</sup> The Corrupt Practices and other Related Offences Act (ICPC Act) of Nigeria was adopted on 13 June 2000, it renders both receiving and offering a bribe a criminal offence. It prohibits and prescribes punishment for corrupt practices and other related offences, the Act also established the Independent Corrupt Practices and other Related Offences Commission (ICPC).

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<sup>324</sup> As defined in Criminal Code Act Chapter 77, Art 98(d), Laws of the Federation of Nigeria (1990)

<sup>325</sup> Id at Art 98.

<sup>326</sup> *Supra*, note 309.

<sup>327</sup> Corrupt Practices and Other Related Offences Act Cap C 31 LFN 2004 (hereafter ICPC Act)

While the appointment of the Chairman and members of the Commission is vested in the President subject to Senate confirmation,<sup>328</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 in my opinion 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.

#### **4.8.1.5 Economic and Financial Crimes Commission Act 2004**

The Economic and Financial Crimes Commission (EFCC) is a commission that investigates financial crimes such as advance fee fraud and money laundering. By contrast, under the EFCC Act the Chairman and members of the Commission are appointed by the President subject to the confirmation of the Senate, and section 3 provides that a member of the Commission may at any time be removed by the President for inability to discharge the functions of his office for misconduct or if the President is satisfied that it is not in the interest of the Commission or the interest of the public that the member should continue in office.

#### **4.8.1.6 Money Laundering (Prohibition Act) 2004**

The Money Laundering (Prohibition) Act of Nigeria was adopted on 24 March 2004. This Act provides for the repeal of the Money Laundering (Prohibition) Act 2003 and makes comprehensive provisions to prohibit the laundering of the proceeds of a crime or an illegal act; and provides appropriate penalties and expands the interpretation of financial institutions and

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<sup>328</sup> Section 3(6) and (7) (terms of 5 and 4 years respectively subject to renewal once)

scope of supervision of regulatory authorities on money laundering activities, among other things.

#### **4.8.1.7 Advance Fee Fraud & Fraud Related Offences Act 2006**

The Advance Fee Fraud and other Fraud Related Offences Act of Nigeria was enacted by the National Assembly on the 5th June 2006. This Act prohibits and punishes certain offences pertaining to Advance Fee Fraud and other fraud related offences and to repeal other Acts related therewith.

### **4.8.2 REGIONAL TREATIES AGAINST CORRUPTION**

#### **4.8.2.1 Economic Community of West African States (ECOWAS) Treaty on Exchange of Information on Criminal Matters.**

The treaty of which Nigeria is a signatory to states that with a view to strengthening national legal instruments on mutual legal assistance, extradition and making them more functional and efficient, all member states shall harmonize their domestic law in accordance with the relevant ECOWAS Conventions on Mutual Assistance in Criminal Matters and Extradition. It further states that member states should undertake to adopt a convention to incriminate and make punishable the most commonly committed crimes in the sub-region”.<sup>329</sup> In

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<sup>329</sup> <http://www.sec.ecowas.int/sitecedea0/english/ap101299.htm>.

essence, this treaty will enable countries gain access to public officials who may seek for refuge in other ECOWAS countries in other to evade prosecution for corruption and other related matter.

#### **4.8.2.2 African Convention on Prevention & Combating Corruption.**

The aim of the convention is to promote and strengthen the development in Africa by each state party. They are required to prevent, detect, punish and eradicate corruption and related offences in the public and private sectors. They should promote, facilitate and regulate cooperation among the state parties to ensure the effectiveness of measures and actions to prevent, detect, punish and eradicate corruption and other related offences in Africa. State parties are expected to coordinate and harmonize the policies and legislation between state parties for the purposes of prevention, detection, punishment and eradication of corruption on the continent.<sup>330</sup> Nigeria became a signatory to this Convention in 2003 and ratified it in 2006.

#### **4.8.3 INTERNATIONAL CONVENTION AGAINST CORRUPTION**

##### **4.8.3.1 United Nations Convention against Corruption (UNCAC)**

The United Nations Convention against Corruption (UNCAC) is the first legally binding international anti-corruption instrument. In its eight chapters and seventy one articles, UNCAC obliges its states parties to implement a wide and detailed range of anti-corruption measures

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<sup>330</sup> <http://www.africa-union.org/root/au/Documents/Treaties/List/African%20Convention%20on%20Combating%20Corruption.pdf>.

affecting their laws, institutions and practices. These measures aim to promote the prevention, criminalization, law enforcement, international cooperation, asset recovery, technical assistance, information exchange, and mechanisms for implementation.<sup>331</sup> Nigeria became a signatory to UNCAC in 2003 and went ahead to ratify in 2004.

Even though Nigeria has ratified all these treaties and Convention, they are not yet operative because of the legal provision contained in section 12 of the Nigerian 1999 Constitution, which requires the National Assembly to “domesticate” a treaty, or convention, that is, to formally incorporate the treaty or convention into the domestic legal framework. Basically, the 1999 Constitution stipulates that no treaty shall have the force of law except to the extent such treaties have been enacted into law by the National Assembly. This means that the National Assembly may not only refuse to enact a law “domesticating” treaties but can also just give partial consent by excising part of the provisions of the treaties and conventions. In that event, only the part approved by the National Assembly becomes part of the domestic law.<sup>332</sup> My point here is that Nigeria should commence the domestication of these treaties and Convention so as to take advantage of the provisions they provide in curbing corruption.

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<sup>331</sup> [http://www.unodc.org/pdf/corruption/publications\\_unodc\\_convention-e.pdf](http://www.unodc.org/pdf/corruption/publications_unodc_convention-e.pdf).

<sup>332</sup> The domestication process commences with the signing of the instrument by the designated official. The Instrument then goes through some administrative review aimed at identifying any areas of incompatibility with the Constitution or other laws. This task is usually undertaken by the Department of International Law and Treaties at the Federal Ministry of Justice Nigeria. Thereafter, the document may pass through several ministries and government departments whose mandate and activities are relevant to the subject of the Treaty or Convention. At the end of the review process, a legal instrument to enact the provisions of the treaty into law is then presented to the National Assembly for deliberation.

#### **4.9 UNDERSTANDING THE DISTINCTION BETWEEN BRIBE, GIFTS, GREASE PAYMENT, AND FACILITATION PAYMENT**

At this point, I believe it is important to distinguish between all these different terms because people have attached their own interpretation to them, used them interchangeably to the extent that they are now hackneyed words. The terms bribe, grease payment and facilitation payments are all different forms of corruption. People ask questions like “what if I give a gift or tip after an act has been performed for me is that the same thing as bribe and being corrupt? What if one makes a facilitation payment just to accelerate the process, is that the same as bribe? To answer these questions, an understanding of how to identify these terms and deciding where to draw the line between permissible and prohibited actions is imperative.

As already defined by the Nigerian Criminal Code in Section 98, a bribe occurs when a person corruptly gives, confers or procures any property or benefit of any kind to, on or for a public official and is guilty of corruption. On what a gift is, the fifth schedule, part 1, Section 6 of the Nigerian Constitution 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. In other words, a gift is something of value given without the expectation of return. Facilitation payment or grease payment on the other hand is a payment to a foreign official, in order to expedite performance of duties of non-discretionary nature which they are already bound to perform.<sup>333</sup>

Although the most classic cases of bribery concern political officials and civil servants, however one need not be a political official or a civil servant to be bribed. Payments, whether in money or in kind, can be characterized along two dimensions; first does an explicit quid pro quo

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<sup>333</sup> The Foreign Corrupt Practices Act, United States Code Title 15. Commerce and Trade, Chapter 2b—Security Exchanges S. F (1) S 78dd- 2 (b).



exist? If so, the transaction can be labeled a sale even if there is a long time lag between payment and receipt of the benefit. Both market sales and bribes involve reciprocal obligations, gifts to charities or loved ones often do not explicitly involve reciprocity, although many do generate implicit obligations. The second dimension is the institutional positions of payers and payees, are they agents or principals? <sup>334</sup> Gift connotes voluntariness, Nigerians and indeed most Africans are habitual gift-givers which they do voluntarily, no strings attached.

By the same token, the equation of bribe or gratification of gifts which citizens were obliged to present to chiefs and kings under the traditional social and political system is mistaken. Citizens presented tributes to their political overlords as a form of tax which went to the upkeep of the royal home,<sup>335</sup> presentation of tribute was compulsory in the traditional dispensation, not so with gift-giving, which remains a sign of charity and hospitality on the part of the giver.<sup>336</sup> Till this day, the practice of paying tribute and giving gifts to traditional leaders in Nigeria is still practiced but not compulsory. Against this background, it is clear that a gift differs from a bribe or a facilitation payment because it is not intended to obtain a direct benefit for the giver while the latter is intended to obtain a direct benefit from the receiver.

The main distinction between facilitation payments, ordinary bribery and extortion is that facilitation payments tend to be made to obtain something to which the payer is already entitled to. In other words, what the payer wants the corrupt official or employee to do is not something improper or something that exceeds their authority such that the normal course of business would be perverted through dishonest or unlawful behavior but rather to do what it is their duty to do in

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<sup>334</sup> Susan Rose – Ackerman, Corruption and Government: Causes, Consequences and Reform, Cambridge University Press, 92 (1999).

<sup>335</sup> P. D. Ocheje, Exploring the Legal Dimensions of Political Legitimacy: A 'Rights' Approach to Governance in Africa in E. K. Quashigah and O. C. Okafor (eds.), Legitimate Governance in Africa, The Hague 165-205, at 190-193(1999). A. Pollis and P. Schwab, Human Rights: A Western Construct with Limited Applicability, in Pollis and Schwab, Human Rights: Cultural and Ideological Perspectives, New York at 36 (1980).

<sup>336</sup> Id.

the procedure for resolving a particular matter. There are many different kinds of gifts, and therefore the similarities and differences between gifts and facilitating payments can be very varied.<sup>337</sup>

- As with facilitating payments, gifts may consist of money, goods, services, discounts etc.
- They may be large or, like facilitation payments, small.
- In principle, the initiative in gift-making comes from the giver; although there may be a prior spoken or unspoken demand - for example, in the form of a long-standing custom.
- As with facilitation payments, gifts may be given once, occasionally, or on a regular basis.
- Gifts may be made to the office or company or, as with facilitation payments, to an individual official, manager or employee - either at their place of work or home depending on how secretive they have to be.
- Unlike bribes or facilitation payments, gifts tend to be public, or at least they could be without drawing attention, whereas bribes and facilitating payments tend to be made in secret.

I believe that I can rightly conclude to the extent that a gift is something of value given without the expectation of return while bribe, facilitation payment, grease payment on the other hand is something of value given with strings attached. Ultimately, the terms bribe, facilitation

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<sup>337</sup> Susan Rose-Ackerman, Bribes and gifts, in A. Ben-Ner and L. Putterman (eds.), Economics, Values, and Organization, Cambridge University Press (1998).

payment and grease payment can be categorically and unequivocally grouped as corrupt acts which lead to corruption.

## 5.0 A CULTURE OF CORRUPTION

*Corruption is condemned by all religions, all ethical code, and all legal systems. It hinders all development, slows all progress and impedes all advancement. It strikes hardest at the poor and vulnerable, siphoning scarce resources away from those most in need. Corruption erodes trust in government and private institutions alike; it undermines confidence in the fairness of free and open markets; and it breeds contempt for the rule of law. Corruption is, simply put, a scourge on civil society.*<sup>338</sup>

### 5.1 INTRODUCTION

Corruption is Nigeria's biggest single problem. It has not only shattered public trust in government, but it has cost the government and the people of Nigeria billions of naira due to corrupt management of public funds, unrealized public projects and deteriorated infrastructure caused by looted maintenance budgets.<sup>339</sup> History has showed that Nigeria has had anti corruption institutions in one form or the other since the 1970s and there has been debate about the effectiveness of institutions such as anti-corruption agencies. Some argue that anti-corruption agencies 'may provide an effective means of promoting probity in government and protection of state income and expenditure', Transparency International states that such bodies are more often

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<sup>338</sup> Eric Holder , U.S. Attorney General address at the Opening Plenary of the VI Ministerial Global Forum on Fighting Corruption and Safeguarding Integrity, Doha, Qatar ( Nov. 7, 2009) available at <http://www.justice.gov/ag/speeches/2009/ag-speech-091107.html>.

<sup>339</sup> See generally Hearing Before the Subcommittee on Africa, Global Human Rights and International Operations of the Committee on International Relations House of Representatives, One hundred Ninth Congress, Second Session. (May 18, 2006).

failures than successes<sup>340</sup> and I believe that where such anti corruption agencies are truly independent, it can help in curbing corruption.

The preamble to the 1999 Nigerian Constitution demonstrates the sweeping aim of the country's system of justice.<sup>341</sup> It aims to promote good governance and welfare of all persons in Nigeria, on the principles of freedom, equality and justice.<sup>342</sup> Section 14(1) of the Nigerian Constitution proclaims that the Federal Republic of Nigeria shall be a state based on principles of democracy and social justice and all public officers are sworn into office in accordance to the Nigerian Constitution<sup>343</sup> and the oath of office in the 7<sup>th</sup> Schedule talks about discharging the duties in a manner that does not permit personal interest to influence official conduct or official decisions.<sup>344</sup>

However, one of the lapses I observed with the 7<sup>th</sup> schedule of the Nigerian Constitution is that it provides no means of attaching criminal sanctions for noncompliance with these oaths of office, all it does is establishing a rhetoric promoting the ideals of a just and equitable state. Whereas Section 98 of the Nigerian Criminal Code (1990), proscribed persons from giving or promising to give payment to a public official in order to obtain “contract, license or permit” or face a seven – year prison sentence.<sup>345</sup> The Constitution which is the grundnorm of the country has failed in this area.

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<sup>340</sup> Pope, Jeremy, *TI Source Book*, Transparency International, Berlin. (ed.) (1999).

<sup>341</sup> Constitution, The Preamble (1999) (Nigeria).

<sup>342</sup> Id.

<sup>343</sup> Constitution, 7<sup>th</sup> Schedule (1999) (Nigeria).

<sup>344</sup> The 7th Schedule of the Nigerian Constitution generally talks about Oath of Allegiance, starting from the office of the President, vice -President, governors, deputy governors, ministers and commissioners. Also, there are set of oaths for members of the National Assembly and State Houses of Assembly and the final one, which is the judicial oath of office for judicial officers.

<sup>345</sup> See Schedule to the Criminal Code Act, Chapter 77, Laws of the Federation of Nigeria. Revised Edition (1990). This code is applicable only in the southern part of Nigeria.

## 5.2 WHAT IS AN ANTI-CORRUPTION AGENCY?

An Anti Corruption Agency should be a separate, independent and permanent bureau whose key function is to provide leadership in core areas of anticorruption activity. I am emphasizing on the word independent because Independent and non-partisan officers are necessary to ensure a high level of neutrality when investigating corruption cases. It is therefore imperative that the influence of political affiliations and conflicts of interest be kept to an absolute minimum in such cases.

De Sousa in his book stated that the operational definition of an anti corruption agency is; “publicly funded bodies of a durable nature whose specific mission is to fight corruption, associated crimes and to reduce the opportunity structures favorable to its occurrence through preventive and repressive strategies.”<sup>346</sup> De Sousa however failed to include the word independent in his definition. The issue of independence is important because of the danger of political interference, issues of political accountability and allocation of resources for the commissions are raised to establish such independence.

On a broader spectrum, Doig et al<sup>347</sup> pointed out that Anti Corruption Agencies have one or more of three common features as thus;

- **Investigation and enforcement duties.** Independent investigative power is a common role among the vast majority of Anti Corruption Agencies, undeniably an essential one for maintaining the credibility of the body’s assessments and findings of corruption in a society.
- **Corruption prevention responsibilities.** Most Anti Corruption Agencies offer advice on macro and micro strategies for averting corruption via corruption prevention departments. Furthermore,

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<sup>346</sup> De Sousa, Luís, Corruption: Assessing Ethical Standards in Political Life through Control Policies (2006) (unpublished Ph.D. thesis European University Institute) (on file with author).

<sup>347</sup> Doig, Alan, David Watt, Robert Williams. *Why do developing country anticorruption commissions fail to deal with corruption? Understanding the three dilemmas of organizational development, performance expectation, and donor and government cycles*, Public Administration and Development. 27, 3 at 251 – 259 (2007).

education and training provide evidence that knowledge about corruptive behavior beforehand can aid in preventing the act. Such capacities include workshops on anti-corruption with consultative assistance to public and private sector employees.

- **Public awareness and responsibility to educate on matters of corruption.** In addition to prevention and investigation, certain agencies undertake a broader role to conduct research, monitor and promote reform in the public service and/or the criminal justice system generally.

Just to build on what Doig et al has identified, the Nigerian Economic and Financial Crimes Commission (Establishment) Act of 2004 has all three features as identified by Doig in its Act. Section 6 of the Act generally provides for the investigation, enforcements of all financial crimes, corruption prevention and public awareness and education on matters of corruption. If major anti-corruption initiatives are to be firmly anchored, they need to be distinct national government agencies dedicated to curbing corruption. These agencies must command public respect and be credible, transparent and fearless.<sup>348</sup> Building upon what Pope and Vogl stated, an anti corruption agency must also include the following characteristics; independence, permanence, broad mandate and corruption prevention mission. By independence I mean that an anti corruption commission should be free from any interference by the executive branch of government or political affiliation. By permanence I mean the commission should have a quality of been permanent and sustainable. Having a broad mandate is essential to the success of an anti corruption commission because it would enable the commission to instigate and pursue corruption charges without limitation.

Take for instance the Independent Corrupt and other Related Offences Commission in Nigeria, it can only institute actions based on petitions, this has limited the powers of the

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<sup>348</sup> Pope J & Vogl F , *Making anticorruption agencies more effective*, Finance and Development: Quarterly Magazine of the IMF 37(2) (2000).

commission. It is easier to have measures that prevent corruption by enhancing integrity and transparency rather than cure it; it is better to always nip issues in the bud before they materialize. Independence is a key issue in the design of most Anti Corruption Agencies and a continuous concern during their lifetime. Independence does not necessarily mean free will but rather refers to the capacity to carry out its mission, vision and goals without political interference, which is, operational autonomy.

As bodies entrusted with the implementation of anticorruption policies/strategies, Anti Corruption Agencies cannot act in a completely independent way, they are expected to transform policy into action and therefore they share with the political class the onus of success or failure. Political interference can be exerted directly by threatening to terminate the agency's work, frustrate its work, dismiss its senior officers or limit its financing.

As intense as the incidence of corruption is in Nigeria, the country has always had agencies, programs and mechanisms to combat the plague. The first form of mechanism was in the form of customary law and later legislative enactments.<sup>349</sup> Bribery was forbidden in the Yoruba tradition<sup>350</sup> under the native law and custom, a person who received or offered bribes in order to pervert the judgment of the law was liable to either a heavy fine, imprisonment, or both.<sup>351</sup> History also has it that the penalties for conduct amounting to egregious corruption often included banishment and death sentences, even for traditional rulers.<sup>352</sup> At this point, I shall be discussing the progressive realization of anti corruption commissions in Nigeria, relevance, impacts and their present status from the 1970s till date.

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<sup>349</sup> Akinseye George & O Oko, *Subverting the Scourge of Corruption in Nigeria: A Reform Prospectus* at 34, N.Y.U.J. INT'L L.&POL at 397, 424 – 54 (2002).

<sup>350</sup> Oyewo and OB Olaoba, *A Survey of African Law and Custom – With Particular Reference to the Yoruba Speaking People of South – Western Nigeria*, Jator Publishing Company, Ibadan at 180 (1999).

<sup>351</sup> AK Ajisafe, *The Laws and Customs of the Yoruba People*, George Routledge & Sons, London at 32 (1924).

<sup>352</sup> B Akinyemi, *Corruption, a Battle Nigeria Must Win*, This Day Online(Nigeria) 22 August, 2004 available at <http://thisdayonline.com/archive/2004/08/22/20040822dis01.html>.



### 5.3 EVOLUTION OF ANTI CORRUPTION AGENCIES IN NIGERIA

Huther and Shah<sup>353</sup> have developed a framework for the evaluation of anti-corruption initiatives, they argue that ombudsmen and anti-corruption agencies must be assessed in the context of the wider political and governance environment of a particular country. They conclude that the likelihood of such institutions succeeding is dependent on the pervasiveness level of corruption in the country and the overall quality of governance. This is true to the fact that where there is pervasive corruption and a low level in the quality of governance fighting corruption will be a huge challenge where the necessary institutions that have the mandate to fight corruption are not efficient, corruption will persist. The key point is that an anticorruption body will be effective only to the extent that it operates within a framework of accountable and transparent institutions.

Manning<sup>354</sup> stresses the importance of strong political backing from all arms of government, combined with independence from executive government intervention, adequate financial and human resources. The effectiveness of any particular anti-corruption agency cannot be assessed in isolation from other institutions of accountability and law enforcement, viewing from the political environment in which it was created to that which it operates. Building on Manning's strong points and speaking from the stance point of a Nigerian, almost all the anti corruption efforts in Nigeria have failed because of lack of political will, lack of independence and insufficient funding.

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<sup>353</sup> Huther, Jeff, and Anwar Shah, *Anticorruption Policies and Programs: A Framework for Evaluation*, World Bank Policy Research Working Paper 2501 at 12 (2000).

<sup>354</sup> Manning, Nick, *Using an Ombudsman to Oversee Public Officials*, PREM Notes, 19, World Bank Institute, Washington DC. (1999).

### **5.3.1 Operation Purge the Nation**

This was one of the first military sponsored anti – corruption program was launched by General Murtala Muhammad.<sup>355</sup> Operation Purge the Nation was designed to rid Nigerian political system of incompetent, corrupt, unethical, depraved, morally delinquent civil servants and politicians and to return respectability and professionalism to the country’s public service. As part of the new program, heads of fifty government departments were forcefully retired and over eleven thousand people were purged from the national civil service.<sup>356</sup> Unfortunately the impact of Operation Purge the Nation on corruption in Nigeria was short lived, absenteeism was reduced significantly, civil servants became more efficient, performed their duties diligently and incidence of corruption seemed to decrease. Operation Purge the Nation categorically failed for various reasons; many of the civil servants that were sacked were paid full benefits.

### **5.3.2 Public Complaints Commission (PCC)**

The Public Complaints Commission otherwise known as the Nigerian Ombudsman is an independent organization established by the Federal Government of Nigeria in 1975 through Decree No. 31 of 1975, amended by Decree 21 of 1979, now Cap 377 Laws of the Federation of Nigeria 1990 and revalidated in Section 315(5) of 1999 Nigerian Constitution. With a nation-wide network of offices, it became the first West African country to set up such a system and the largest federal government to have it at national and state levels. Although the creation of the PCC was widely acclaimed in Nigeria, this initial enthusiasm appeared to have been short-lived as the publicity about the Commission has dwindled over the years. The PCC tends to operate in secret because its reports are inaccessible to the public, with the result that the average Nigerian

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<sup>355</sup> Toyin Falola, *Corruption in the Nigerian Public Service* at 40.

<sup>356</sup> Id.

knows almost nothing about what it is, what it does, how it performs, and why it continues to exist.<sup>357</sup>

According to the PCC Act, Chapter 377 L.F.N. 1990, the chief commissioner and commissioners in the states are appointed by the National Assembly. The chief commissioner appoints all other officers at the headquarters and state offices, including the national secretary at the headquarters and the directors of investigation at the state level.<sup>358</sup> Part of the motivation for setting up this constitutional body is to provide citizens with a framework through which they could improve governance in the country by making certain that civil servants who engaged in illegal, unfair, or irregular practices were investigated and if necessary, brought to justice.

The Public Complaints Commission therefore provides an opportunity for Nigerians and non-Nigerians resident in Nigeria particularly the less privileged to seek and obtain redress for their grievances at no cost and with minimum delay. They can obtain redress for wrongful dismissal from service, wrongful termination of appointment, delay or refusal by any government department to pay compensation for land, non- payment of or delay in payment of retirement benefits, difficulty in getting insurance companies to pay claim, loss of postal orders, money orders and parcels, non- release of results/ certificates by examination bodies, complaints against police, Nigeria armed forces for abuse of office such as brutality to civilians and complaints against Nigeria Electric Power Authority, Nigeria Telecommunications, for overbilling.

Sadly, because of several exceptions to its mandate, PCC has been reduced to dealing primarily with petty issues, PCC cannot entertain matters pending before the National Assembly,

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<sup>357</sup> Ladipo Adamolekun & E. L. Osunkunle , Nigeria's Ombudsman System: five years of the Public Complaints Commission, Ibadan Heinemann(1982).

<sup>358</sup> <http://www.business-anti-corruption.com/country-profiles/sub-saharan-africa/nigeria/initiatives/public-anti-corruption-initiatives>.

the National Council of States and the Federal Executive Council, matters before any Court of law, Matters in which legal and administrative procedure have not been exhausted, anonymous petition and cases between two private individuals. Also, because the agency lack of police powers, it is unable to have any significant impact on the conduct of public officials and private agencies.<sup>359</sup> The PCC is reported to have a significant backlog of cases, largely due to a lack of funding. The government usually acts on findings of the PCC, however many complaints are never investigated due to the lack of resources.<sup>360</sup>

### **5.3.3 Code of Conduct Bureau**

The Code of Conduct Bureau was set up by the Federal Government under the Code of Conduct Bureau and Tribunal Act.<sup>361</sup> The Bureau could not however become operational due to the inability of the National Assembly to pass the enabling bill into law until the demise of the second republic in 1983. The organization was however resuscitated in 1988 with the appointment of a ten-member board. In order to avoid the problems the body encountered in the Second Republic, General Babangida, the then head of state went a step further by promulgating Decree 1 of 1989 to give legal backing to the organization. In 1999, the Constitution affirmed the above thus permanently enshrining the organization.<sup>362</sup>

The Code of Conduct Bureau and Tribunal Act, Chapter 56 LFN 1990 gave the Bureau the mandate to establish and maintain a high standard of public morality in the conduct of government business and to ensure that the actions and behavior of public officers conform to

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<sup>359</sup> Olowu, D., Ethical Violations in Nigeria's Public Services: Patterns, Explanations and Remedies in S. Rasheed and D. Olowu (eds.), Ethics and Accountability in African Public Services, Nairobi (1993).

<sup>360</sup> *Supra* Note 348.

<sup>361</sup> Laws of the Federation of Nigeria, Revised Edition, Cap 56 (1990).

<sup>362</sup> <http://www.codeofconductbureau.com/aboutus.html>.

the highest standard of public morality and accountability.<sup>363</sup> It is important to note that the provisions of the Code of Conduct Bureau should be lauded and should be taken seriously by civil servants, but in reality, civil servants have simply ignored these codes. In Nigeria, most civil servants do not declare their assets and where they do it is usually overrated as to give room to loot.<sup>364</sup> Civil servants have flaunted these codes and are still flaunting them because the penalties for noncompliance are either weak or non existence and impunity for violating these codes is common place in Nigeria.

#### **5.3.4 War against Indiscipline (WAI)**

In the aftermath of the 1983 military coup, Maj. General Tunde Idiagbon, initiated and implemented another anti – corruption program called, War against Indiscipline (WAI). The purpose of this program was to instill a sense of integrity and discipline in civil servants in an effort to improve professionalism in the bureaucracy. Unfortunately, WAI was poorly executed and capricious. Again, like its predecessor, WAI died a natural death.

#### **5.3.5 Public Accounts Committee (PAC)**

The Public Accounts Committee (PAC) was established to perform an oversight function over all the spending activities of all executive offices. PAC was expected to examine critically the annual report and comments on government accounts presented by the country's Auditor General. Unfortunately, PAC could not function properly under the military regime, and during corrupt civilian governments, the committee was starved for funds.

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<sup>363</sup> To implement the above mandate, Section 3, part 1 of the Third Schedule to the 1999 Constitution of the Federal Republic of Nigeria has provided an enabling legal environment for the Bureau.

<sup>364</sup> Interview with an officer of the Code of Conduct Bureau.

### 5.3.6 Independent Corrupt Practices Commission (ICPC)

For the first time in the history of the Nation, the Corrupt Practices Act of 2000 establishes a statutory body answerable to the National Assembly and whose main purpose is fighting corruption. Recognizing that corruption has become pervasive, the Act grants the Independent Corrupt Practices Commission (ICPC) considerable power for investigation, arrest and prosecution of suspected persons. The Act stipulates that the ICPC shall consist of a Chairman and twelve other members<sup>365</sup> to be selected from each of the six geo-political zones of Nigeria.<sup>366</sup> The ICPC Act provides that the Chairman and Members of the Commission, who shall be persons of proven integrity, shall be appointed by the President upon confirmation by the Senate and shall not begin to discharge their duties until they have declared their assets and liabilities as prescribed in the Nigerian Constitution.

Section 6 (a-f) of the ICPC Act 2000 sets out the duties of the Commission as;

- To receive and investigate complaints from members of the public on allegations of corrupt practices and in appropriate cases, prosecute the offenders.
- To examine the practices, systems and procedures of public bodies and where such systems aid corruption, to direct and supervise their review.
- To instruct, advice and assist any officer, agency, or parastatals on ways by which fraud or corruption may be eliminated or minimized by them.
- To advise heads of public bodies of any changes in practice, systems or procedures compatible with the effective discharge of the duties of public bodies to reduce the likelihood or incidence of bribery, corruption and related offences.

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<sup>365</sup> Corrupt Practices and Other Related Offences Act, No. 5 of 2000, Art. 3(3).

<sup>366</sup> South- East, South -West, South-South, North - West, North East and North Central.

- To educate the public on and against bribery, corruption and related offences;
- To enlist and foster public support in combating corruption.

The ICPC chairman is vested with additional powers, including the power to seize movable property in the custody or control of a bank or financial institution, where the property is the subject matter of any investigation under the Act;<sup>367</sup> the power to obtain information from any person including relatives, associates and their banks suspected of having committed an offence under the Act;<sup>368</sup> and the power to make an application to Court to prohibit any person from dealing with any property which is the subject matter of an offence under the Act, where the property is held or deposited outside Nigeria.<sup>369</sup> The Act collectively established and redefined nine offences relating to corrupt practices and abuse of office, among which are:

- Accepting gratification (section 8).
- Fraudulent acquisition of property (section 12).
- Fraudulent receipt of property (section 13).
- Making a false statement or return (section 16).
- Bribing a public officer (section 8).
- Use of office or position for gratification (section 19).
- Bribery in relation to auction (section 21).
- Bribery in relation to contracts (section 22).
- Failure to report bribery transactions (section 23).

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<sup>367</sup> Id at Art. 45.

<sup>368</sup> Id at Art. 44.

<sup>369</sup> Id at Art. 46.

### 5.3.7 Economic and Financial Crime Commission (EFCC)

Three years after the establishment of Independent Corrupt Practices Commission (ICPC), the Economic and Financial Crime Commission (EFCC) was established as a law enforcement agency that investigates financial crimes such as advance fee fraud and money laundering under the EFCC (Establishment) Act of 2004. The Commission is empowered to investigate, prevent and prosecute offenders who engage in money laundering, embezzlement, bribery, looting and any form of corrupt practices, illegal arms deal, smuggling, human trafficking, child labor, illegal oil bunkering, illegal mining, tax evasion, foreign exchange malpractices including counterfeiting of currency, theft of intellectual property and piracy, open market abuse, dumping of toxic wastes, and prohibited goods”.<sup>370</sup>

The Commission is also responsible for identifying, tracing, freezing, confiscating, or seizing proceeds derived from terrorist activities. EFCC is host to the Nigerian Financial Intelligence Unit (NFIU), vested with the responsibility of collecting suspicious transactions reports (STRs) from financial and designated non-financial institutions, analyzing and disseminating them to all relevant government agencies and other Financial Intelligent Units all over the world.<sup>371</sup> There is, therefore, no gainsaying that the Nigerian anti-corruption regime is very comprehensive. It covers a wide range of subjects such as institutional issues, definition of applicable offences and rules governing the prosecution and trial of offenders.

One of the problems that face Anti-Corruption Commissions is how to secure convictions of accused persons in Courts especially high profile cases. In my recent interview with a top officer at the Economic and Financial Crimes Commission in Nigeria he stated that the main challenge the commission faces is the prosecution of high profile cases. He blames the role

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<sup>370</sup> EFCC Establishment Act, Art. 46 (2004).

<sup>371</sup> Id.



money plays in politics, the slow judicial process and the attitude of defense counsel in dragging the legal process by focusing more on procedural issues rather than substantial issues. In the light of the legislative and institutional mechanisms put into place to combat corruption in Nigeria, one would expect that the level of systemic corruption in the country would reduce. The question, therefore, is whether this is really the case, why are there systems in place that are not efficient and effective? The most pertinent source of evaluation would perhaps be the agencies and authorities at the forefront of combating corruption in Nigeria.

Thus, according to the EFCC and ICPC, the commission's gains since inception include an increased societal confidence and it has been involved in the investigation of cases ranging from high profile corruption cases, advanced fee fraud, money laundering, tax evasion, contract scams, identity theft, illegal oil bunkering, bribery, looting, and foreign exchange malpractices.<sup>372</sup> In reality, that does not seem to be the case, only one conviction has been secured by the EFCC,<sup>373</sup> numerous plea bargains and hundreds of high profile cases pending in Court.<sup>374</sup>

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<sup>372</sup> Official statistics and the accounts of EFCC are, to say the least, not always available, reliable or up to date.

<sup>373</sup> Olabode George, a powerful figure in Nigeria's ruling party George was convicted and sentenced to two and a half years in prison for corruption while he was chairman of the Nigerian Ports Authority. This case was the Economic and Financial Crime Commission's first and so far only conviction obtained after a full trial of a major political figure in October 2009. George emerged from a Lagos prison in February 2011, to a rapturous welcome by senior members of the ruling party despite his conviction. Far from being treated as a pariah because of his misdeeds, according to media reports, he was treated to a lavish welcome ceremony attended by prominent ruling party politicians.

<sup>374</sup> In December 2009, Nigerians watched in bewilderment and disappointment as the disgraced former governor of Delta State James Ibori was acquitted of all charges brought against him by EFCC.

## **6.0 UNITED STATES OF AMERICA’S FOREIGN CORRUPT PRACTICES ACT (FCPA) AND IT’S EFFECTS ON NIGERIA**

### **6.1 INTRODUCTION**

The FCPA prohibits payments (including promises to pay) of anything of value (including favors, perks, etc.) to influence corruptly the discretion of a foreign official to do something in violation of his or her official duty, to obtain, retain, direct business, or to gain any improper advantage.<sup>375</sup> The FCPA also prohibits indirect payments, as well.<sup>376</sup> These provisions can transform acts of a non-U.S. representative, agent or business partner into a potential crime under U.S. law that is attributable to the U.S. party.<sup>377</sup> The FCPA exempts “facilitating” payments which are usually small payments that are designed to get a foreign official to perform a non-discretionary function.<sup>378</sup> For example, if a company’s goods are being processed slowly through customs, a payment may be allowed to have the goods move more quickly. A payment to have the customs office open on a holiday, however, would not be permitted.

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<sup>375</sup> The U.S. Foreign Corrupt Practices Act of 1977 ("FCPA") generally prohibits U.S. companies and citizens, foreign companies listed on a U.S. stock exchange, or any person acting while in the United States, from corruptly paying or offering to pay, directly or indirectly, money or anything of value to a foreign official to obtain or retain business (the “Anti bribery Provisions”). The FCPA also requires “issuers” (any company including foreign companies) with securities traded on a U.S. exchange or otherwise required to file periodic reports with the Securities and Exchange Commission (SEC) to keep books and records that accurately reflect business transactions and to maintain effective internal controls (the “Books and Records and Internal Control Provisions”).<sup>375</sup>

<sup>376</sup> Penalties for violation of the anti-bribery provisions can be significant. The Justice Department can pursue criminal sanctions of up to two million dollars per count for legal entities, with individuals facing fines of up to two hundred and fifty thousand dollars per violation and imprisonment up to five years. (Each payment or act in furtherance of the violation can be considered a separate count or violation). Corporate indemnification is not permitted for fines imposed on individuals. An alternative sanctions schedule is possible. If the violation produced a gain for the offender or a loss for a third party, the maximum fine can be the greater of twice the gross gain or loss. See the Foreign Corrupt Practices Act, United States Code Title 15. Commerce And Trade, Chapter 2b--Securities Exchanges S. F(1) § 78dd-2(g).

<sup>377</sup> See 15 U.S.C. § 78dd-1, 78d-2 & 78m. The FCPA is jointly enforced by the Department of Justice (DOJ) and the Security and Exchange Commission (SEC). The Justice Department enforces the anti-bribery provisions, while the Securities and Exchange Commission has jurisdiction over the accounting requirements

<sup>378</sup> See the Foreign Corrupt Practices Act, United States Code Title 15. Commerce And Trade, Chapter 2b--Securities Exchanges S. F(1) § 78dd-2(b)

Accepted examples of Facilitation Payments under the FCPA are<sup>379</sup>;

- Obtaining permits, licenses, or other official documents;
- Processing visas and work orders;
- Providing police protection, mail pick-up and delivery;
- Providing phone service, power and water supply,
- Loading and unloading cargo, or protecting perishable products;
- Scheduling inspections associated with contract performance or transit of goods across country.

## **6.2 FACILITATION PAYMENTS UNDER THE FCPA; CORRUPTION OR NOT**

### **CORRUPTION! IT'S EFFECTS ON NIGERIA**

Facilitation payments are permitted in United States, Canada, Australia, New Zealand and South Korea but illegal in every country in which they are paid.<sup>380</sup> Facilitation payment is an interesting issue in the anti-corruption world and there are debates as to whether facilitation payment can be tagged as corruption or not and this is where its effects on Nigeria becomes very worrisome. I believe facilitation payment within the context of FCPA is a subtle phrase for bribery which promotes petty corruption because it consist of small payments or gifts made to a person with authority to obtain a favor such as expediting an administrative process, obtaining a permit, license or service.

This practice is particularly burdensome for third world countries like Nigeria where corruption is entrenched and the culture of government bureaucracy is a problem, which makes facilitation payment only a step towards the culture of corruption, which we are desperately

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<sup>379</sup> Art Aronoff , Senior Counsel ,Office of the Chief Counsel for International Commerce, Domestic and International Anticorruption Initiatives.

<sup>380</sup> <https://www.traceinternational.org/documents/FacilitationPaymentsSurveyResults.pdf>.

trying to curb. These foreign companies come in and take advantage of the already lax system in Nigeria and impede the fight against corruption by creating more opportunities for corruption. Most of these foreign companies hide behind the veil of facilitation payment under the FCPA and engage in grand corruption, hence the high fines incurred on them by the Security and Exchange Commission and my argument here is that the FCPA act has done little to regulate U.S companies from going outside the intended meaning of facilitation payment as evident in the case of Nigeria.

In Nigeria, there are numerous cases of foreign US companies doing business and bribing public officers with millions of dollars to secure contracts as will be discussed below. Facilitation payments while legal under the FCPA remain unethical and unacceptable. I believe facilitation payment will encourage laxity amongst public officials, they will not carry out their duty or resolve the issues entrusted to them as swiftly or efficiently as expected when they know they can be nudged by facilitation payment. This represents a step towards a culture of corruption in society hampering the fight against corruption because superior public officers are themselves corrupt.

Nigeria should take such measures as may be necessary to establish under its criminal law that it is an offence for any non Nigerian or foreign organization to intentionally offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a Nigerian public official, otherwise known as “foreign official” by the FCPA Act<sup>381</sup> for that official or for a third party to act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.

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<sup>381</sup> The term foreign official is very important because without one, there can be no FCPA anti – bribery violation, criminal or civil.

Similarly, Section 98 of the Nigerian Criminal Code in criminalizing bribery should include “public official receiving bribe from foreign official, person or organization”. In addition, such organizations should be sanctioned and fined. Nigerian legislation should not only focus on criminalizing bribery and corruption amongst Nigerians but should extend its jurisdiction to non Nigerians and their corporations because in the past few years, a large percentage of FCPA enforcement actions have involved transactions in Nigeria and this has exacerbated the incidence of corruption in the country. In the interests of effectiveness, viable economy and good governance, it is only right that large-scale corruption should head the agenda of governments.

In October of 2009, TRACE International, Inc. (TRACE)<sup>382</sup> a non-profit membership association that pools resources to provide practical and cost-effective anti-bribery compliance solutions for multinational companies, their commercial intermediaries (sales agents, representatives, consultants, distributors, suppliers and etc.), conducted a benchmarking survey on facilitation payment. The survey revealed a clear trend by corporations to ban facilitation payments, coupled with awareness by survey respondents of the added risk and complexity presented by facilitation payments.

### **6.3 LANDMARK CASES OF FACILITATION PAYMENTS UNDER THE FOREIGN CORRUPT PRACTICES ACT (FCPA) BY UNITED STATES CORPORATIONS TO NIGERIAN OFFICIALS<sup>383</sup>**

Here, I shall discuss some landmark cases where US corporations have used the veil of facilitation payments under the FCPA to bribe Nigerian officials into getting contracts and preferential treatment from public officials to reiterate my point that the practice of facilitation payment is burdensome on Nigeria and creates a culture of corruption and therefore should not

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<sup>382</sup> <https://secure.traceinternational.org/Default.asp>.

<sup>383</sup> <https://secure.traceinternational.org/compendium/search.asp>.

be encouraged in any way.<sup>384</sup> One of the cases that made news headline all over the world is the Halliburton case.

The Halliburton bribery tale has been a worrisome issue since it broke in 2003, following an investigation of Kellogg, Brown and Root ( KBR), a Halliburton subsidiary over payments to a range of high profile Nigerian government officials, politicians, including those of the Nigerian National Petroleum Corporation (NNPC) and the Nigerian Liquefied and Natural Gas (NLNG). The sum of one hundred and eighty million dollars bribe was involved over a contract estimated at nearly seven billion dollars for the construction of the LNG plant in Bonny, River State. The bribe allegedly spanned the period from 1995 till when the contract was awarded to 2004 to KBR. On February 11, 2009, KBR LLC pleaded guilty to conspiracy to violate the FCPA and to four counts of violating the FCPA's anti bribery provisions. Under the plea agreement, KBR LLC agreed to pay a four hundred and two million dollars criminal fine and to retain an independent compliance monitor for a three year period.

In the wake of this scandal, the first move by the Nigerian government was the declaration by the former minister of justice and Attorney-General, Mr Michael Aondaoka (SAN) that a law suit would be filed against indicted foreign givers of bribes for 'soiling the countries reputation' as well as see if Nigeria can get some compensation and redress,<sup>385</sup> while overlooking the prosecution of Nigerians who took the bribes and inevitably soiled Nigeria's image. Due to pressure from the media and general public, the Nigerian government inaugurated a committee of five security chiefs to investigate the involvement of Nigerians in the one hundred and eighty multi-million dollar scam. The panel subsequently promised that it would complete the assignment and submit its report within eight weeks of commencing the investigation. Till date

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<sup>384</sup> For a comprehensive list of corruptions case see <https://secure.traceinternational.org/compendium/search.asp>.

<sup>385</sup> The punch, 8 April (2009).

no names have been provided, no indictments or arrests have been made either in connection to the Halliburton case.

Another interesting case I shall discuss is the corruption scandal that involved William Jefferson, who at the time of scandal was a serving Congressman in the United States House of Representatives for Louisiana's 2nd Congressional District from 1991 until 2009. Beginning in 2001 and continuing until 2005, Jefferson solicited bribes from several businessmen in exchange for his assistance with securing business in several West African countries including Nigeria. According to the prosecution, Jefferson allegedly agreed to pay Nigeria's former Vice President Atiku Abubakar and other Nigerian officials half a million dollars in cash to secure a contract in Nigeria and officials would later receive a percentage of the share of the profits after the business had been completed.

Jefferson was given one hundred thousand dollars in marked bills to pass on to the Nigerian officials as first installment on the half a million dollars payment. The FBI recovered ninety thousand dollars from Jefferson's freezer when they searched his home and on June 4, 2007, Jefferson was indicted on sixteen counts including conspiracy to solicit bribes by a public official, conspiracy to commit wire fraud and conspiracy to violate the FCPA, solicitation of bribes by a public official, wire fraud, violations of the FCPA, money laundering, obstruction of justice and racketeering. On August 5, 2009, Jefferson was convicted on eleven counts.

The last case I shall discuss is the wide publicized Siemens scandal of 2007. Between March 12, 2001 and December 30, 2007, Siemens used a variety of methods to make approximately four thousand two hundred and eighty three illegal payments to government officials, totaling approximately one billion one hundred million dollars and these payments caused the company to realize over one billion one hundred million dollars in profits during the relevant time period.

The payments made in various divisions of the company between 2001 and 2007 included amongst others cash payments to Nigerian officials in connection with four telecommunications projects. Siemens used a variety of methods to conceal these payments and improperly recorded all four thousand two hundred and eighty three payments on its books and records.

Approximately nine hundred and eighty two million seven hundred thousand dollars in payments were funneled through third parties, Siemens routed more than two hundred and eleven million dollars in bribes through slush funds that were often maintained by former Siemens executives, third parties or affiliated companies. Siemens also used cash to pay approximately one hundred and sixty million four hundred thousand dollars in bribes. In addition to the other methods, Siemens used a number of internal accounts to make more than sixteen million two hundred thousand dollars in payments, these accounts were intended to make payments on transactions between two Siemens entities; however, Siemens often used these accounts to make payments to third parties. On December 15, 2008, Siemens settled charges with the DOJ, the SEC and the Munich Prosecutor's Office for a record-breaking one billion six hundred million dollars billion in fines and penalties.<sup>386</sup>

Nigeria illustrates both the national and the international aspects of current attempts to crack down on corruption as can be seen in the Halliburton, Jefferson and Siemens cases. Nevertheless, corruption remains a significant obstacle for companies doing business in Nigeria. For example, in the World Economic Forum's 2008-09 Global Competitiveness Report, corruption emerged as the third most problematic factor for doing business in Nigeria, after 'inadequate supply of infrastructure' and 'access to financing'.<sup>387</sup> Senior business people expressed a similar view

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<sup>386</sup> For a full compendium of facilitation payments paid by US companies to Nigerian officials, see <https://secure.traceinternational.org/compendium/search.asp>.

<sup>387</sup> See <https://members.weforum.org/pdf/GCR08/GCR08.pdf>



when interviewed for Control Risks' Facing up to Corruption in Nigeria report, which was released in May 2009.<sup>388</sup>

Obviously, the unavoidable corruption or facilitation payment as it were would discourage companies and foreign investors who want to do business in Nigeria but do not want to be saddled with bribing government officials to secure contracts. Facilitation payments carry legal risks even if they are permitted under the anti-bribery laws of a particular country. US companies should recognize the waning of the argument supporting a facilitation payment exception and should develop compliance policies that do not permit any kind of grease payments.<sup>389</sup> Facilitation payments fosters a culture of corruption among governmental officials, Nigeria should enforce domestic bribery laws that prohibit such payments.

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<sup>388</sup> See [www.control-risks.com](http://www.control-risks.com)

<sup>389</sup> The Organisation for Economic Co-operation and Development OECD's February 2010 recommendation decries the "corrosive effect of small facilitation payments, particularly on sustainable economic development and the rule of law." As a result, member states should "periodically review their policies and approach on small facilitation payments in order to effectively combat the phenomenon," and should "encourage companies to prohibit or discourage" facilitating payments, "recognizing that such payments are generally illegal in the countries where they are made, and must in all cases be accurately accounted for in such companies' books and financial records." In March 2010, the OECD called directly on businesses to implement the recommendations. For a full text, see OECD Working Group on Bribery in International Business Transactions, *Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions*, § VI (Nov. 26, 2009, adopted by the Council Feb. 18, 2010 with amendments), available at <http://www.oecd.org/dataoecd/11/40/44176910.pdf>.

## **7.0 STRENGTHING OF ANTI CORRUPTION COMMISSIONS AND LAWS IN NIGERIA**

### **7.1 INTRODUCTION**

Anticorruption efforts should be synonymous with fundamental state building and this entails, first and foremost, developing the capacity of the state to deliver basic public goods, such as public order and stability, health care, social protection and anti poverty programs to elevate poverty. Enhancing the capacity of basic institutions of public administration and the civil service is necessary.<sup>390</sup> To effectively tackle corruption in Nigeria the state of affairs in the country needs to be improved. By state of affairs I mean standard of living, the availability and access to basic infrastructures. Where people are impoverished, they will do anything to survive and that also involves been corrupt. Decades of development failure and the consequent escalation of poverty have created a desperate need among Nigerians to search for the cause(s) of their plight.

In Nigeria, access to public goods and service is fraught with corruption and bureaucratic bottleneck, you find yourself paying for basic infrastructural and fundamental human rights services. You want a government clearance you are clearly entitled to, you have to bribery to expedite the process, you want basic health care, you have to pay to expedite the process of seeing a doctor on time. You want your child to get accepted into a university institution, you have to bribe to ensure he gets in, the list is endless. Crimes of corruption in Nigeria are protected by a code of silence, parties to the offence have no incentive to come forward to give evidence. Corruption is an enemy so elusive that the temptation to accept it as a necessary evil is a strong one.

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<sup>390</sup> [http://lnweb90.worldbank.org/eca/eca.nsf/Attachments/Anticorruption5/\\$File/chapter5.pdf](http://lnweb90.worldbank.org/eca/eca.nsf/Attachments/Anticorruption5/$File/chapter5.pdf).

Corruption is a hidden crime, therefore, anti corruption institutions and other important components of government must have an intelligence function, that look for new ways that has been abused by the system because the enemy is cognizant and will always come up with their own strategies to beat the system, when we fight corruption, corruption fights back. Anti Corruption Commissions must be independent (politically as well as operationally) from outside influence in order to enable it to pursue corruption allegations at all levels (this can be achieved through constitutionally guaranteed independence or through the establishment of adequate accountability/ oversight mechanisms) and they need to operate on the basis of solid and comprehensive legal frameworks.<sup>391</sup>

On the issue of independence, International instruments such as the United Nations Convention against Corruption and the African Union Convention on Preventing and Combating Corruption (UNCAC) refer to the establishment of dedicated anti-corruption bodies as among measures to prevent corruption. UNCAC<sup>392</sup> states that each State Party shall grant the body or bodies that prevents corruption the necessary independence, in accordance with the fundamental principles of its legal system, to enable the body or bodies to carry out its or their functions effectively and free from any undue influence. Similarly, the African Union Convention on Prevention and Combating Corruption<sup>393</sup> states that State parties should establish, maintain and strengthen independent national anticorruption authorities or agencies.

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<sup>391</sup> Without enforceable and effective laws, an agency is constrained. For example in Hong Kong, the authorities recognized the value of a legal framework within The Independent Commission Against Corruption (ICAC). Similarly, Corrupt Practices Investigation Bureau (CPIB) in Singapore and the New South Wales Independent Commission Against Corruption (ICAC) also have the backing (after repeated amendments) of strong enabling legislation.

<sup>392</sup> United Nations Convention Against Corruption, Article 6.

<sup>393</sup> African Union Convention on Prevention and Combating Corruption, Article 5.

The Anti Corruption Commissions must have adequate financial,<sup>394</sup> human<sup>395</sup> and technical resources as well as organizational capacity to effectively combat corruption, it must operate under exemplary leadership which must be of the highest integrity, they must have adequate powers for investigation, i.e. to question witnesses, access documents, etc. as well as the possibility to prosecute as and where required. The experience of Nigeria is that one cannot rely on one single solution in fighting corruption because of the systematic nature of corruption, therefore, the whole system needs to be overhauled and strengthened because of the interwoven nature of the Nigerian system.

In essence, giving the issues relating to political change, corruption is not likely to just disappear, however, the establishment of properly focused independent anticorruption agencies is imperative and may provide an effective means of promoting integrity in government. Such goals will only be achieved on an incremental and gradual basis but the use of an anticorruption agency may offer a medium and stepping stone with a number of corresponding roles that may offer with time a sustainable anti-corruption strategy to help progress toward good government. Corruption takes many forms and a one size fits all or cookie cutter approach is not the solution, each country is unique and each solution has to be tailor-made. These Commissions must have strong political backing at the highest levels of government, moreover, a serious anticorruption program cannot be imposed from the outside, it requires committed and credible leadership from within, ideally from the highest levels of the state.

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<sup>394</sup> For example, the budget for Hong Kong ICAC was US\$94 million in 2002/US\$90 million in 2001; The ICAC in New South Wales operates with an annual budget of about US\$8.7 million. Botswana's Directorate on Corruption and Economic Crime has a US\$2.4 million budget.

<sup>395</sup> Hong Kong's ICAC has a manpower of 1,300 staff for a total population of 6.8 million. Thailand's NCCC has a manpower of approximately 500 for a total population of 65 million. It explains some of the difficulties the NCCC encounters in covering its mandate.

For the purpose of my dissertation, the anti corruption commissions I shall be focusing on are The Code of Conduct Bureau (CCB), The Corrupt Practices and Other Related Offences Commission (ICPC), and The Economic and Financial Crimes Commission (EFCC). I shall give a legal analysis of these commissions to assess their effectiveness, lapses and recommendations on the way forward. I shall also discuss the role Freedom of Information Law in Nigeria in curbing corruption while looking at Freedom of Information developments in India and South Africa.

**Table 3: COMPARATIVE ANALYSIS OF NIGERIAN ANTI CORRUPTION AGENCIES.**

	<b>The Economic and Financial Crimes Commission (EFCC)</b>	<b>The Independent Corrupt Practices and Other Related Offences Act (ICPC)</b>	<b>The Code of Conduct Bureau and Tribunal (CCB)</b>
<b>Established to</b>	Investigate all financial crimes including advance fee fraud, money laundering, counterfeiting, illegal charged transfer, future market fraud, fraudulent encashment of negotiable instruments, computer credit card fraud, contract, scam.etc.	To receive and investigate any report and in appropriate cases, to prosecute cases of fraud or corruption.	To deal with complaints of corruption by public servants for the breaches of its provisions. To receive, examine, take and retain such assets of declarations by Public officers. Also to receive complaints about non-compliance with or breach of this Act and where the Bureau considers it necessary to do so, refer such complaints to the Code of Conduct Tribunal.
<b>Established by</b>	Economic and Financial Crimes Commission (Establishment) Act 2004	Corrupt Practices and Other Related Offences Act, 2000	The Code of Conduct Bureau and Tribunal Act, Chapter 56 LFN 1990
<b>Commenced on</b>	23 <sup>rd</sup> March, 2004	1st June, 2000	1990
<b>Jurisdiction</b>	The Federal High Court or High Court of a State of the Federal Capital Territory	The Chief Judge of a State or the Federal Capital Territory, Abuja	Code of Conduct Tribunal
<b>Appointment</b>	The Chairman and members of the Committee other than ex – officio members shall be appointed by the President subject to the confirmation of the Senate	The Chairman and members of the Commission shall be appointed by the President, upon confirmation by the Senate	The chairman and the other members shall be appointed by the President, Commander-in-Chief of the Armed Forces.
<b>Act is Applicable to</b>	Individuals, corporate bodies, organizations, groups	Individuals, public bodies, parastatals,	Public Officers.

## **7.2 LEGAL ANALYSIS OF THE CODE OF CONDUCT BUREAU (CCB), INDEPENDENT CORRUPT PRACTICES AND OTHER RELATED OFFENCES COMMISSION (ICPC), AND THE ECONOMIC AND FINANCIAL CRIMES COMMISSION (EFCC)**

Historically, the office of Director of Public Prosecutions occupied paramount status of prosecution in Nigeria and pre and post independence Constitutions referred expressly to the Director of Public Prosecutions, investing in that office, the exclusive control over prosecutions. Also noteworthy is the fact that there existed under this Constitutional arrangement an office of the Attorney-General as a cabinet member. However it would seem that the notion of an independent prosecutor was too radical in these early stages of statehood for soon after, subsequent constitutions transferred to the Attorney-General the control over prosecutions.<sup>396</sup> Entering the 1970s, we saw the evolution of various agencies tasked with jurisdiction of prosecuting specific offences like corruption as it relates to my dissertation.

In the 21<sup>st</sup> century, we now have three major anti corruption commission whose establishment mission is to prevent, investigate and prosecute corruption. In this chapter, I shall be analyzing all three anti corruption commission by examining the acts in order to pick on areas I believe needs development or amendment as applicable and proffer my recommendations as appropriate. My general recommendation for all three commissions is the need to be structurally independent with sufficient power to act, adherence to the constitutional guidelines of the country as well as preserving the fundamental human rights of an accused person.

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<sup>396</sup> See e.g. section 97 1960 Constitution of Nigeria see also section 104 Constitution of the Federal Republic of Nigeria (1963) and further B.O. Nwabueze, *A Constitutional History of Nigeria*, First edition, London, Hurst & Co pg. 56 (1982)

### **7.2.1 Legal analysis of The Code of Conduct Bureau (CCB).**

As already discussed, The Code of Conduct Bureau and Tribunal Act, Chapter 56 LFN 1990 gave the Bureau the mandate to establish and maintain a high standard of public morality in the conduct of government business and to ensure that the actions and behavior of public officers conform to the highest standard of public morality and accountability. To implement the above mandate, section 3, part 1 of the Third Schedule to the 1999 Constitution of the Federal Republic of Nigeria has provided an enabling legal environment for the Bureau to:

Receive declarations by public officers under paragraph 11 of part 1 of the fifth Schedule to the Constitution, examine the declarations in accordance with the requirements of the Code of Conduct or any Law, retain custody of such declarations and make them available for inspection by any citizen of Nigeria on such terms and conditions as the National Assembly may prescribe, ensure compliance with and where appropriate, enforce the provisions of the Code of Conduct or any law relating thereto, receive complaints about non – compliance with or breach of the provisions of the Code of Conduct or any law in relation thereto, investigate the complaints and, where appropriate, refer such matters to the Code of Conduct Tribunal, appoint, promote, dismiss and exercise disciplinary control over the staff of the Code of Conduct Bureau in accordance with the provisions of an Act of the National Assembly enacted in that behalf and finally to carry out such other functions as may be conferred upon it by the National Assembly.

Public officers for the purposes of the Code of Conduct Include,<sup>397</sup>

- President of Nigeria.
- Vice President of Nigeria.
- President and Deputy President of the Senate.

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<sup>397</sup> <http://www.codeofconductbureau.com/needCCB.html>.



- Speaker and Deputy Speaker of the House of Representatives and Speakers and Deputy Speakers of the House of State Assemblies, all members and staff of Legislative houses.
- Governors and Deputy Governors of the States.
- Chief Justice of Nigeria, Justice of the Supreme Court, President and Justices of the Court of Appeal, all other judicial officers and all staff of law.
- Attorney General of the Federation and Attorney General of each state.
- Ministers of the Government of the Federation and Commissioners of the government of the States, Chief of Defense Staff, Chief of Army staff, Chief of Naval Staff, Chief of Air Staff and all members of the armed forces of the federation.
- Inspector General of Police, Deputy Inspector General of Police, all members of the Nigeria Police Force and other government security agencies established by law.
- Secretary of the Government of the Federation, head of civil service, permanent secretaries, Director – General and all other persons in the civil service of the federation or of the state.
- Ambassadors, high commissioners and other officers in Nigeria missions abroad.
- Chairman, members of the boards or other governing bodies and staff of statutory corporations and of companies in which the Federal or State government has controlling shares.
- All staff of universities, colleges and institutions owned and financed by the federal or state government or local government councils.
- Chairman, members and staff of permanent commissions or councils appointed on full time basis.

However, the immunity clauses of section 308 of the Constitution that restricts the institution of civil or criminal proceedings against the President, Vice-President, Governor or the Deputy Governor have been employed successfully against the Code of Conduct Tribunal.<sup>398</sup> This immunity clause makes both the Bureau and Tribunal ineffective.

#### **7.2.1.1 Establishment of Code of Conduct Tribunal**

The tribunal shall consist of a chairman and two other members, the chairman shall be a person who has held or is qualified to hold office as a judge of a superior Court of record in Nigeria and shall receive such remuneration as may be prescribed by law.<sup>399</sup> A person holding the office of chairman or member of the Tribunal shall not be removed from his office except upon an address supported by two-thirds majority of each House of the National Assembly, praying that he be so removed for inability to discharge the functions of the office in question (whether arising from infirmity of mind or body) or for misconduct or for contravention of this Act. A person holding the office of chairman or member of the Tribunal shall not be removed from office before retiring age, save in accordance with the provisions of this section.<sup>400</sup>

#### **7.2.1.2 Powers of the Tribunal to Impose Punishment**

Where the Tribunal finds a public officer guilty of contravening any of the provisions of this Act, it shall impose upon that officer any of the punishments specified under subsection 2 of the tribunal Act which shall include vacation of office or any elective or nominated office, as the

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<sup>398</sup> Attorney-General of the Federation, Code of Conduct Bureau, and Code of Conduct Tribunal V. Alh. Atiku Abubakar 8 NWLR (Pt 1035) 117 at 155 (2007), Atiku Abubakar V. Attorney-General of the Federation 3 NWLR (Pt 1022) 546 at 648 (2007).

<sup>399</sup> *Supra* note at 382.

<sup>400</sup> *Id.*

case may be, disqualification from holding any public office (whether elective or not) for a period not exceeding ten years, seizure and forfeiture to the State of any property acquired in abuse or corruption of office. The punishments mentioned above shall be without prejudice to the penalties that may be imposed by any law where the breach of conduct is also a criminal offence under the Criminal Code or any other enactment or law. Also, where the Tribunal gives a decision as to whether or not a person is guilty of a contravention of any of the provisions of this Act, an appeal shall lie as of right. In addition, any right of appeal to the Court of Appeal from the decision of the Tribunal shall be exercised in accordance with the provisions of the rules of Court for the time being in force regulating the powers, practice and procedure of the Court of Appeal.

### **7.2.1.3 Asset Declaration under the Code of Conduct Bureau**

This department has an important responsibility for the administration of asset declaration to all public officers and the verification of same. Over the years the administration of assets declarations has taken a large chunk of the energy and resources of the Bureau partly because the Bureau did not have the powers to investigate complaints until recently.<sup>401</sup> Though assets declaration is a Constitutional provision for all public officers irrespective of status in service,<sup>402</sup> the Bureau had for logistical reasons pegged the requirement to declare as it found convenient, a major function of the Bureau beyond taking custody of the forms is to verify the claims by declarant, personnel skilled in verification, investigation, other operations of the

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<sup>401</sup> See statement by Sam Saba, Secretary of the Nigerian Code of Conduct Bureau available at <http://www.icac.org.hk/news/issue8eng/button2.htm>.

<sup>402</sup> Constitution, Third Schedule, Part 1, (1999) (Nigeria).

Bureau that involves a lot of resources and logistics which the Bureau has in very short supply.<sup>403</sup>

Now, the judicial determination of Section (3)(c) of Part I of the Third Schedule to the 1999 Constitution<sup>404</sup> as to whether access of declaration should be made available for inspection by every citizen of Nigeria was decided in the case of Incorporated Trustees of Media Rights Agenda(MRA) v The Code of Conduct Bureau and Attorney-General of the Federation. By an Originating Summons filed in August 1999 at the Federal High Court by MRA, the organization which is a nongovernmental organization in Lagos, Nigeria sought to compel the Code of Conduct Bureau to release the declaration of assets made by forty public officers, including that of former President Olusegun Obasanjo. MRA also asked the Court to make a judicial determination of the following questions:

- Whether every Nigerian citizen has a right to ensure that Nigerian public officers comply with the provisions of the code of conduct for public officers set out in Part 1 of the Fifth Schedule to the 1999 Constitution.
- If the answer is in the affirmative, whether the right of every Nigerian citizen to ensure compliance with the code of conduct for public officers also confers on every citizen by necessary implication, a right of access to assets declaration forms submitted to the Code of Conduct Bureau by public officers pursuant to Section 3[a] of Part 1 of the Third Schedule and Section 11(1) of Part 1 of the Fifth Schedule to the 1999 Constitution.
- If the answer is yes, whether the true interpretation and effect of Section 3(c) of Part 1 of the Third Schedule to the Constitution is that every Nigerian, *prima facie*, has an uninhibited right of access to assets declarations made by public officers, which can only

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<sup>403</sup> Saba, *supra* note at 386.

<sup>404</sup> States that the Bureau shall have the power to retain custody of such declarations and make them available for inspection by any citizen of Nigeria on such terms and conditions as the National Assembly may prescribe.

be circumscribed if and when the National Assembly imposes lawful conditions for that purpose; and

- If the answer to this question is also in the affirmative, whether the Code of Conduct Bureau's refusal to give MRA access to the assets declarations made by the affected public officers, whose names are listed in the Schedule to the Originating Summons, is unconstitutional.

In the suit, MRA contended that the true interpretation and effect of section (3)(c) of Part 1 of the Third Schedule to the 1999 Constitution is that every Nigerian citizen has an uninhibited right of access to assets declarations made by public officers, that the refusal of the Code of Conduct Bureau to allow it access to the assets declarations made by forty named public officers is unconstitutional.<sup>405</sup> They also contended that it was concerned that there have been major violations of the provisions of the code of conduct for public officers set out in the Constitution, in particular that a number of executive and legislative public office holders have assumed their various offices without submitting declarations of their assets to the Bureau, as stipulated by the code of conduct for public officers.<sup>406</sup>

In deciding the case, Justice Gbolahan Jinadu of the Federal High Court ruled that Nigerians cannot inspect the assets declarations made by public officers until the National Assembly prescribes the conditions for its exercise. He stated that the prescription of terms and conditions by the National Assembly is a pre-condition to the exercise of unimpeded right of access to inspect the declaration forms submitted to the Code of Conduct Bureau by public officers. He also added that members of the public have no right to ensure that public officers

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<sup>405</sup> [http://www.mediarightsagenda.org/pressept\\_99.html](http://www.mediarightsagenda.org/pressept_99.html)

<sup>406</sup> Id.

comply with the code of conduct for public officers because that right is reserved for the Bureau by the provisions of Paragraph 3(d) in Part 1 of the Third Schedule to the 1999 Constitution. The suit was struck out. The contention of Section (3c) of Part 1 of the Third Schedule to the 1999 Constitution is the sentence.... “**on such terms and conditions as the National Assembly may prescribe**”. Obviously till date, such terms and conditions are yet to be prescribed by the National Assembly, this lacuna has been overlooked over the years and needs to be addressed and amended by the National Assembly to afford a proper interpretation of the constitution.

#### **7.2.1.4 Investigative and Monitoring powers of the Bureau.**

The Bureau through its department of investigation and monitoring, receives complaints from members of the public on breaches of the code of conduct by public officers. This ranges from indiscipline, abuse of office, lack of accountability, corruption and unethical conduct in government business, among others. The power of investigation is a very recent addition to the powers conferred on the Bureau, while the department has commenced its investigation on complaints and petitions sent to the Bureau, it has an urgent need to develop its capacity in this area through training and orientation on investigation and related matters. In the year 2000, for example, the Bureau received a number of petitions against public officers out of which forty nine are in various stages of investigation.<sup>407</sup>

#### **7.2.1.5 Education and Advisory Services Department**

Apart from handling staff training and public enlightenment, the education and advisory services department also promotes an educational system that motivates positive moral and social values. The need for an effective and efficient Code of Conduct Bureau in Nigeria cannot

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<sup>407</sup> Id.

be emphasized enough, this is particularly against the backdrop of fraud and corruption that has taken over the economy. Nigerians have suffered physical deficiency and poverty directly as a result of the endemic fraud and institutional corruption that has besieged the country. In order to confront this social menace, a set of ethics and rules of behaviors for public officers becomes necessary as a way of re-orientating the attitude of public officers away from the prevailing malaise. How many public officers actually declare their assets? Does the bureau go on a verification mission of claims made by public officers in their assets declaration to the Bureau? These questions I cannot answer for certain because of the unavailability of data and information.

#### **7.2.1.6 Maintaining bank accounts in any country outside Nigeria**

Section 7 of the Code of Conduct Bureau and Tribunal Act states that any public officer specified in the second schedule of the Act or any persons as the Armed Forces Ruling Council, may from time to time, by order prescribed shall not maintain or operate a bank account in any country outside Nigeria. Similarly, the Code of Conduct for public officers that is spelt out in the 1999 Nigerian constitution fifth schedule, part I also states that public officers should not maintain or operate a bank account in any country outside Nigeria, despite the clear wordings of section 7 of the Code and the Constitution, there has been numerous cases of public officers been linked to foreign bank accounts in contravention to the code.<sup>408</sup>

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<sup>408</sup> In 2004, former governor of Plateau state, Joshua Dariya was found guilty of money laundering contrary to Section 14 (1) of the Money Laundering (Prohibition) Act, Illegal transaction in foreign exchange contrary to Section 29 of the Foreign Exchange (Monitoring etc) Act, 1995, False Declaration contrary to Section 164 of the Penal Code, False Declaration contrary to Section 25(1 ) of The Corrupt Practices etc Act, False Declaration contrary to Section 11 (1) and (2) of the Code of Conduct for Public Officers contained in the 5th Schedule to the 1999 Constitution, Maintaining foreign bank accounts contrary to Section 3 of the Code of Conduct for Public Officers contained in the 5th Schedule to the 1999 Constitution. See Former Attorney-General, Akinlolu Olujimi's letter to Plateau State Speaker, Simon Lalong available at [http://www.amanaonline.com/Articles/art\\_2411.htm](http://www.amanaonline.com/Articles/art_2411.htm). Also, in 2005, Diepreye Alamiyeseigha former governor of Bayelsa state was charged by a British Court with

### 7.2.1.7 Conclusion

The Code of Conduct Bureau and Tribunal Act provide for the retention of declarations and to make such declaration available for inspection by any citizen of Nigeria on “such terms and conditions as the National Assembly may prescribe”. This provision should be amended to include those prescribed terms and conditions by the National Assembly whatever it may be. In addition, those terms and conditions should enable the Bureau to enforce open declaration of assets every two years in order to make the declaration process public and transparent, as such this law will enable Nigerians monitor the acquisition of wealth or not by public officials. For easy accessibility, asset declaration should be made public via an online asset registry because of the increased number of people who have access to the internet in Nigeria. I believe that asset disclosure program will enhance the legitimacy of government in the eyes of the public.

Insufficient funding militates against the critical functions of the Bureau such as assets declaration administration, verification of assets exercise, investigation of cases, computerization of mass data generation of assets declared by public officers, publicity and enlightenment. As such, adequate funding should be made available to the Bureau and Tribunal so that they can effectively execute their mandates.

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laundering 1.8 million pounds where he jumped bail and mysteriously appearing in Nigeria. See <http://www.assetrecovery.org/kc/node/24d05648-b4b0-11dd-a1f9-7986f5e51dc8.0;jsessionid=3E1DAA9BC8D402D673B4D12B1751D30A>. Similarly, James Ibori, former governor of Delta State, several foreign accounts were linked to him. He is presently being shielded by some powerful people in Nigeria from prosecution and is still on the run from the law in Britain and America for money laundering charges. See *Allegations of corruption against ex governor, James Ibori*, Tell (Nigeria) Nov.23, 2007.



### **7.3 LEGAL ANALYSIS OF THE CORRUPT PRACTICES AND OTHER RELATED OFFENCES COMMISSION (ICPC)**

As already pointed out, section 3 of the Act<sup>409</sup> establishes the Independent Corrupt Practices and Other Related Offences Commission to function independently of the direction or control of any other person or authority. Section 6 of the Act charges the Commission with extensive administrative, educational and investigatory duties, it has the duty to receive, investigate complaints and also to prosecute offenders in appropriate cases where reasonable grounds exist for suspecting that an offence has been committed under the Act.<sup>410</sup> The Commission is also empowered to subject the practices, systems and procedures of public bodies to periodic review with a view to eliminating opportunities for fraud or corruption, to advise, assist public officers, agencies on ways to curtail the likelihood or incidence of bribery, corruption and related offences, to enlist and foster public support in combating corruption.<sup>411</sup>

#### **7.3.1 The Issue of Presumption of Innocence, Burden of Proof and Evidential Burden**

A number of provisions under sections 3-19 of the Act relate to presumption of innocence in the offences of corruption including bribery, gratification, 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,

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<sup>409</sup> See the Corrupt Practices and other Related Offences Act 2000.

<sup>410</sup> Id at 6(a)

<sup>411</sup> Id 6(b)

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.

Still on section 53, 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, so 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 or non-existence of a fact in issue, due regard being the standard of proof demanded of the party under such obligation".<sup>412</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

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<sup>412</sup> Tapper, Collin, Cross & Tapper on Evidence, pg. 132. Oxford University Press. (2010).

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.

Now, under the constitution<sup>413</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 acts 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.

### **7.3.2 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 defense 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 defense lawyer only which is good for the sake of

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<sup>413</sup> Constitution, Art 35(2) (1999) (Nigeria).

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 and shall also be liable to a fine not exceeding one hundred thousand naira.” Whilst this provision discourages people from bearing false witness, I believe 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. This provision needs to be reviewed. I recommend imprisonment be reduced to six months imprisonment and fine should be increased to five hundred thousand Naira, lower the sentence, increase the fine.

### **7.3.3 Conclusion**

The Corrupt Practices and Other Related Offences Act, 2000, is a good piece of legislation. However, it does not have proactive powers to function. The mandate of ICPC is to prohibit and prescribe punishment for corrupt practices and other related offences, to receive and investigate reports of corruption and in appropriate cases prosecute the offenders. However, for ICPC to carry out its mandate and prosecute corruption cases, it is only required to act upon petitions written by people to its commission. Section 27(1) of the Act explicitly states that every report relating to the commission of an offence under this Act may be made orally or in writing to an

officer of the Commission. In addition to my previous recommendations, it is in my opinion that the existence of this commission is a mere waste of time and resources because of its crawling pace in prosecuting offenses and I recommend it should be dissolved. My reasons shall be explained further in the accompanying pages.

#### **7.4 LEGAL ANALYSIS OF THE ECONOMIC AND FINANCIAL CRIMES**

##### **COMMISSION (EFCC)**

Section 1 of the Act<sup>414</sup> establishes the Economic and Financial Crimes Commission and Section 6 of the Act states that the Commission shall be responsible for the enforcement and administration of the provisions of this act, the investigation of all financial crimes as stated in the act, the co-ordination and enforcement of all economic and financial crime laws conferred on any other person or authority. The adoption of measures to identify, trace, freeze, confiscate or seize proceeds derived from terrorist activities, economic and financial crimes related offences or the properties the value of which corresponds to such proceeds. The adoption of measures to eradicate the commission of economic and financial crimes, coordinated preventive and regulatory actions, introduction and maintenance of investigative and control techniques on the prevention of economic and financial related crimes. The facilitation of rapid exchange of scientific and technical information and the conduct of joint operations geared towards the eradication of economic and financial crimes. The examination and investigation of all reported cases of economic and financial crimes with a view to identifying individuals, corporate bodies or groups involved. ..et al.

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<sup>414</sup> See generally the Economic and Financial Crimes Commission (Establishment) Act 2004

Under Section 7 of the Act, the Commission has the power to cause investigations to be conducted as to whether any person, corporate body or organization has committed any offence under this Act or other law relating to economic and financial crimes and cause investigations to be conducted into the properties of any person if it appears to the commission that the person's lifestyle and extent of the properties are not justified by his source of income. This special power of the Commission is what makes it distinct from the Independent Corrupt Practices and other Related Offences Commission (ICPC) where petitions has to be written and submitted before it can take any action against the perpetrators.

#### **7.4.1 The Issue of Independence of the Commission**

Independence is a key issue in the design of most Anti Corruption Commissions and a continuous concern during their lifetime, by independence I mean the capacity to carry out its mission without political interference. Section 2(3) of the Act states that the Chairman and members of the Commission other than ex-officio members shall be appointed by the President and appointment shall be subject to the confirmation of the Senate. Section 3(2) further states that a member of the Commission may at any time be removed by the President for inability to discharge the functions of his office whether arising from infirmity of mind or body or any other cause or for misconduct or if the President is satisfied that it is not in the interest of the Commission or the interest of the public that the member should continue in office.

The independence of an anti-corruption agency is fundamental to its success, Independence from the government can allow the agency to resist the influence of individuals or groups with specific agendas, political or otherwise that may be in conflict with the interests of

government transparency and accountability. Some countries have Constitutional provisions that guarantee an anti-corruption agency's independence. Hong Kong is one instance illustrating the independence of an anti-corruption agency, Institutional safeguards, a legal mandate guarantee the independence of Hong Kong's Independent Commission against Corruption (ICAC). Legislation and the Hong Kong Constitution guarantee this independence.<sup>415</sup> In addition, while the Commission reports directly to Hong Kong's Chief Executive, four independent committees monitor the activities of the ICAC, these committees include representatives from civil society and an independent ICAC Complaints Committee, which reviews all complaints against the Commission itself.<sup>416</sup>

Australia/New South Wales,<sup>417</sup> Latvia<sup>418</sup> and South Korea also use institutional mechanisms to ensure the independence of their states' anti-corruption agencies, in Australia/New South Wales, a multi-party Parliamentary Joint Committees monitors and oversees the activities of the Independent Commission against Corruption and guarantees that the commission does not abuse its autonomy.<sup>419</sup> In Latvia and South Korea, different branches of government share the selection and appointment of anti-corruption agency staff. In Latvia, the Parliament appoints the head of the anti-corruption agency after a recommendation by the Executive Cabinet.<sup>420</sup> The President of South Korea appoints the Chairman and standing members of the agency, and the Parliament and

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<sup>415</sup> See the Basic Law of the Hong Kong Special Administrative Region, Art. 57 (1997) (Hong Kong) available at [http://www.info.gov.hk/basic\\_law/fulltext/index.htm](http://www.info.gov.hk/basic_law/fulltext/index.htm).

<sup>416</sup> See UNDP, Regional Centre in Bangkok, Institutional Arrangements to Combat Corruption: A Comparative Study (2005) available at [http://regionalcentrebangkok.undp.or.th/practices/governance/documents/Corruption\\_Comparative\\_Study-200512.pdf](http://regionalcentrebangkok.undp.or.th/practices/governance/documents/Corruption_Comparative_Study-200512.pdf).

<sup>417</sup> See Independent Commission against Corruption Act Act No. 35 (1988) (Australia) available at <http://www.legislation.nsw.gov.au/maintop/scanact/inforce/NONE/0>.

<sup>418</sup> See Law on Corruption Prevention and Combating Bureau (Latvia) (2002). [http://www.knab.gov.lv/uploads/en\\_hm/EN\\_bureau.htm](http://www.knab.gov.lv/uploads/en_hm/EN_bureau.htm).

<sup>419</sup> See John R. Heilbrunn, *Anti-Corruption Commissions Panacea or Real Medicine to Fight Corruption?* World Bank Institute available at <http://siteresources.worldbank.org/WBI/Resources/wbi37234Heilbrunn.pdf>

<sup>420</sup> UNDP, *supra* note 417.

Chief Justice recommend three members each.<sup>421</sup>

Mr. Nuhu Ribabu who was the pioneer chairman of the Economic and Financial Crimes Commission (EFCC) from 2003 till 2007 was appointed by the then President, Olusegun Obasanjo. Mr. Ribadu started off enthusiastically and was applauded by Nigerians, after a while, the popular view and concerns of Nigerians was that Mr. Ribadu was being used as a tool by President Obasanjo to taunt his political opponents. On May 2007, a new administration was sworn in and President Yaradua took over as the President of Nigeria, before Nigerians knew what was happening, Mr. Ribadu was removed from office, sent on training, survived two failed assassination tempt and was forced to go on exile.<sup>422</sup> Some Nigerians I spoke to say Mr. Ribadu deserved what he got because he allowed himself to be used by the Obasanjo's government and he was accused of selectively prosecuting Obasanjo's political enemies. The point I am trying to emphasize here is that because the President appointed Mr. Ribadu, he was able to use him as he pleased, the President was Mr. Ribadu's direct boss hence, Ribadu was on a tight leash.

Having said that, the executive branch of government should not have the jurisdiction to appoint or remove heads of anti corruption commissions, where the President has the power to appoint and remove the chairman and other members of the commission, it takes from the commission its independence and makes the commission susceptible to interference by the President and the President's political affiliations. To secure the independence of the EFCC, I recommend that the appointment and removal of Executive Chairman should be the sole responsibility of the National Judicial Council of Nigeria.

The National Judicial Council is one of the Federal Executive Bodies created by virtue of section 153 of the 1999 Constitution of Nigeria, it was established in order to insulate the

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<sup>421</sup> Transparency International, *National Integrity Systems Country Study Report – Korea* (2001) available at [http://www.transparency.org/policy\\_research/nis/regional/asia\\_pacific](http://www.transparency.org/policy_research/nis/regional/asia_pacific) (last accessed Sept. 23, 2007).

<sup>422</sup> I personally interview Mr. Ribadu in Washington D.C. 2010.



Judiciary from the whims and caprices of the Executive hence guaranteeing the independence of this arm of government. I recommend the National Judicial Council of Nigeria because it is independent enough to appoint the chairman and other members of the committee without bias. For inclusion, nominations for appointment should come from civil society. This is to ensure that the voice of the people is included in the process. As regards removal, such members should be removed with cause by the National Judicial Council. I suggest with cause so as to limit the discretionary powers of removal by the National Judicial Council.

#### **7.4.2 The Issue of Prosecution of Offences and Compulsory Interrogation**

Section 19 of the Act generally states that the Federal High Court or High Court of a state of the Federal Capital Territory has jurisdiction to try offenders under this Act. The Court shall have the power notwithstanding anything to the contrary in any other enactment, to impose the penalties provided for in this Act. The Court should ensure that all matters brought before it by the Commission against any person, body or authority shall be conducted with dispatch and given accelerated hearing and the Court should adopt all legal measures necessary to avoid unnecessary delays and abuse in the conduct of matters brought by the Commission before it or against any person, body or authority.

Section 19 of the Act also states that the Chief Judge of the Federal High Court or a High Court of a State or the High Court of the Federal Capital Territory Abuja, as the case may be shall by order under his hand, designate a Court or judge he shall deem appropriate to hear and determine all cases under this act or other related offences under this Act, a Court or judge so designated shall give such matters priority over other matter pending before it.

In spite of the seeming arrests and arraignments of persons accused of corruption, the slow judicial process is very discouraging. The impunity in which people in power allegedly loot and steal is not only alarming but embarrassing, most Nigerians no longer express bitterness each time they hear of billions of naira being stolen from public coffers, what they feel is sadness and repulsion for a system which treats such cases with levity. If the Courts do not deliver rulings that will further render the existing acts upon which suspects are standing trial null and void, it is the defense counsel that will through frivolous applications frustrate the trial. The unduly slow pace of justice in Nigeria offers a safety valve for corrupt public officials as well as backlog of cases that are pending before various High Courts and the Federal High Court.<sup>423</sup>

At this point, I believe Nigeria is in dire need of special courts to try corruption cases, one of the advantages of the establishment of a specialized court or division is that the presiding judge will devote more time to corruption cases, the slow judicial processes by the courts do not allow the anti corruption commissions to achieve its goals. Just like the Nigerian electoral tribunals,<sup>424</sup> the establishment of special courts to hear corruption cases should be explored.

In Philippines, the government has a special court called Sandiganbayan to prosecute corruption cases, it is of the same level as the Court of appeal and it decides criminal and civil cases against government officials and employees accused of graft, corruption and other offences. The Court is composed of a presiding justice and fourteen other justices who sit in five divisions of three justices each in the trial and determination of cases. The Court has original and

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<sup>423</sup> See appendix 2 for a list of corruption cases pending in various Courts in Nigeria.

<sup>424</sup> Constitution, Art 285 (1999) (Nigeria).

appellate jurisdiction,<sup>425</sup> the Court gives its final verdict on a case within three month from the date of registration of the case.<sup>426</sup>

Another example of a special Court is the special anti-corruption Courts of Kenya which was established under the Anti-Corruption and Economic Crimes Act of 2003 (ACECA) and presided over by a special magistrate,<sup>427</sup> the innovative special anti-corruption Courts are established to deal with the corruption cases as a matter of priority. Section 4 of the ACECA emphasizes that, “notwithstanding anything contained in the Criminal Procedure Code or in any other law for the time being in force, the offences in this Act shall be tried by special magistrates only”.

Compulsory interrogation powers found in section 27 of the EFCC Act requires a person who has been arrested for an offence to make a written declaration on the location and provenance of his assets, to refuse to make the declaration or to make a false one is an offence punishable with five years imprisonment. This section is a contravention of 35(2) of the Nigerian constitution which states that any person who is arrested or detained shall have the right to remain silent or avoid answering any question until after consultation with a legal practitioner or any other person of his own choice. Compulsory interrogation is clearly an infringement of an accused person’s fundamental human rights.

## **7.5 THE OVERLAPPING FUNCTIONS IN THE ICPC AND THE EFCC ACT**

Offences are duplicated in anti-corruption statutes in Nigeria which is unnecessary because duplication of laws open avenues for double jeopardy which is unconstitutional. While I

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<sup>425</sup> Republic Act 3019, Anti Graft Act, Public Act 1379, Penal Act, Anti Money Laundering Act (Philippines).

<sup>426</sup> See Froilan L. Cabarios, Corruption Control in the Criminal Justice System of The Philippines; Public Attorney, Department of Justice, Public Attorney’s Office, Philippines.

<sup>427</sup> See Anti-Corruption and Economic Crimes Act, 2003, section 3.

shall sporadically discuss other anti corruption statutes, my main focus shall be overlapping functions in the ICPC and EFCC Act. The Criminal Code Act and the Penal Code provide for official corruption of public officers<sup>428</sup> and public officers taking gratification<sup>429</sup> and the Corrupt Practices and Other Related Offence Act, 2004 also provides for accepting gratification,<sup>430</sup> corrupt offers to public officers,<sup>431</sup> and corrupt demands by persons.<sup>432</sup>

EFCC investigates both the public and private sector, specifically the EFCC Act mandates the commission to combat financial and economic crimes; prevent, investigate, prosecute and enforce other laws and regulations including the Money Laundering Act 1995, the Money Laundering (Prohibition) act 2004, the Advance Fee Fraud and Other Fraud Related Offences Act 1995, the Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Act 1994, the Banks and other Financial Institutions Act 1991 and Miscellaneous Offences Act.<sup>433</sup>

### **7.5.1 Investigation of Offences and Interrogation of Offenders**

Sections 27, 28 and 29 of the Corrupt Practices and Other Related Offences Act, 2004(ICPC) provide for the power to investigate reports, inquire into information, power to examine persons and power to summon persons for examination respectively. The three sections generally provide for the power of investigation and interrogation.<sup>434</sup> Section 28 of the Act specifically empowers an officer to give three orders<sup>435</sup> which the person investigated must comply with.<sup>436</sup> Subject to

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<sup>428</sup> Section 98A and 98B of the Criminal Code Act and the Penal Code respectively.

<sup>429</sup> Section 115 and 115 of the Criminal Code Act and the Penal Code respectively.

<sup>430</sup> Section 8.

<sup>431</sup> Section 9.

<sup>432</sup> Section 10.

<sup>433</sup> See EFCC Establishment Act, Art 6 (2004).

<sup>434</sup> Section 27(3).

<sup>435</sup> Section 28(1)(a), (b) and (c),

the provisions of section 29 to 34 of the Act,<sup>437</sup> the Commission has the power to issue summons directed to a person complained against or any other person to attend before the Commission for the purpose of being examined in relation to the complaint or in relation to any other matter which may and or facilitate the investigation of the complaint.

Similarly, section 6 of the Economic and Financial Crimes Commission Act, 2004 (EFCC) provides for power of investigation by the Commission, the Commission has the power to cause investigations to be conducted as to whether any person, corporate body or organization has committed an offence under the Act or other law relating to economic and financial crimes.<sup>438</sup> The Commission has the power to cause investigations to be conducted into the properties of any person if it appears to it that the person's life style and extent of the properties are not justified by his source of income.<sup>439</sup> Since both Acts do not provide for the modus operandi of investigation and interrogation, officers of the anti-corruption bodies are expected, in the interest of the rule of law, to comply with the Criminal Procedure Act<sup>440</sup> and the Criminal Procedure Code<sup>441</sup> in their investigation and interrogation.<sup>442</sup>

## **7.5.2 Arrest, Search, Seizure and Forfeiture**

The ICPC Act does not specifically provide for the arrest of a person who is served with summons to appear before the Commission. It merely provides that a person who has been

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<sup>436</sup> Section 28(3) to (9). Section 28(10) provides penalty of three months imprisonment for non-compliance with the section.

<sup>437</sup> Section 29 provides for summons against suspects. Section 30 provides for forms and service of summons. Section 31 provides for mode of service. Section 32 provides for substituted service. Section 33 provides for acknowledgment of service. Section 34 provides for detention of person refusing to acknowledge service.

<sup>438</sup> Section 6(1)(a).

<sup>439</sup> Section 6(1)(b).

<sup>440</sup> Laws of the Federation of Nigeria, Cap. 41 (2004).

<sup>441</sup> Id. Note 1960.

<sup>442</sup> The Criminal Procedure Act applies to the Southern States and the Criminal Procedure Code applies to the Northern States.

served with a summons and refuses to appear before the Commission will be arrested and detained.<sup>443</sup> A provision, the Supreme Court declared unconstitutional in the case of Attorney-General of Ondo State v. Attorney-General of the Federation.<sup>444</sup> Similarly, the EFCC Act specifically provides for the arrest and apprehension of economic and financial crime perpetrators.<sup>445</sup>

By section 37 of the ICPC Act, an officer of the Commission in the course of his investigation may seize property which he has reasonable grounds to suspect is related to an offence.<sup>446</sup> Section 38 provides for the custody of seized property. Similarly, section 25 of the EFCC Act provides for seizure of property and specifically states that any property subject to forfeiture under the Act may be seized by the Commission in incidental to an arrest or search, in the case of property liable to forfeiture upon process issued by the Court following an application made by the Commission in accordance with the prescribed rules.<sup>447</sup>

While section 47 of the ICPC Act provides for the forfeiture of property upon prosecution for an offence, section 48 provides for forfeiture of property where there is no prosecution and the Chairman of the Commission is enjoined to apply to a Judge of the High Court for an order of forfeiture of the property before the expiration of twelve months from the date of the seizure. Similarly, sections 19, 20, 21, 22, 23 and 24 of the EFCC Act provide for forfeiture of properties. Section 19 provides for forfeiture after conviction in certain cases, section 20 provides for properties that will be forfeited by the Federal Government, section 21 and 22 provides for the forfeiture of foreign assets and passport and section 24 makes further general provision on forfeiture.

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<sup>443</sup> Section 35.

<sup>444</sup> *Supra* note at 180.

<sup>445</sup> Section 12(1)(b).

<sup>446</sup> Section 37(1).

<sup>447</sup> Section 25(1).

### 7.5.3 Decision to Prosecute

The decision to prosecute must be exercised judicially and judiciously and with utmost caution for fear of prosecuting and probably convicting an innocent person and the decision in most cases is taken by the prosecution. Section 61 of the Corrupt Practices and Other Related Offences Act, 2004 provides for the prosecution of offences. Every prosecution for an offence under the Act or any other law prohibiting bribery, corruption and other related offences will be deemed to be done with the consent of the Attorney-General.<sup>448</sup> By section 61(1) of the Act, prosecution of offences need not be by the Attorney-General, section 61(2) of the Act vests in the appropriate authority the power to prosecute offences however, the appropriate authority is not defined in the Act, this is a lacuna and should be addressed to avoid misconstruing the section.

Similarly, section 12 of the EFCC Act generally provides for special duties of the units of the Commission,<sup>449</sup> section 12(2) which provides that the legal and prosecution unit shall be charged with the responsibility for prosecuting offenders under the Act, supporting the general and assets investigation unit by providing the unit with legal advice and assistance whenever it is required, conducting such proceedings as may be necessary towards the recovering of any assets or property forfeited under the Act and performing such other legal duties as the Commission may refer to it from time to time.

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<sup>448</sup>Section 61(1).

<sup>449</sup> The Units are spelt out in section 11 of the Act. They are the General and Assets Investigation Unit, the Legal and Prosecution Unit, the Research Unit, the Administrative Unit and the Training Unit.

#### **7.5.4 Jurisdiction of Courts**

Offences in the Criminal Code Act and the Penal Code including corruption are usually tried in the High Court. Section 61(3) of the Corrupt Practices and Other Related Offences Act vests in the Chief Judge of a State or of the High Court of the Federal Capital Territory, Abuja the power to designate a Court or judge or such number of Courts or judges as he will deem appropriate to hear and determine all cases of bribery, corruption, fraud, or other related offences arising under the Act or any other laws prohibiting fraud, bribery, or corruption.

Similarly, section 18 of the EFCC Act provides that the Federal High Court or High Court of a State has jurisdiction to try offenders under the Act.<sup>450</sup> Section 19(1) of the Money Laundering (Prohibition) Act, 2004 provides that the Federal High Court shall have exclusive jurisdiction to try offences under the Act. Section 14 of the Advance Fee Fraud and Other Fraud Related Offences Act, 2006 provides that the Federal High Court or the High Court of the Federal Capital Territory and the High Court of the States shall have jurisdiction to try offences and impose penalties under the Act.

As it were, ICPC Act vests jurisdiction in the State High Court or the High Court of the Federal Capital Territory,<sup>451</sup> the EFCC Act vests jurisdiction in the Federal High Court or High Court of a State, the Money Laundering (Prohibition) Act vests in the Federal High Court exclusive jurisdiction and the Advance Fee Fraud and Other Fraud Related Offences Act vests jurisdiction in the Federal High Court, or the High Court of the Federal Capital Territory or the High Court of a State. Both the ICPC Act and the Advance Fee Fraud and Other Fraud Related Offences Act share in common in terms of jurisdiction, the High Court of the Federal Capital Territory and the High Court of a State.

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<sup>450</sup> Section 18(1).

<sup>451</sup> Section 61(3).



The EFCC Act also shares with the ICPC Act and the Advance Fee Fraud and Other Fraud Related Offences Act in terms of jurisdiction, the High Court of a State. While the ICPC Act, and the EFCC Act vest jurisdiction in two Courts, the Advance Fee Fraud and Other Fraud Related Offences Act vests jurisdiction in three Courts, the Money Laundering (Prohibition) Act vests jurisdiction in only the Federal High Court, a jurisdiction which is exclusive to that Court.

### **7.5.5 Conclusion**

As earlier stated, I recommend that the Independent Corrupt Practices and other Related Offences Commission (ICPC) should be dissolved by the National Assembly for its lack of proactiveness and its overlapping functions with the Economic and Financial Crimes Commission (EFCC) as I have emphasized above. Eliminating this problem of overlapping functions between both commissions would also eliminate instances of double jeopardy currently experienced in cases prosecuted by the agencies.<sup>452</sup> The law provides that nobody should be prosecuted or convicted twice on the same offence neither could the case be re-opened if he was convicted or discharged and acquitted.<sup>453</sup> The duplication of offences is a constraint in the successful prosecution of the anti-corruption offences. The creation of anticorruption commissions does not mean that the problems of corruption will miraculously disappear, If there is one lesson to be learnt from the history of anti corruption commissions in Nigeria is that there are no individual solutions to tackling corruption, anti corruption commissions are an innovative institutional response to corruption, but they are not the ultimate panacea.

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<sup>452</sup> For instance, former governor of Bayelsa state, Mr. Diepreye Alamiyeseigha was indicted under the ICPC Act and EFCC Act for the same offences.

<sup>453</sup> Constitution, Art 36(9) (1999) (Nigeria).

## **7.6 FREEDOM OF INFORMATION LAW AND ITS CRITICAL ROLE IN FIGHTING CORRUPTION; EXPERIENCES OF INDIA’S RIGHT TO INFORMATION ACT (RTI) AND THE SOUTH AFRICA’S PROMOTION OF ACCESS TO INFORMATION ACT.**

*“Knowledge will forever govern ignorance, and a people who mean to be their own governors, must arm themselves with the power knowledge gives. A popular government without popular information or the means of acquiring it is but a prologue to a farce or a tragedy or perhaps both”.<sup>454</sup> Fighting corruption requires transparency and accountability, which includes making information on public transactions open to the public. The dissemination of information about public affairs and the management of public issues is one of the most frequently-cited anticorruption measures”.*

Section 39 (1) of the Nigerian Constitution states that, every person shall be entitled to freedom of expression, including freedom to hold opinions and to receive and impart ideas and information without interference. For governance institutions and civil society groups working on transparency and anticorruption, access to information is very essential for them to monitor and expose corruption. Transparency in the structures and procedures for spending public funds and granting benefits helps prevent corruption by reducing the opportunities for corruption. Access to government records and information is an essential requirement for modern government, access facilitates public knowledge and discussion, it provides an important guard against abuses, mismanagement and corruption which can also be beneficial to governments themselves – openness and transparency in the decision making process can assist in developing

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<sup>454</sup> James Madison available at [http://www.jamesmadisonproject.org/news.php?news\\_id=6](http://www.jamesmadisonproject.org/news.php?news_id=6).

citizen trust in government actions and maintaining a civil and democratic society.<sup>455</sup>

Governments around the world are increasingly making more information about their activities available and over fifty countries around the world have now adopted comprehensive Freedom of Information(FOI) Acts to facilitate access to records held by government bodies and over thirty more have pending efforts. While FOI acts have been around for several centuries, over half of the FOI laws have been adopted in just the last ten years. The growth in transparency is in response to demands by civil society organizations, the media and international lenders.<sup>456</sup>

At the International level, the right to information finds articulation as a human right in most important basic human rights documents, namely the Universal Declaration of Human Rights,<sup>457</sup> the International Covenant on Civil and Political Rights.<sup>458</sup> At regional levels, there are numerous other human rights documents, which include this fundamental right for example, the European Convention for the Protection of Human Rights and Fundamental Freedoms,<sup>459</sup> the American Convention on Human Rights,<sup>460</sup> the African Charter on Human and People's Rights,<sup>461</sup> etc. The Commonwealth has also formulated principles on Freedom of Information, even the United Nations at its very inception in 1946, the General Assembly resolved that

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<sup>455</sup> David Banisar, Freedom of Information And Access To Government Records Around The World, (May 2004) available at [http://freedominfo.org/documents/global\\_survey2004.pdf](http://freedominfo.org/documents/global_survey2004.pdf).

<sup>456</sup> Id.

<sup>457</sup> See Article 19(2) of the Universal Declaration of Human Rights states that everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

<sup>458</sup> See Article 19 of the International Covenant on Civil and Political Rights states: "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers".

<sup>459</sup> See Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedom states that everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.

<sup>460</sup> See Article 13 of the American Convention on Human Rights states that everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.

<sup>461</sup> See Article 9(1) of the African Charter on Human and People's Rights states that Every individual shall have the right to receive information.

Freedom of Information is a fundamental human right and the touchstone for all freedoms to which the United Nations is consecrated.<sup>462</sup> The 2003 United Nations Convention against Corruption (UNCAC) entered into force in 2005 and its one hundred and forty signatories have committed to adopting access to information regimes, as well as to implementing other transparency measures in the conduct of state business<sup>463</sup>. Nigeria is a signatory to the Convention.

The potential of UNCAC is in three-fold:<sup>464</sup>

- It provides a global framework for combating corruption, by establishing worldwide standards that bind countries at all levels of economic and democratic development;
- It encapsulates the measures necessary to prevent corruption, including access to information and promotion of transparency in private finance, public procurement and national anti-corruption agencies;
- It sets legal standards for the criminalization of corrupt acts.

Article 10 of the Convention on public reporting encourages countries to adopt measures to improve public access to information as a means to fight corruption. It states “Taking into account the need to combat corruption, each State Party shall, in accordance with the fundamental principles of its domestic law, take such measures as may be necessary to enhance transparency in its public administration, including with regard to its organization, functioning and decision-making processes, where appropriate. Such measures may include”,

- (a) Adopting procedures or regulations allowing members of the general public to obtain, where appropriate, information on the organization, functioning and decision-making

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<sup>462</sup>United Nation General Assembly, (1946) Resolution 59(1), 65th Plenary Meeting, December 14.

<sup>463</sup> <http://www.unodc.org/unodc/en/treaties/CAC/index.html>.

<sup>464</sup><http://www.ifap.ru/library/book115.pdf>.

processes of its public administration. With due regard for the protection of privacy and personal data, on decisions and legal acts that concern members of the public;

(b) Simplifying administrative procedures, where appropriate, in order to facilitate public access to the competent decision-making authorities; and

(c) Publishing information, which may include periodic reports on the risks of corruption in its public administration.

In addition, Article 13 on “participation of society” states that each State Party shall take appropriate measures, within its means and in accordance with fundamental principles of its domestic law, to promote the active participation of individuals and groups outside the public sector, such as civil society, non-governmental organizations and community-based organizations, in the prevention of and the fight against corruption and to raise public awareness regarding the existence, causes and gravity of and the threat posed by corruption.

This participation should be strengthened by such measures as:

(a) Enhancing the transparency of and promoting the contribution of the public to decision making processes;

(b) Ensuring that the public has effective access to information;

The Commonwealth, an association of fifty three countries in 1980 adopted a resolution encouraging its members to enhance citizens’ access to information, in 1999 the Commonwealth Law Ministers recommended that member states adopt laws on Freedom of Information based on the principles of disclosure, promoting a culture of openness, limited exemptions, records management, and a right of review.<sup>465</sup> In 2003, the Commonwealth secretariat issued model bill

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<sup>465</sup> Communiqué issued by the Meeting of Commonwealth Law Ministers at the Port of Spain, Trinidad and Tobago, May 1999.

on Freedom of Information<sup>466</sup> the draft sets out detailed procedures for parliamentary systems based on the Freedom of Information laws in Canada, Australia and other Commonwealth countries.

On a regional level, the African Union Convention on Preventing and Combating Corruption<sup>467</sup> requires states parties to adopt measures that guarantee access to information. Article 9 of the Convention states that, each state party shall adopt such legislative and other measures to give effect to the right of access to any information that is required to assist in the fight against corruption and related offences. The African Union which created the African Commission on Human and Peoples' Rights<sup>468</sup> adopted the Declaration of Principles on Freedom of Expression in Africa on October 2002,<sup>469</sup> The Declaration calls on member states to recognize freedom of expression rights, section IV on "Freedom of Information" states:

1. Public bodies hold information not for themselves but as custodians of the public good and everyone has a right to access this information, subject only to clearly defined rules established by law.
2. The right to information shall be guaranteed by law in accordance with the following principles: everyone has the right to access information held by public bodies; everyone has the right to access information held by private bodies which is necessary for the exercise or protection of any right;

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<sup>466</sup> Commonwealth Secretariat, Freedom of Information Model Bill, May 2003.

[http://www.cpahq.org/CommonwealthFOIAct\\_pdf\\_media\\_public.aspx](http://www.cpahq.org/CommonwealthFOIAct_pdf_media_public.aspx)

<sup>467</sup> [http://www.africa-union.org/Official\\_documents/Treaties\\_%20Conventions\\_%20Protocols/Convention%20on%20Combating%20Corruption.pdf](http://www.africa-union.org/Official_documents/Treaties_%20Conventions_%20Protocols/Convention%20on%20Combating%20Corruption.pdf)

<sup>468</sup> See African Charter on Human and Peoples' Rights, Nairobi, Kenya, June 1981. <http://www.africaunion.org/root/au/Documents/Treaties/Text/Banjul%20Charter.pdf>.

<sup>469</sup> See Resolution on the Adoption of the Declaration of Principles on Freedom of Expression in Africa, African Commission on Human and Peoples' Rights, 32nd Session, 17 - 23 October 2002.

Any refusal to disclose information shall be subject to appeal to an independent body and/or the Courts; public bodies shall be required, even in the absence of a request, actively to publish important information of significant public interest;

No one shall be subject to any sanction for releasing in good faith information on wrongdoing, or that which would disclose a serious threat to health, safety or the environment, save where the imposition of sanctions serves a legitimate interest and is necessary in a democratic society; and secrecy laws shall be amended as necessary to comply with Freedom of Information principles.

3. Everyone has the right to access and update or otherwise correct their personal information, whether it is held by public or by private bodies.<sup>470</sup>

Toeing the same line, the Treaty of ECOWAS of 1975 encourages the free flow of information within national borders as well as regional cooperation in the area of information. Article 65 of the Treaty states that member states undertake to co-ordinate their efforts, pool their resources in order to promote the exchange of radio and television programmes at bilateral and regional levels and also encourage the establishment of programme exchange centers at regional level and strengthen existing programme exchange centers.

Article 66 of the Treaty further states that;

- In order to involve more closely the citizens of the Community in the regional integration process, member states agree to co-operate in the area of information.
- To this end they undertake as follows:
  - to maintain within their borders, and between one another, freedom of access for professionals of the communication industry and for information sources;

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<sup>470</sup> Adopted by The African Commission on Human and Peoples' Rights, meeting at its 32nd Ordinary Session, in Banjul, The Gambia, from 17 to 23 October 2002.

- to facilitate exchange of information between their press organs, to promote and foster effective dissemination of information within the Community;
- to ensure respect for the rights of journalists;
- to take measures to encourage investment capital, both public and private, in the communication industries in Member States;
- to modernize the media by introducing training facilities for new information techniques; and
- to promote and encourage dissemination of information in indigenous languages, strengthening co-operation between national press agencies and developing linkages between them.

Also, the 2007 African Charter on Democracy, Elections and Governance in article 2(10) states one of its objectives as to Promote the establishment of the necessary conditions to foster citizen participation, transparency, access to information, freedom of the press and accountability in the management of public affairs. The most basic feature of Freedom of Information laws is the ability for individuals to ask for records, documents and information held by public authorities and other government bodies. There are a number of common exemptions that are found in nearly all law, these include the protection of national security and international relations, personal privacy, commercial confidentiality, law enforcement and public order, information received in confidence, and internal discussions. Most laws require that harm must be shown before the information can be withheld, for at least some of the provisions.<sup>471</sup>

A number of countries' laws include "public interest tests" that require that withholdings must be balanced against disclosure in the public interest and this allows for information to be released even if harm is shown if the public benefit in knowing the information outweighs the

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<sup>471</sup> Id at 412.



harm that may be caused from disclosure. This is often used for the release of information that would reveal wrongdoing, corruption or to prevent harm to individuals or the environment but in some countries it applies to all exemptions for any public reason.<sup>472</sup>

The idea of a Freedom of Information law for Nigeria was conceived in 1993 by three different organizations, working independently of each other. The organizations, Media Rights Agenda (MRA), Civil Liberties Organization (CLO) and the Nigeria Union of Journalists (NUJ), subsequently agreed to work together on a campaign for the enactment of a Freedom of Information Act. The objective of the campaign was to lay down as a legal principle the right of access to documents and information in the custody of the government or its officials and agencies as a necessary corollary to the guarantee of freedom of expression. It was also aimed at creating mechanisms for the effective exercise of this right.<sup>473</sup>

The consultations among the initial partner organizations was geared, among other things, towards determining the various interest groups likely to be affected by the legislation, those who should have a right or standing to request information under a Freedom of Information regime and under what circumstances information may be denied those seeking them, what departments or organs of government would be responsible for releasing information and documents to those seeking them and determining the agencies and arms of government to which the legislation would extend. Media Rights Agenda was designated the technical partner in the project under the arrangement agreed upon for taking the project forward. In keeping with this role, it was asked to produce a draft Freedom of Information Law.<sup>474</sup>

The political situation in Nigeria deteriorated shortly afterwards as the then President, General Sani Abacha's regime became more repressive and brutal and the law was never passed.

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<sup>472</sup> Id

<sup>473</sup> [http://www.foicoalition.org/publications/foi\\_advocacy/background.htm](http://www.foicoalition.org/publications/foi_advocacy/background.htm).

<sup>474</sup> Id.

Following the death of General Abacha in June 1998, the regime of Major-General Abdulsalami Abubakar which took over political authority in the country immediately embarked on a transition to civil rule program under which elections were held into various levels of government between December 1998 and February 1999. This development created the necessary political climate to revisit the issue.<sup>475</sup>

Another opportunity to review the draft law and its content came up in March 1999 when Media Rights Agenda, working with ARTICLE 19, the International Centre against Censorship in London and the Nigerian National Human Rights Commission, organized a workshop on Media Law Reform in Nigeria which was held between March 16 and 18, 1999, the workshop was attended by sixty one representatives of the media; both independent and state controlled, regulatory bodies, the legal profession, international institutions, local and international non-governmental organizations, and other interest groups.<sup>476</sup> The Freedom of Information Bill was finally presented to the legislature in 1999.

On May 28, 2011, history was made and the Freedom of Information bill was signed into law by the President of Nigeria as the Freedom of Information Act of 2011, twelve years after the bill was first presented to the Nigerian National Assembly. In a nutshell, the newly enacted Freedom of Information Act:

- Guarantees the right of access to information held by public institutions, irrespective of the form in which it is kept and is applicable to private institutions where they utilize public funds, perform public functions or provide public services.

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<sup>475</sup> Id.

<sup>476</sup> Id.

- Requires all institutions to proactively disclose basic information about their structure and processes and mandates them to build the capacity of their staff to effectively implement and comply with the provisions of the Act
- Provides protection for whistleblowers.
- Makes adequate provision for the information needs of illiterate and disabled applicants;
- Creates reporting obligations on compliance with the law for all institutions affected by it. These reports are to be provided annually to the Federal Attorney General's office, which will in turn make them available to both the National Assembly and the public.
- Requires the Federal Attorney General to oversee the effective implementation of the Act and report on execution of this duty to Parliament annually.

For the first time, public institutions are legally obliged to keep proper records and must respond to requests for information within seven days after application is received make the information available to the applicant. Where the public institution considers that the application should be denied, the Institution shall give written notice to the applicant that access to all or part of the information will not be granted, stating reasons for the denial.<sup>477</sup>

The Freedom of Information Act provides for among other things, the right of any person to access or request information, whether or not contained in any written form, which is in the custody or possession of any public official, agency or institution howsoever described. An applicant for access to public information need not demonstrate any specific interest in the information being applied for.<sup>478</sup>

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<sup>477</sup> See Section 5, Freedom of Information Act of 2011 (Nigeria).

<sup>478</sup> See Section 2, Freedom of Information Act of 2011 (Nigeria).

The Act, however, has a laundry list of exemptions in sections 12,13,15,16,17 and 18; exemption of international affairs and defense,<sup>479</sup> exemption of law enforcement and investigation,<sup>480</sup> exemption of personal information,<sup>481</sup> exemption of third party information,<sup>482</sup> exemption of professional or other privileges conferred by law, including journalism confidentiality privileges,<sup>483</sup> and exemption of course or research materials.<sup>484</sup> Exemptions to the freedom of information law should be as limited in scope as possible for the law to have meaning and the desired impact on governance”. Exemptions should be clearly and narrowly drawn and subject to strict and public interest tests, the Freedom of Information Act is deficient in this area.

I believe the Freedom of Information Law is a fundamental tool in fighting corruption because whether it involves government agencies or private citizens and civil society organizations, they should be able to compel disclosure of relevant public information for relevant investigations into allegations of corruption and other related activities. Citizen's right to seek information from the state on any issue promotes transparency and accountability in government because such openness shows that the government has nothing to hide and this will improve citizen's trust in government action.

Want to know how government money is been spent? Use the legislation to clear-up rates, Unhappy about a regulatory body that never seems to do anything when people complain? Ask for their internal guidance on handling complaints and see if their staff is doing what they're supposed to do, want to know about how the money allocated to your state is spent and on what? Ask for financial records and budgets. The public will have the right to peer into a public

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<sup>479</sup> Id at Section 12.

<sup>480</sup> Id at Section 13.

<sup>481</sup> Id at Section 15.

<sup>482</sup> Id at Section 16.

<sup>483</sup> Id Section 17.

<sup>484</sup> Id at Section 18.

authority's files and check how well it is doing its job. People who want to know why they aren't getting the service they expect, are unhappy with a proposal, or want to satisfy themselves that the right decision was taken, will now be able to see the paperwork for themselves.

To the public, secrecy means that there is something to hide, that officials can't justify their decisions, are concealing their errors or have ignored legitimate concerns and this would make them skeptical about what the authority tells them, less likely to follow its advice or believe its successes. Freedom of Information is a chance to strengthen public confidence that few authorities can afford to ignore. The public is entitled to a clear understanding of the work of all public authorities. The Freedom of Information law would contribute to better government accountability, transparency and popular participation in democratic processes.

The print and electronic media have a significant role to play during the lifespan of an anti – corruption programme, given the importance of access to information and information dissemination throughout the process.<sup>485</sup> This is true because some anti – corruption activities may never fully achieve their desired effect unless they are complemented by truly independent and professional media organizations, it is difficult to imagine avenues more effective than the media in exposing corruption, or informing them of gains made in sectors where similar anti-corruption programmes are being implemented.

I believe true democracy cannot be achieved or felt if the citizens have no access to information. Rather, true democracy is achieved when people engage with their leaders and influence decision making process. With access to information, citizens will then be empowered to demand action against the corrupt and recovery of diverted development expenditure, lack of free flow of information impairs and slows down economic and social development.

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<sup>485</sup> A Brunetti & B Weder, *Free Press is Bad News for Corruption* 87 *Journal of Public Economics* 1801 (2003).

### 7.6.1 Right to Information Act (RTI); the Indian Experience

The Supreme Court ruled in 1975 that access to government information was an essential part of the fundamental right to freedom of speech and expression. In order to promote transparency and accountability in the administration, the Indian Parliament enacted the Freedom of Information Act, 2002, which was repealed later and a new act, The Right to Information Act, (“the Act”)<sup>486</sup> came into force on 12 October 2005. The new law empowers Indian citizens to seek information from a public authority, thus making the government and its functionaries more accountable and responsible.<sup>487</sup>

The Act defines information in section 2(f) as any material in any form, including records, documents, memos, e-mails, opinions, advices, press releases, circulars, orders, logbooks, contracts, reports, papers, samples, models, data material held in any electronic form and information relating to any private body which can be accessed by a public authority under any other law for the time being in force. RTI mandates the proactive disclosure of information by public authorities. Section 3 and 4 of the Act states that subject to the provisions of this Act, all citizens shall have the right to information. It also states that every public authority shall maintain all its records duly catalogued and indexed in a manner and in the form which facilitates the right to information under this Act and ensure that all records are appropriately computerized within a reasonable time and subject to availability of resources, computerized and connected through a network all over the country so that access to such records is facilitated.

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<sup>486</sup> See The Right to Information Act, 2005.(India)

<sup>487</sup> State of Uttar Pradesh v. Raj Narain and Others [(1975) 4 SCC 428. Also see S.P. Gupta vs. Union of India (AIR 1982 SC 149); See Government of India, Report of the Working Group on Right to Information and Promotion of Open and Transparent Government, May 1997. For a detailed review of the situation of Freedom of Information in India until 2001, See Article 19, Global Trends on the Right to Information: A Survey of South Asia, July 2001. Available at <http://www.article19.org/>

Section 8 of the Act includes a list of exemptions, although they are all subject to a blanket override whereby information may be released if the public interest in disclosure outweighs the harm to the protected interest. Exemptions covers disclosures that would prejudicially affect the sovereignty and integrity of India, the security, strategic or economic interests of the State, relations with foreign States, would lead to incitement of an offence, has been expressly forbidden to be published by a Court or tribunal, could constitute a contempt of Court, would endanger the life or safety of a person or identify a source used by law enforcement bodies, would impede an investigation or apprehension or prosecution of an offender, would cause a breach of parliamentary privilege, cabinet papers (although materials relied upon must be released after decisions are made), commercial confidence information, trade secrets or intellectual property where disclosure would harm the competitive position of a third party, information available due to a fiduciary relationship, information obtained in confidence from a foreign government and personal information which has no relationship to any public activity or which would cause an unwarranted invasion of privacy.

The Main thrust of RTI Act is to change the culture of secrecy and aloofness that has long plagued India's monolithic and opaque bureaucracy, the RTI Act has promised to reverse this culture of secrecy and unaccountability by recognizing that the government only holds information on behalf of the owners, its citizens. Indeed, by breaking down this culture of secrecy, the law also opens channels of communication between citizens and government.<sup>488</sup> The RTI Act provides citizens with a vital tool to inform themselves about a government's record in office, in this way it empowers ordinary people to make more informed electoral decisions,

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<sup>488</sup> Goel S.L. Good Governance- An Integral Approach, New Delhi: Deep & Deep Publications Pvt. Ltd. 273-314 (2007).

giving them an opportunity to participate more effectively in governance and policy formulation.<sup>489</sup>

Although the Official Secrets Act, of 1923, which is based on the 1911 UK OSA, has not been repealed, the Right to Information Act specifically states that its provisions will have effect notwithstanding anything inconsistent in the OSA or any other law.<sup>490</sup> The Public Records Act, 1993 sets a thirty year rule for access to archives<sup>491</sup> and the Right to Information Act specifically states that information shall be provided under the Act after twenty years, but it then specifies that certain exemptions will still apply beyond this period. Right to Information in India means the freedom of people to have access to government information and it implies that citizens and non-governmental organizations should enjoy a reasonably free access to all files and documents pertaining to the governmental operations, decisions, and performance. In other words, it means openness and transparency in the functioning of the government. Thus, it is antithetical to secrecy in public administration.<sup>492</sup>

The Right to Information Act has improved the enforcement of many other economic and political rights In India. For example, the Right to Information Act is used to enforce rations distribution by revealing that food vendors are not providing the government subsidized food to impoverished citizens. This has resulted in substantial changes in the food distribution system to ensure that citizens are getting their food while vendors are getting adequate compensation. Others are using it to prompt officials to respond to longstanding problems with roads, buildings

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<sup>489</sup> Id.

<sup>490</sup> See The Official Secrets Act, 1923, Act no. 19 of 1923.  
[http://www.ijnet.org/FE\\_Article/MediaLaw.asp?UILang=1&CID=101585](http://www.ijnet.org/FE_Article/MediaLaw.asp?UILang=1&CID=101585)

<sup>491</sup> See Public Records Act, No. 69 (1993). Available at [http://nationalarchives.nic.in/public\\_record93.html](http://nationalarchives.nic.in/public_record93.html)

<sup>492</sup> Oken Jeet Sandham, [RTI best weapon to check corruption](http://www.kanglaonline.com/index.php?template=kshow&kid=1016&Idoc_Session=561499fc6d40039b2956ce296335e04e)  
[http://www.kanglaonline.com/index.php?template=kshow&kid=1016&Idoc\\_Session=561499fc6d40039b2956ce296335e04e](http://www.kanglaonline.com/index.php?template=kshow&kid=1016&Idoc_Session=561499fc6d40039b2956ce296335e04e)



and jobs.<sup>493</sup> Varsha Rajora, in his paper on “Tackling Corruption through RTI: A Base for Good Governance”<sup>494</sup> stated that RTI has recorded the following successes since its introduction in 2005.

- It has made administration more accountable and has reduced the gap between the administration and the people by increasing citizen participation.
- It has made people aware of administrative decision-making and promoted public interest by discouraging arbitrariness in administrative decision making
- It facilitates better delivery of goods and services to people by civil servants
- It facilitates intelligent and constructive criticism of administration
- It has reduced the scope for corruption in public administration
- It upholds the democratic ideology by promoting openness and transparency in Administration
- It has made administration more responsive to the requirements of the people
- It has reduced the abuse of authority by the public servants.

The RTI Act is not only a strong tool against government but also against judicial corruption. The Delhi High Court's ruling states that information about judges' assets cannot be kept concealed and it must be disclosed to any citizen seeking the information under the RTI Act. The landmark verdict further held that the office of the Chief Justice of India is a public authority and it cannot enjoy special exemption from the RTI Act.<sup>495</sup>

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<sup>493</sup> <http://www.privacyinternational.org/foi/foisurvey2006.pdf>

<sup>494</sup> Varsha Rajora, Institute of Law, Nirma University, Gujarat, India.

<sup>495</sup> See RTI - a tool against judicial corruption. <http://www.rti.org>

## 7.6.2 Promotion of Access to Information Act (PAIA) of South Africa

The Constitution of the Republic of South Africa<sup>496</sup> guarantees the right of access to information in Section 16(1)<sup>497</sup> and the general right in section 16(1)(b)<sup>498</sup> is augmented by an explicit right of access to information in section 32 of the South African Constitution. There is a further constitutional obligation that the state enacts enabling legislation to fully realize this right.<sup>499</sup> Contemporaneous with section 32(2) of the Constitution, parliament enacted the Promotion of Access to Information Act (PAIA)<sup>500</sup> to give effect to the right of access to information, PAIA came into operation on 9 March 2001, giving effect to the constitutional right of access to any information held by any public or private body that is required for the exercise or protection of any rights. Where a request is made in terms of the Act, the body to which the request is made is obliged to release the information, except where the Act expressly provides that the information may or must not be released.<sup>501</sup>

PAIA is lauded as one of the few pieces of information access legislation the world over that is progressive enough to apply to both public and private sectors, as well as to records, irrespective of when the record came into existence. Its application also restricts “the exclusion of any provision of other legislation that prohibits or restricts the disclosure of a record...and is materially inconsistent with an object, or a specific provision, of this Act”.<sup>502</sup> The PAIA enables the public to scrutinize government decision-making and hold government accountable for

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<sup>496</sup> 108 of 1996.

<sup>497</sup> See Section 16(1) which states that: “Everyone has the right to freedom of expression, which includes freedom of the press and other media, freedom to receive or impart information or ideas, freedom of artistic creativity; and academic freedom and freedom of scientific research.

<sup>498</sup> Freedom to receive or impart information or ideas.

<sup>499</sup> For a detailed exposition of the South Africa’s constitutional and legislative framework providing for access to information- see Memeza M Baseline Report on Access to Information in the SADC region, report commissioned by the Freedom of Expression Institute (2004) at p.34.

<sup>500</sup> See The Promotion of Access to Information Act, Act 2 of 2000 (South Africa).

<sup>501</sup> <http://www.dti.gov.za/downloads/accesstoinfo.pdf>

<sup>502</sup> See Art. 5 of The Promotion of Access to Information Act (South Africa).

actions and decisions that affect their lives and rights. The framework created in terms of the PAIA enables the public to access information and ensures that the public service participates in promoting a culture of human rights and a just public administration. Without reliable and relevant information, citizens do not know what government is doing and cannot hold it accountable.<sup>503</sup>

The Act furthermore sets out a series of enabling provisions for information requesters, among which is that the requester's right of access is not affected by "any reason the requester gives for requesting access" or by the relevant information officer's "belief to what the requester's reasons are for requesting access".<sup>504</sup> There is also an expansive list of the duties and responsibilities of public and private information holders, a key feature of which is the requirement to publish manuals containing comprehensive details of how to access information<sup>505</sup> as well as provide categories of records that are automatically available.<sup>506</sup>

PAIA also provides for the Human Rights Commission to play a major role in assessing, monitoring and implementing various aspects of the legislation.<sup>507</sup> Section 9 of the Act recognizes that such right to access to information cannot be unlimited and should be subject to justifiable limitations, including, but not limited to:

- Limitations aimed at the reasonable protection of privacy;
- Commercial confidentiality; and
- Effective, efficient and good governance; and
- In a manner that balances that right with any other rights, including such rights contained in the Bill of Rights in the Constitution.

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<sup>503</sup> [http://www.info.gov.za/otherdocs/2007/implmnt\\_access\\_info\\_act.pdf](http://www.info.gov.za/otherdocs/2007/implmnt_access_info_act.pdf)

<sup>504</sup> See Art 11(3) of The Promotion of Access to Information Act (South Africa).

<sup>505</sup> See Art. 14 & 51 of The Promotion of Access to Information Act (South Africa).

<sup>506</sup> See Art. 15 & 52 of The Promotion of Access to Information Act (South Africa).

<sup>507</sup> See Art. 83 & 84 of The Promotion of Access to Information Act (South Africa).

Public and private organizations are requested by PAIA to publish manuals describing their structure, functions, contact information, access guide, services and description of the categories of records held by the organization. The manuals, to be submitted to the South African Human Rights Commission (SAHRC), are to be published in the Government Gazette by February 2003. SAHRC is designated to see the functioning of the Act and it is required under law to issue a guide on the Act and submit reports to Parliament. The Commission is also expected to promote the Act, make recommendations and monitor its implementation.<sup>508</sup>

State bodies currently have thirty days to respond.<sup>509</sup> The Act also includes a unique provision (as required in the Constitution) that allows individuals and government bodies to access records held by private bodies when the record is “necessary for the exercise or protection” of people's rights. Bodies must respond within 30 days.<sup>510</sup> The Act does not apply to records of the Cabinet and its committees, judicial functions of Courts and tribunals, and individual members of Parliament and provincial legislatures.<sup>511</sup> PAIA sets out several grounds for the refusal of a request for access to records in both public and private bodies.<sup>512</sup> One of those grounds for refusal prescribes the mandatory protection of commercial information of third party.<sup>513</sup> This provision has the potential to prevent access, on the grounds of 'commercial confidentiality', to information emanating from the privatization and/or corporatization initiatives of the government.

The Supreme Court of Appeal limited the right of individuals to obtain information from private bodies, ruling in March 2006, the Court stated that a hospital was not required to provide information to the wife of a deceased patient who was trying to obtain more information about

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<sup>508</sup> See 83 & 84 The Promotion of Access to Information Act (South Africa).

<sup>509</sup> See Art 25(1) The Promotion of Access to Information Act (South Africa).

<sup>510</sup> See Art 3 & 4 The Promotion of Access to Information Act (South Africa).

<sup>511</sup> See Art 12 The Promotion of Access to Information Act (South Africa).

<sup>512</sup> See Art. 33 -45 & Art. 62 – 69 of The Promotion of Access to Information Act (South Africa).

<sup>513</sup> See Art 36 & 64 of The Promotion of Access to Information Act (South Africa).

his death as part of a potential lawsuit against the hospital.<sup>514</sup> South Africa's Freedom of Information legislation remains unique in the world, however, being the only such law that permits access to records held by private as well as public bodies.<sup>515</sup> Some other countries cover the private sector only partly.<sup>516</sup>

However, one caveat I observed with the Act is the fact that Section 12(a) states that, 'this Act does not apply to a record of the Cabinet and its committees', this exemption is brutal because it renders the right of access to policy decisions and processes of government inaccessible to the public (for example, state policy on reparations). This is completely inconsistent with the constitutional right of access to 'any information' held by a public body.

Based on the comparative analysis of India's Right to Information Act and South Africa's Promotion to Access of information Act, I would rightly state that Nigeria can draw experiences from both Acts and I shall say why. I decided to use both Acts as analysis because both countries have some similarities with Nigeria as regards population, diversity and level of corruption and they have been able to curb corruption by having the Freedom of Information Act. Both Acts have unique features that can be borrowed by the newly passed Nigerian Freedom of Information Act.

The Freedom of Information Act provides for the right of any person to access or request information, whether or not contained in any written form, which is in the custody or possession of any public official, agency or institution.<sup>517</sup> Just like Section 3 of the South Africa's Promotion to Access of information Act, I propose that the right of individuals to access information or

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<sup>514</sup> Unitas Hospital v Van Wyk SCA 32 (RSA) (2006) (South Africa).

<sup>515</sup> *Id.*

<sup>516</sup> For example, Liechtenstein law extends the right of access to information from only private individuals who perform public tasks. Angolan, Armenia and Peru laws allow access to records of only those private companies, which are performing public functions. Czech Republic, Dominican Republic, Finland, Trinidad and Tobago, Slovakia, Poland, and Iceland limit this right only to those private organizations that receive public funds. Estonia, France and the UK have adopted a programmatic approach by including private bodies in selected sectors.

<sup>517</sup> See Art 2(1) Freedom of Information Act of 2011 (Nigeria)

records should be extended to private companies that are owned by the state and operating mainly for profit, they may or may not be performing public functions. I shall explain why.

In Nigeria, the private sector is performing many functions which were previously the domain of public sector and as a result, a lot of information is now with the private sector. In 1999, the Federal Government enacted the Public Enterprise (Privatization and Commercialization) Act which established the Bureau of Public Enterprises (BPE).<sup>518</sup> BPE is charged with the overall responsibility of implementing the council's policies on privatization and commercialization, as such a number of public enterprises have been privatized.<sup>519</sup> As a result of privatization in Nigeria, a substantial amount of information about public functions which was previously in the possession of governments now belongs to the private sector and if the proposed bill protects private companies, information relating to private banks, telecommunication companies, hospitals, and universities will not be accessible to individuals.

Section 8 of the Freedom of Information Act states that where the government or public institution refuses to give access to a record or information applied for under the Act or a part thereof, the institution shall state in the notice given to the applicant the grounds for the refusal and that the applicant has a right to challenge the decision refusing access and have it reviewed by a Court. Section 21 further states that any applicant who has been denied access to information, or a part thereof may apply to the Court for a review of the matter within thirty days after the public institution denies or is deemed to have denied the application, or within such further time as the Court may either before or after the expiration of the thirty days fix or allow. I

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<sup>518</sup> <http://www.bpeng.org/en/default.htm>

<sup>519</sup> For example, National Electric Power Authority (NEPA), Nigerian Telecommunications Limited (NITEL), Nigerian Airways, National Fertilizer Company of Nigeria, Federal Super Phosphate Fertilizer Company Limited, Ashaka Cement Company Limited and Unipetrol Nigeria Limited.

believe that seeking redress in Court for been refused access to a record will not be efficient because of the already slow judicial process in Nigeria.

The law should provide for an individual right of appeal to an independent administrative body from a refusal by a public body to disclose information. The body must meet certain standards and have certain powers. Its independence should be guaranteed, both formally and through the process by which the head and/or board is/are appointed. Individuals appointed to such a body should be required to meet strict standards of professionalism, independence and competence, and be subject to strict conflict of interest rules. The procedure by which the administrative body processes appeals over requests for information which have been refused should be designed to operate rapidly.

Having said that, I would recommend that just like what the India's Right to Information offers, the Freedom of Information Bill should include the establishment of an Information Commission with branches in the six geographical region of Nigeria as it were for easy accessible. This Commission should amongst other powers that shall be assigned to it be responsible for receiving and inquiring into a complaint from any person, who has been refused access to any information requested under the Act or who has not been given a response to a request for information or access to information within the time limit specified under this Act. The Information Commission, as the case may be, shall, while inquiring into any matter should have the same powers as are vested in a high Court. The decision of the Commission should be communicated within thirty days from the day such appeal was filed.

The decision of the Information Commission or State Information Commission, as the case may be, shall be binding.

**Table 4: COMPARATIVE ANALYSIS OF FREEDOM OF INFORMATION LAWS**

<b>FREEDOM OF INFORMATION ACT, NIGERIA</b>	<b>PROMOTION OF ACCESS TO INFORMATION ACT, SOUTH AFRICA</b>	<b>RIGHT TO INFORMATION ACT, INDIA</b>
Came into force on May 28, 2011	Came into force March 2001	Came into force on October 2005
Grants any person the right to access or request information, which is in the custody or possession of any public official, agency or institution	Applies to access to records held by private as well as public bodies. This Act applies to— a record of a public body and a record of a private body. (Section 3)	Means the right to information accessible under the RTI Act, which is held by or under the control of any Public Authority. (Section 2(j))
Does not apply to international affairs and defense, law enforcement and investigation, personal information, third party information, professional or other privileges conferred by law, including journalism confidentiality privileges and course or research materials	Section 12 of this Act does not apply to the record of certain public bodies as thus; the Cabinet and its committees, the judicial functions of, a Court referred to in section 166 of the Constitution; a Special Tribunal established in terms of section 2 of the Special Investigating Units and Special Tribunals Act, 1996 (Act No. 74 of 1996); or a judicial officer of such Court or Special Tribunal; or an individual member of Parliament or of a provincial legislature in that capacity.	Section 24(1) states that nothing contained in this Act shall apply to; Intelligence Bureau, Research and Analysis Wing of the Cabinet, Secretariat, Directorate of Revenue Intelligence, Central Economic Intelligence Bureau, Directorate of Enforcement, Narcotics Control Bureau, Aviation Research Centre, Special Frontier Force, Border Security Force, Central Reserve Police Force, Indo-Tibetan Border Police, Central Industrial Security Force, National Security Guards, Assam Rifles, Special Service Bureau, Special Branch (CID), Andaman and Nicobar, The Crime



		Branch-C.I.D.-CB, Dadra and Nagar Haveli, Special Branch, Lakshadweep Police.
<p>Section 8 states that where the government or public institution refuses to give access to a record or information applied for or a part thereof, the institution shall state in the notice given to the applicant the grounds for the refusal, the specific provision of this Bill that it relates to and that the applicant has a right to challenge the decision refusing access and have it reviewed by a Court.</p> <p>Section 21 further states that any applicant who has been denied access to information, or a part thereof may apply to the Court for a review of the matter within thirty days after the public institution denies or is deemed to have denied the application, or within such further time as the Court may either before or after the expiration of the thirty days fix or allow.</p>	<p>Section 74 &amp; 75 of the Act states that a requester may lodge an internal appeal with the relevant authority against a decision of the information officer of a public body within 60 days.</p>	<p>Section 19(1) of the Act states that any person who, does not receive a decision within the time specified indicated in the Act or is aggrieved by a decision of the Central Public Information Officer or State Public Information Officer, as the case may be, may within thirty days (30 days) from the expiry of such period or from the receipt of such a decision prefer an appeal. Section 19(2) states that a second appeal against the decision under sub-section (1) shall lie within ninety days (90 days) from the date on which the decision should have been made or was actually received, with the Central Information Commission or the State Information Commission.</p>

## 7.7 CONCLUSION

To Nigerians, corruption is such a common phenomenon that defines the country and expectations of corruption infuse everyday experience whether one is a parent trying to look for school admission for their child, a college graduate trying to find a job, a motorist approaching most often than not an unauthorized police check point, a business person looking for federal, state or local government contracts, a traveler seeking for a foreign visa, or an ordinary Nigeria just trying to survived the everyday hassles. Most Nigerians I spoke to through the course of my research say they give bribe for services due to them out of necessity.

In Nigeria, the political terrain is so toxic that it becomes a game of “if you cannot beat them, then you join them”, vested interests can have a strong impact on political will to address corruption, thus, those in favor of corruption will do anything within their power to maintain the status quo and sustain that vicious circle of corruption. The Nigerian State ought to create an enabling environment for accountability and transparency in governance by ensuring that the fundamental objectives outlined in Chapter II of the 1999 Constitution are made justiciable. A society which cannot establish a social security scheme to provide adequate shelter, sufficient food, social security insurance, pension, gratuity, unemployment benefits, health benefits and welfare for the disabled cannot meaningfully tackle corruption and promote accountability in government.

It does not matter whether it is a developed, developing or less developed country, reducing corruption requires functioning governmental institutions and curbing corruption requires strong oversight through legislature, judiciary, law enforcement, independent media and civil society “When these institutions are weak, corruption spirals out of control with horrendous

consequences for ordinary people and for justice and equality in societies more broadly”.<sup>520</sup> Where corruption is entrenched, anti corruption commissions can only play a limited role, as their powers of investigation and enforcement may be constrained by influential politicians, god fathers and civil servants who indulge in corruption.

The basic success of any anti-corruption regime is political will and from the foregoing, it is irrefutable that there are enough laws in the statute book to squash corruption but the enforcement of those laws depends on the political will of the governing class coupled with the creation of an enabling environment for a corrupt free society. Vigorous prosecution and change in public attitude is needed to curb corruption. What I have proposed is a pragmatic research work drawing on legal scholarship on strengthening anti corruption commissions and laws in Nigeria. I focused on reviewing the laws already in place, proposed amendments and new steps, it is with this aim in mind that I have developed this proposal for reforming anti corruption laws, to be challenged, debated and refined as the way forward.

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<sup>520</sup> Transparency International, *Persistently high corruption in low-income countries amounts to an ongoing humanitarian disaster*, Berlin, (Sept. 23, 2008).

## APPENDIX A

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## APPENDIX B

### PENDING EFCC CASES

	Name	Trial Court	Case Status	Amount Involved (Naira)	Status of Suspect
1	Ayo Fayose (Former Governor of Ekiti State)	Federal High Court, Lagos	Arraigned on 51 state counts. Plea taken	N1.2 Billion	granted bail by court since 2007
2	Adenike Grange(Former Minister of Health	FCT. High CourtMaitama	Arraigned on 56 state counts. Plea already taken.	N300 million	granted bail by court since 2008
3	Joshua Dariye(Former Governor Plateau State)	FCT High CourtGudu	Arraigned on 14 state counts. Plea already taken .	N700 Million	granted bail by court since 2007
4	Saminu Turaki(Former Governor, Jigagwa State)	FCT High CourtMaitama	Arraigned on 32 state counts. Plea already taken.	N36 Billion	granted bail by court since 2007
5	Orji Uzor Kalu(Former Governor, Abia State	Fed. High CourtMaitama	Arraigned on 107 state counts. Lost at trial court but has gone on appeal to stay trial.	N5 Billion	granted bail by court since 2008
6	James Ibori(Former Governor, Delta State)	Federal High Court Asaba	Arraigned on 170 state counts. Case re-assigned by CJ to Asaba FHC. Accused was acquitted of all charges in December 2009.	N9.2 Billion	granted bail by court since 2008
7	Iyabo Obasanjo-Bello(Serving Senator)	FCT High Court, Maitama	Arraigned on 56 state counts. Plea already taken.	N10 Million	granted bail by court since 2008
8	Lucky Igbinedion(Former Governor of Edo State)	Fed. High Court, Enugu	Arraigned on 191 state counts. Applied for plea bargain & Convicted	N4.3 Billion	Case determined 2008

9	Gabriel Aduku(Former Minister of Health)	FCT. High Court, Maitama	Arraigned on 56 state counts.Court judgment on no case against suspect under review by EFCC	N300 Million	Case determined in 2008
10	Jolly Nyame(Former Governor of Taraba State)	Fed. High Court, Abuja	Arraigned on 21 state counts.Plea already taken .	N180 Million	granted bail by court since 2008
11	Chimaroke Nnamani (Former Governor of Enugu State)	Fed. High Court, Lagos	Arraigned on 105 state counts. Plea taken .	N5.3 Billion	granted bail by court since 2007
12	Michael Botmang(Former Governor of Plateau State)	Fed. High Court,Maitama	Arraigned on 31 state counts. Plea taken.	N1.5 Billion	granted bail by court since 2008
13	Roland Iyayi (Former Managing Director of FAAN)	FCT High Court, Maitama	Arraigned on 11 state counts. Plea taken. Trial on-going Court taking prosecution witnesses testimony	N5.6 Billion	granted bail by court since 2008
14	Nyeson Wike (Serving Chief of Staff to Governor of Rivers State)	FCT High CourtMaitama	Arraigned on state counts. Court quashed charges. EFCC appealed judgment. Appeal pending at appeal court.	N4.670 Billion	granted bail by court since 2008
15	Kenny Martins (Police Equipment Fund)	FCT High Court,Maitama	Arraigned on 28 amended state counts. Plea taken and trial on-going. Witnesses under cross-examination. Continuation of trial fixed for Nov.9	N7,740 Billion	granted bail by court since 2008
16	Eider George (Austrian Business man)	FCT High Court, Maitama	Arraigned on 11 state counts. Plea taken and trial on-going. Prosecution witnesses undergoing cross-examination.		granted bail by court since 2008



			Continuation of trial fixed for Nov.17		
17	13 Filipinos (Charged for Oil Bunkering)	Fed. High Court, Benin	Arraigned on state counts, convicted at the close of trial and sentenced to 65 Years altogether	N300 Million	EFCC returns to court to seek forfeiture of vessel used for oil theft Oct 23 slated for adoption of written addresses on that
18	6 Ghanaians (Charged for Oil Bunkering)	Fed. High Court, Benin	Arraigned on state counts and trial Commenced. Prosecution closed case, matter adjourned to Nov.4&5 for defence to close.	N250 Million	granted bail by court in 2009
19	Patrick Fernandez (Indian Buisnessman)	Fed. High Court, Lagos	Arraigned on 56 state counts. Plea already taken and trial commences Nov	N32 Billion	granted bail by court in 2009
20	Prof. Babalola Borishade (Former Minister of Aviation)	FCT High Court, Maitama	Arraigned on 11 state counts. Plea taken and trial on-going .	N5.6 Billion	granted bail by court since 2008
21	Boni Haruna (Former Governor, Adamawa State)	Fed. High Court, Maitama	Arraigned on amended 28 state counts. Plea taken.	N254 Million	granted bail by court since 2008
22	Femi Fani-Kayode (Former Minister of Aviation)	Fed. High Court, Lagos	Arraigned on 47 state counts . Plea taken .	N250 Million	granted bail by court in 2008
23	Prince Ibrahim Dumuje (Police Equipment Fund)	FCT High Court, Abuja	Arraigned on 28 amended state counts. Plea taken	N7,740 Billion	granted bail by court since 2008
24	Bode George (Chieftain of the ruling party, PDP)	Fed. High Court, Lagos	Arraigned on 68 state counts. Plea taken and trial concluded. Accused sentenced to 29 years in Imprisonment. Accused has appealed decision.	N100 Billion	granted bail by court since 2008

25	Rasheed Ladoja (Former Governor of Oyo State)	Fed. High Court,Lagos	Arraigned on 33 state counts. Plea taken .	N6 Billion	granted bail by court since 2008
26	Four Snr Zenith Bank Managers	Fed. High Court, Port Harcourt	Arraigned on 56 state counts. Plea taken but case stalled over an injunction by Rivers State Govt, which is a party in the case to stop EFCC. Injunction being challenged at appeal court	N3.6 Billion	Granted bail by court in 2009
27	Mallam Nasir El-Rufai (Former Minister of Federal Capital Territory)	Fed. High Court,Abuja	Arraigned on 8 state counts. Suspect charged for corruption and abuse of office. Plea not taken because suspect has refused to put in appearance and papers for extradition filed.		Suspect at large
28	Sen. Nicholas Ugbade,(Serving Senator)Hon. Ndudi ElumeluHon. Mohammed Jibo,Hon. Paulinus Igwe,(Serving Members of House of Reps)Dr Aliyu Abdullahi(Serving Fed.Perm.Sec) Mr. Samuel Ibi.Mr. Simon Nanle,Mr. Lawrence Orekoya,Mr Kayode Oyedeji,Mr. A. Garba Jahun,(This is the Rural Electrification Agency Case involving a serving Senator, 3 serving members of the House of Representatives, the Permanent Secretary of the Ministry of Power and other high profile public officers)	FCT High Court Abuja	Arraigned on 158 state counts. Plea taken while prosecution has filed more charges against suspects.	N5.2 Billion	Remanded in Prison Custody and later granted bail Court in 2009

29	Prof B. Sokan, Molkat Mutfwang, Michael Aule, Andrew Ekpanobi, (All Directors) Alexander Cozman (MD, Intermarket Ltd). (This is the UBEC case where high profile public servants connived with an American, Alexander Cozman) to defraud the Government.	Federal High Court, Abuja	Arraigned on 64 state counts. Plea taken while more charges were filed against suspects due to appearance of Prof Sokan.	N636 Million	Suspects remanded in prison custody and later granted bail by court in 2009.
30	Dr Ransome Owan, Mr. Abdulrahman Ado, Mr. Adulrasak Alimi, Mr. Onwuamaeze Iloeje, Mrs Grace Eyoma, Mr. Mohammed Bunu, Mr. Abimbola Odubiyi (This is the Nigeria Electricity Regulatory Commission case where the Chairman and his 6 Commissioners corruptly enriched themselves)	Federal High Court, Abuja	Arraigned on 196 state counts. Plea taken. Trial billed to commence while more charges were filed against suspects.	N1.5 Billion	granted bail by court in 2009
31	Tom Iseghohi, Muhammed Buba, Mike Okoli, (GM & Managers of Transcorp Group PLC)	Fed. High Court, Abuja	Arraigned on 32 state counts. Plea taken. Matter adjourned for commencement of trial Nov 9.	N15 Billion	Suspects Remanded in Kuje Prison and later granted bail by court in 2009
32	Dr Albert Ikomi, rtd perm sec, his firm, satellite town dev co Ltd	Fed. High Court, Ikoyi, Lagos	Arraigned on 4 state counts. Plea taken and Matter adjourned for hearing	N43 Million	Suspects Remanded in Ikoyi Prison and later granted bail by court in 2009
33	Dr Yuguda Manu Kaigama, Chairman, Taraba State Civil Service Commission	Taraba State High Court 5, Jalingo	Arraigned on 37 state counts. Plea taken and Matter adjourned for trial	N17 Million	Suspect remanded in prison custody. Co-accused, Yakubu Danjuma Takun, at large.
34	Chief Joe Musa, DG National Gallery of Art, Olusegun Ogumba, Chinedu Obi, Oparagu Elizabeth, Kweku Tandoh, (All Directors of NGA).	FCT High Court, Lugbe (Justice Olukayode Adeniyi)	Arraigned on 12 state counts. Plea taken.	N1.012 Billion	Suspects Remanded in Kuje Prison and later granted bail by court in 2009

35	Dr Dayo Olagunju, Ex.Sec.National Commission for Mass Literacy, Adult & Non-Formal Education. Joshua Alao, Alice Abang, Jibrin Waguna, Ahmed Abubakar, Shehu Abdullahi, Dr Victoria King-Nwachukwu, Adamu Khalid, Moses Oseni, Francis Awelewa & Bashir Suleiman	Fed. High Court, Abuja. Justice Anuli Chikere	Arraigned on 17 state counts. Plea taken and Matter adjourned for commencement of trial Oct 22	N479 Million	Suspects Remanded in Kuje Prison and later granted bail by court in 2009
36	Hamman Bello Hammed, Ex-CG Customs, Hannatu Sulaiman, Tajudeen Olalere, Lukman Hussain, Popular Foods Ltd & Silver Maritime shipping coy ltd	Fed. High Court Lagos. Justice Ramat Moh'd	Arraigned on 46 state counts. Plea taken.	N2.5 Billion	Suspects Remanded in Kirikiri & Ikoyi Prisons and later granted bail by court in 2009.
37	Professor Innocent Chuka Okonkwo, fmr VC Imo state Univ, Uchechi Nwugo & Wilfred Uwakwe	Fed. High Court, Abuja. Justice Mohammed Garba Umar	Arraigned on 14 state counts. Plea taken Adjourned to Nov for trial.	N145 Million	Suspects Remanded in Kuje Prison and later granted bail by court in 2009
38	Dr (Mrs) Cecilia Ibru (Fmr CEO, Oceanic Bank PLC)	FHC, Ikoyi, Lagos. Justice Dan Abutu	Arraigned on 25 state counts. Plea taken and case adjourned to Nov for trial	N160.2 Billion	Suspect remanded in EFCC custody, but granted bail on 14/9/09
39	Dr Bartholomew (Fmr CEO, Union Bank PLC) Bassey Ebong, Henry Onyemem & Niyi Albert Opeodu (Ex-Directors, UBN)	FHC, Ikoyi, Lagos. Justice Dan Abutu	Arraigned on 28 state counts. Plea taken and case adjourned to Nov for trial	N187.1 Billion	Suspects remanded in EFCC custody, But granted bail on 14/9/09
40	Raymond Obieri, (Fmr Chairman, Intercontinental Bank PLC Hyacinth Enuha, Ikechi Kalu, C.A Alabi, Samuel Adegbite, Isyaku Umar, Sanni Adams.	FHC, Ikoyi, Lagos. Justice Dan Abutu	Arraigned on 18 state counts. Plea taken and case adjourned to Nov for trial	N131.8 Billion	Suspects remanded in EFCC custody, But granted bail on 14/9/09
41	Sebastian Adigwe, Peter Ololo, Falcon Securities Ltd	FHC, Ikoyi, Lagos. Justice Dan Abutu	Arraigned on 36 state counts. Plea taken and case adjourned to Nov for trial	N277.3 Billion	Suspects remanded in Prison custody, But granted bail on 15/9/09

42	Okey Nwosu	FHC, Ikoyi, Lagos.Justice Dan Abutu	Arraigned on 11 state counts. Plea taken and case adjourned to Nov for trial	N95.1 Billion	Suspects remanded in Prison custody,But granted bail on 15/9/09
43	Alex Nkenchor, Ex- Bank Manager, Ebi Odeigah & GMT Securities & Assets Nig Ltd	Lagos High Court, Ikeja. Justice M.O Obadina	Arraigned on 10 state counts. Plea taken and suspects still remanded in prison custody pending consideration of bail application.	N860 Million	Suspects remanded in ikoyi prison. Bail application for consideration Oct 20

## APPENDIX C

### CASE STUDIES

#### CASE STUDY 1

##### CHRIS NGIGE AND CHRIS UBA SAGA

A wealthy member of the powerful Uba political family, Chris Uba is an iconic example of the godfather phenomenon in Nigeria.<sup>521</sup> Chris Uba, a member of the People Democratic Party Board of Trustees, was at the apex of his power during the 2003 Nigerian elections, when he sponsored People Democratic Party (PDP) candidates and rigged their election to office across Anambra State. After that election he publicly declared himself “the greatest godfather in Nigeria,” noting that “this is the first time an individual single-handedly put in position every politician in the state”.<sup>522</sup> Among the politicians Chris Uba “sponsored” in 2003 was PDP Gubernatorial candidate Chris Ngige. The terms of their relationship were spelled out in remarkably explicit fashion in a written “contract” and “declaration of loyalty” that Ngige signed prior to the election.

Ngige promised in writing to “exercise and manifest absolute loyalty to the person of Chief Chris Uba as my mentor, benefactor and sponsor and agreed to allow Uba control over all important government appointments and the awarding of all government contracts”. The contract referred to Governor Ngige as the “Administrator” and to the unelected Uba as “Leader/Financier.” It also

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<sup>521</sup> Chris Uba’s brother Andy Uba served as special advisor to President Obasanjo for nearly the entirety of the Obasanjo Administration and ran for Governor of Anambra State in 2007 his other brother Ugochukwu Uba was a senator representing Anambra South Senatorial District until losing in the PDP primaries in late 2006.

<sup>522</sup> Jibrin Ibrahim, *The Rise of Nigeria’s Political Godfathers*, BBC News (London), Nov. 10, 2003 available at <http://news.bbc.co.uk/2/hi/africa/3156540.stm>

empowered Uba to “avenge himself in the way and manner adjudged by him as fitting and adequate” in case of any breach by Ngige that could not be settled through mediation.<sup>523</sup> Relations between Ngige and Uba deteriorated rapidly. In July 2003 Governor Ngige was kidnapped by armed policemen and forced at gunpoint to sign a “letter of resignation.”<sup>524</sup> Ngige’s resignation was eagerly accepted by the State House of Assembly despite the circumstances under which it was obtained. Ngige successfully petitioned to have his resignation thrown out by the federal Courts and remained in office but quickly found himself under siege yet again.

In 2004 thugs armed with firearms and crude explosives attacked Government House in Awka and burned part of it to the ground while policemen stood aside and watched.<sup>525</sup> Other gangs then staged several attacks on other government buildings throughout the state.<sup>526</sup> As many as twenty four people were killed during the ensuing violent clashes and looting.<sup>527</sup> Ngige, like most of the Nigerian press and many civil society groups, alleged that Chris Uba was behind the attack. Chris Uba denied any involvement in the matter. The police’s failure to investigate who was behind the attack, and specifically Uba’s alleged involvement, stands as a stark example of the impunity he has consistently enjoyed.<sup>528</sup> The Ngige-Uba saga came to an end in March 2006 when a Federal Court of Appeal ruled that Ngige’s 2003 election victory was fraudulent and therefore null and void. The result was Ngige’s replacement with his 2003 electoral opponent from the opposition All

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<sup>523</sup> Agreement "Among the Parties as Partners in the Project of Government of Anambra State and Nigeria," on file with Human Rights Watch.

<sup>524</sup> *Governor Ngige missing*, The Vanguard (Nigeria) July 11, 2003.

<sup>525</sup> Interview by Human Rights Watch with Chris Ngige, Bethesda, Maryland, (Jan. 18, 2007). *Tensions high in Nigeria State*, BBC

News Online (London), Nov. 12, 2004 available at <http://news.bbc.co.uk/2/hi/africa/4006215.stm>.

<sup>526</sup> Tony Edike, *Awka: A City Where Anarchy Reigned* The Vanguard (Nigeria) Nov. 15, 2004. Vanguard newspaper reported at the time that Anambra “is now ruled by hoodlums who have taken over every nook and cranny of the state maiming, killing and attacking public buildings without any resistance by the retinue of policemen deployed to maintain law and order”.

<sup>527</sup> Id.

<sup>528</sup> Interview by Human Rights Watch with Chris Ngige, Bethesda, Maryland, Interview by Human Rights Watch with civil society activists and opposition politicians, Lagos, Abuja and Awka (Feb. 2007).

Progressives Grand Alliance (APGA), Peter Obi. Obi had produced massive evidence of electoral fraud and his installation as governor was widely hailed as a victory for democracy in Anambra.<sup>529</sup>

## Case Study 2

### RASHIDA LADOJA AND LAMIDI ADEDIBU SAGA

In 2005, Rashidi Ladoja, the governor of Oyo State, was enmeshed in an obstinate fight with his political benefactor and godfather, Lamidi Adedibu. Chief Adedibu, an active member of the ruling party in Nigeria, People Democratic Party (P.D.P) decided that it was time to get rid of former governor, Lamidi Adesina, who was a member of another party called Alliance for Democracy (A.D) put his grassroots political machinery at the disposal of Ladoja, a political novice and former Senator at that time. Ladoja was elected as governor of Oyo State in an election that was largely characterized by election rigging.<sup>530</sup> Ladoja told Human Rights Watch that he fell out with Adedibu shortly after coming into office in 2003 because he refused to allow Adedibu access to the treasury- he alleges that Adedibu ordered him to turn over twenty five percent of the government's security vote of about fifteen million Naira (One hundred and fifteen thousand dollars) per month directly to him.<sup>531</sup>

He also disregarded the proposed list of commissioners his godfather sent to him to appoint and without consulting Adedibu, Ladoja announced his commissioners, picking only one name out of Adedibu's list.<sup>532</sup> Needless to say that Adedibu was irked by Ladoja's actions. Here was a man he helped elect into power disregarding his wishes. The battle lines were drawn and as usual, the

<sup>529</sup> Bolade Ominjo, *Obi Sworn in, Promises New Dawn in Anambra*, The Vanguard (Nigeria) Mar. 18, 2006.

<sup>530</sup> Human Rights Watch interview with Governor Rashidi Ladoja, Ibadan, February 8, 2007.

<sup>531</sup> Id.

<sup>532</sup> Id.



indigenes of Oyo state bared the brunt of the whole crises. Lives were lost, resources of the state were wasted, civil time were expended on impeachment notices at the end of it all, the godfather won and Ladoja was send packing out of the government house. In an interview with Human Rights Watch, Adedibu described Ladoja as an "ingrate".<sup>533</sup>

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<sup>533</sup> Human Rights Watch interview with Chief Lamidi Adedibu, Ibadan, February 7, 2007.

## APPENDIX D

### THE STATE OF CORRUPTION IN NIGERIA SURVEY

#### Perception as to whether public officials are likely to request bribe

- 91.4% said yes
- 8.6% said no

#### Perception as to how many times the respondent has personally given bribe

- 59.1% said 0 -5 times
- 15.3% said 5 – 10
- 12.2% said 10 – 20
- 13.4% said 20 and over

#### Perception as to how many times the respondent has personally received bribe

- 91.7% said 0 -5 times
- 3.8% said 5 – 10
- 2.4% said 10 – 20
- 2.2% said 20 and over

#### Perception as to what regime is most corrupt in Nigeria

- 12.4% said military
- 38.0% said democratic
- 45.5% said both military and democratic
- 4.1% said they did not know

#### Perception as to which of these actions are corrupt actions

- Bribe for securing contracts 76.2% agree, 21.4% disagree 2.4% did not know
- Using personal networks in securing contracts 56.2% agree 35.7% disagree 8.1% did not know
- An official favoring his/her relatives 69.1% agree 23.8% disagree 7.1% did not know

- An official accepting gifts 57.6% agree 30.1% disagree 12.4% did not know

**Perception as to whether respondent is likely/ unlikely or do not know whether they will bribe these groups of persons to get something you are entitled to.**

- Police officers 49.3% likely 44.8% unlikely 6.0% do not know
- State officials 41.8% likely 51.1% unlikely 7.1% do not know
- Local government Officials 41.4% likely 52.2% unlikely 6.3% do not know
- Custom Officers 49.8% likely 43.0% unlikely 7.2% do not know
- Members of the legislature 26.8% likely 62.8% unlikely 10.4% do not know
- Members of the Executive branch 29.1% likely 60.1% unlikely 10.8% do not know
- Members of the judicial 19.7% likely 70.1% unlikely 10.2% do not know
- Teachers/ professors 22.4% likely 70.9% unlikely 6.7% do not know
- Court officials 27.3% likely 63.2% unlikely 9.5% do not know

**Perception as to what the appropriate punishment for public officers who uses his/her public office position for private gains and enriches them self should be.**

- Lose their jobs and go to prison 62.6%
- Lose their jobs and have to pay a fine 17.5%
- Lose their jobs only 1.8%
- It depends on the seriousness of the corruption 15.4%
- There should be no penalty for this 0.9%
- I do not know 1.6%
- I do not care 0.2%

**Survey methodology**

- Nigerian's urban population was determined to be forty eight percent of the total population of one hundred and forty million which translated to be sixty seven million two hundred<sup>534</sup>.

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<sup>534</sup> <http://globalis.gru.unu.edu>

- Sample size is one thousand and thirty seven<sup>535</sup> individuals, under twenty four – over sixty years, eight hundred and eighty one males, three hundred and forty four females
- Online survey was created at [www.surveymonkey.com](http://www.surveymonkey.com)
- The margin of error accepted was four percent<sup>536</sup> at ninety nine percent confidence level<sup>537</sup>
- Response distribution was fifty percent<sup>538</sup>
- Survey was conducted October 17<sup>th</sup> – December 18<sup>th</sup>, 2009

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<sup>535</sup> This is the minimum recommended size of your survey. If you create a sample of this many people and get responses from everyone, you are more likely to get a correct answer that you would from a large sample where only a small percentage of the sample responds to your survey.

<sup>536</sup> The margin of error is the amount of error that you can tolerate. If 90% of respondents answer yes, while 10% answer no, you may be able to tolerate a larger amount of error than if the respondents are split 50 – 50 or 45 – 55. Lower margin of error requires a larger sample size available at <http://www.raosoft.com/samplesize.html>

<sup>537</sup> The confidence level is the amount of uncertainty tolerated. Suppose there are 20 yes-no questions in the survey, with a confidence level of 95%, one would expect that for one of the questions (1 in 20), the percentage of people who answer yes would be more that the margin of error away from the true answer. The true answer is the percentage one would get if one exhaustively interview everyone.

<sup>538</sup> For each question, what does one expect the result will be? If the sample is skewed highly one way or the other, the population probably is, too.

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