

CORRUPTION AND NATIONAL DEVELOPMENT

PROCEEDINGS OF THE

46th Annual Conference

**of the
NIGERIAN ASSOCIATION OF LAW TEACHERS**



**Held 22nd - 26th April, 2013
At the University of Ilorin, Ilorin, Nigeria**

KEYNOTE ADDRESS BY:

Hon. Justice M.M.A. Akanbi CFR, PCA (Rtd.)

EDITED BY:

Dr. I. A. Abdulqadir

Dr. I. A. Yusuf

Dr. A. A. Oba

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CONTENTS

	PAGE
PART A: PRELIMINARIES	
Chairman's Opening Remarks	v
Welcome Address by the President of NALT	viii
Address of the Vice-Chancellor of the University of Ilorin	x
Keynote Address by Hon. Justice M. M. A. Akabi CFR, PCA (Rtd.)	xiii
PART B: PLENARY SESSION	
Corruption in the Nigerian Electoral Processes: Implications for Leadership and National Development	xxiii
PART C: EDITED ARTICLE	
FUSION OF ANTI -CORRUPTION AGENCIES IN NIGERIA: A CRITICAL APPRAISAL <i>Nnamdi Ikpeze, College of Law Afe Babalola University</i>	1
THE FIGHT AGAINST CORRUPTION IN NIGERIA: THE IMPERATIVE OF CRIMINAL JUSTICE SYSTEM REFORMS <i>I.F. Akande, Ph.D., A.M. Madaki, Ph.D., D.A. Idris, A. Ishaq, Faculty of Law, Ahmadu Bello University</i>	31
THE NIGERIA POLICE AND THE FIGHT AGAINST CORRUPTION: AN ASSESSMENT OF GOVERNMENT POLICIES <i>P. O. Itua, W. M. Mote, O. L. Omoregie, F. O. Olumese, R. O. Ehiemua, Faculty of Law, Ambrose Ali University</i>	54

MONEY LAUNDERING IN NIGERIA: IMPLICATIONS ON NATIONAL DEVELOPMENT	PAGE
<i>Dr. M. L. Yusufari, Dr. Mohammed Isah and Dr.A.M. Bello,</i> Faculty of Law, Bayero University Kano	73
A CRITICAL ANALYSIS OF THE PRACTICE, PROCEDURE AND MECHANISMS OF THE ECONOMIC AND FINANCIAL CRIMES COMMISSION (EFCC)	
<i>J.E. Idugboe and T.C. Nwano,</i> Faculty of Law, Benson Idahosa University	108
A CRITICAL APPRAISAL OF THE FIGHT AGAINST CORRUPTION IN NIGERIA	
<i>Aondofa Aligba,</i> Faculty of Law, Benue State University	129
LEGAL REPRESENTATION OF CORRUPT POLITICAL OFFICE HOLDERS IN NIGERIA - BETWEEN PROFESSIONALISM AND NATIONAL DEVELOPMENT	
<i>C. Amari Omaka, Uguru Uchechukwu, F. S. Ogazi, A. Udu Eseni,</i> <i>Chinedu-Igwe,</i> Faculty of Law, Ebonyi State University.	159
THE INDEPENDENCE OF ANTI-CORRUPTION AGENCIES IN NIGERIA: POSSIBILITIES AND CHALLENGES	
<i>T.I. Akomolede, B. Abegunde, A.O.E Filani, O.O. Ojo (Mrs),</i> Faculty of Law, Ekiti State University	186
A CRITIQUE OF THE FIGHT AGAINST CORRUPTION IN NIGERIA	
<i>Associate Professor U.U. Chukwumaeze Ph.D., C. K. Okorie Esq Ph.D.</i> <i>& C. E. Chinweze, LL.M,</i> Faculty of Law, Imo State University	205

	PAGE
PLEA-BARGAIN MECHANISM IN THE JUDICIAL DETERMINATION OF CORRUPTION CASES: A CRITICAL INTER-JURISDICTIONAL ASSESSMENT <i>A.O. Alubo, Ph.D., Joel Barde, Ph.D., O.H. Lar (Mrs), Ph.D., and Matthias Zechariah, Faculty of Law, University of Jos</i>	235
THE INDEPENDENT CORRUPT PRACTICES AND OTHER RELATED OFFENCES COMMISSION (ICPC): A GENERAL ASSESSMENT <i>Prof. A.O. Muzan, Dr. J. A. M. Agbonika, Dr. J. A.A. Agbonika and Obaje Enemaku, Faculty of Law, Kogi State University</i>	272
THE ROLE OF THE JUDICIARY IN COMBATING CORRUPTION: AIDING AND INHIBITING FACTORS IN NIGERIA <i>Dr. F.A.R. Adeleke, Miss Bose Lawal, and Mrs. Oluseyi Olayanju, Faculty of Law, Lagos State University</i>	293
CORRUPTION IN NIGERIA: DIMENSIONS AND IMPLICATION FOR NATIONAL DEVELOPMENT. <i>Dr. Isaac J. Essien, Dr. A. A. Kana, S.C.C. Okoronkwo, Habiba Musa, Faculty of Law, Nasarawa State University</i>	318
AN OVERVIEW OF INTERNATIONAL LEGAL FRAMEWORK FOR COMBATING CORRUPTION <i>Dr. Fatima Waziri – Azi, Dr. Ibe Ifeakandu, Dr. Adebisi Arewa, Nigeria Institute of Advanced Legal Studies</i>	346
AN ECONOMIC ANALYSIS OF COURT-CENTRE CORRUPTION IN NIGERIA <i>Messrs. Festus Emiri, Felicia Eimunjeze and Arthur Chukwu, Nigerian Law School.</i>	367
Combating Corruption in Nigeria: Role of the Law Teachers <i>A.O. Yusuff, PhD, and A.O. Kunuji, Faculty of Law, Obafemi Awolowo University, Ile-Ife.</i>	393

AN ASSESSMENT OF THE ROLE OF THE NATIONAL ASSEMBLY IN THE FIGHT AGAINST CORRUPTION IN NIGERIA

G. O. Akinrinmade, B. Y. Osifeso, A. A. Kolawole, A.O. Johnson Odusanya and O. A. Ayanleye, Faculty of Law, Olabisi Onabanjo University.

429

LEGAL REPRESENTATION OF CORRUPT POLITICAL OFFICE HOLDERS IN NIGERIA: BETWEEN PROFESSIONALISM AND NATIONAL DEVELOPMENT

Gbadamosi, O.A. Ph.D, Aderibigbe, T.O. Ph.D, College of Law, Osun State University

472

CORRUPTION IN NIGERIA: DIMENSIONS & IMPLICATIONS FOR NATIONAL DEVELOPMENT

Faculty of Law, Rivers State University of Science and Technology

488

ICPC: AN ANALYTICAL DISCOURSE OF ITS PRACTICE, PROCEDURE AND MECHANISMS

I. B. Lawa and O.O. Onakoya, Faculty of Law, University of Ibadan

503

COMBATING CORRUPTION IN NIGERIA: THE ROLE OF THE JUDICIARY

B. Bazuaye, Desmond Ireoghogba Flora Alohan and AleroFeminegho Faculty of Law, University of Benin

561

UNTYING THE KNOTS OF IMMUNITY CLAUSE AND THE FIGHT AGAINST CORRUPTION IN NIGERIA

A., A. Oba, I.A. Abdulqadir, H. O. Ijaiya, I. Imam and O. A. Olatunji, Faculty of Law, University of Ilorin

588

THE MATRIXES OF BAD GOVERNANCE: CORRUPTION AND INSECURITY IN NIGERIA

Bello A and Dr. Abiodun Odusote, Faculty of Law, University of Lagos

606

**RECOVERY AND REPATRAITION OF THE PROCEEDS OF
CORRUPTION IN NIGERIA**

*Dr M. K. Adebayo, Dr Maryam I.Gwangndi, Suleiman Usman Santuraki
and Dr Yusuf M. Yusuf, Faculty of Law, University of Maiduguri*

644

**ANALYZING THE EFFECTIVENESS OF RELEVANT LAWS
AND CRIME CONTROL THEORIES IN THE FIGHT AGAINST
CORRUPTION IN NIGERIA**

*Prof. Chukwunonso Okafo, John Funsho Olorunfemi & Rev. Fr. Adrian
Osuagwu, Faculty of Law, University of Nigeria, Enugu Campus*

670

**EFCC: A CRITICAL ANALYSIS OF ITS
PRACTICE, PROCEDURE AND MECHANISMS**

*K. G. Muhammad; I. Shehu; U. A. Dubagari, M. D. Mahmud,
Faculty of Law, Usumanu Danfodiyo University*

702

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725

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NALT 46th Annual Conference Proceedings - Unilorin 2013
**ICPC: AN ANALYTICAL DISCOURSE OF ITS PRACTICE,
PROCEDURE AND MECHANISMS***

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Abstract

Corruption is not only antithetical to the Nigeria's economic and political development, it also manifests social injustice and is symptomatic of societal decay. The enactment of the Corrupt Practices and Other Related Offences Act, 2000 which creates the Independent Corrupt Practices and Other Related Offences Commission (ICPC), is a major move by the Nigerian government to tackle the hydra-headed problem of corruption through the instrumentality of law. This paper examines the practice, procedure and mechanisms of the ICPC and offers suggestions for improvement.

Introduction

Corruption has not only been the bane of the socio-economic and political development of Nigeria, it also creates social disequilibrium and is emblematic of societal degeneration. According to Goodling,¹ while corruption is an English word necessarily laced with western ideas, the concept behind it is found in other cultures.² Corruption is not the exclusive preserve of any nation, race or section of the world, but rather transcends

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¹ N.A. Goodling, 200. "Nigeria's Crisis of Corruption – Can the UN Global Programme Hope to Resolve the Dilemma?" (2003) 18(3) *Vanderbilt Journal of Transnational Law* p. 999

² *Ibid.*

natural boundaries and symbolizes phenomenal universal unwholesomeness.³ According to Oyeboade,⁴ what makes Nigerian case particularly intriguing is the “apparent high tolerance level exhibited by the generality of Nigerians for an otherwise despicable conduct”⁵.

Irrespective of the controversies on its origins and forms, corruption brings odium opprobrium and ridicule to any society why it exists.⁶ According to Rose-Ackerman,⁷ corruption may have its roots in culture and history, it is nevertheless an economic and social problem.⁸ It produces inefficiency and unfairness in the distribution of public benefits and costs.⁹ It equally engenders irrational and inefficient allocation of resources.¹⁰ Since corruption involves the use of public resources that could have been used for social welfare services, it robs the country of its capital investment, which is necessary for economic development.¹¹ Corruption also exacerbates poverty and disproportionately affects those of lower incomes because it pulls resources from the national treasuries and puts same in the bank accounts of a politically powerful few.¹² In the political arena, corruption promotes patron-clientelism and political party interests and electoral malpractices.¹³ The menace of corruption has undermined the key gains of Nigeria’s democratic governance.¹⁴ Direct Foreign Investment (DFI) has been stalled, industrial growth hampered, monetary and physical policies distorted and Nigeria’s

³ O. Oluyide, “Legal Perspectives of Corruption in Nigeria” Sokefun, J (ed) *Issues in Corruption and the Law in Nigeria* (Faculty of Law, Olabisi Onabanjo University Ago-Iwoye 2002), p. 3

⁴ A. Oyeboade, ‘An Overview of Corruption’ in *Law and Nation Building in Nigeria Selected Essays*. (CEPAR, Lagos 2005), p. 2

⁵ *Ibid.*

⁶ Lawal, I.B. 2006. “Legislative Corruption in Nigeria: A Watchdog’s Albatross?” (2006) 3(1) *Journal of Law and Diplomacy* p g.

⁷ Rose-Ackerman, S 1999. *Corruption and Government* Cambridge United Kingdom p 26.

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ T, Osipitan, O. Oyewo, and K.O. Amusa, “Structuring Measures Against Corruption for Sustainable Development”, *NALT Proceedings of 38th Annual Conference*, (Lagos State University 2002), p. 350.

¹¹ M Hussein, “Combating Corruption in Malawi. An Assessment of the Enforcing Mechanisms” *African Security Review*(2005) 14(4) pp 93-94.

¹² E Harsh, “African Mounts Drive Against Graft: International Anti-Corruption Conference Spotlights Global Malady 13 *African Recovery* p. 8.

¹³ M. Hussein, *op. cit* pp 93-94.

¹⁴ N. Ribadu, Address of the National Workshop on Financial Crimes organized by the Nigerian Institute of Advanced Legal Studies, Lagos 24-25 June 2003 p. 4.

international image continually battered.¹⁵ This is clearly evident by the country's corruption rating by the Transparency International.¹⁶

Nigeria is rated among the topmost corrupt countries in the world. In 1996, 1997 and 2000 the Corruption Perception Index by Transparency International rated the country as the most corrupt country in the world.¹⁷ The country was rated the fourth most corrupt country in 1998¹⁸ and the second most corrupt country in 1999,¹⁹ 2001²⁰ and 2002.²¹ Thereafter, the country's rating improved marginally. The country was rated 153 out of the 180 countries surveyed in 2006,²² 143 out of 180 countries surveyed in 2007,²³ 121 out of 180 countries surveyed in 2008²⁴, 130 out of 180 countries in 2009,²⁵ 134 out of 178 countries surveyed in 2010;²⁶ and 143 out of 183 countries surveyed in 2011²⁷. In 2012, the country scored 27 out of a maximum 100 marks to rank 139th out of 176 countries surveyed. This makes Nigeria to be the 35th most corrupt country in the world²⁸. In 2003, Nigeria was listed by the Financial Action Task Force (FATF), among non-co-operative countries (NCCTS) and was delisted at the FATF plenary meeting of 23 June 2006²⁹. The need to redeem the country's battered image and restore sanity and probity into the Nigerian economy necessitated the enactment of the Corrupt Practice and

¹⁵ *Ibid.*

¹⁶ Transparency International is a Washington DC based Non-Governmental anti-corruption agency.

¹⁷ See the Transparency International Corruption Perception Indices for those years.

¹⁸ Transparency International Corruption Perception Index 1998.

¹⁹ Transparency International Corruption Perception 1999.

²⁰ Transparency International Corruption Perception 2001.

²¹ Transparency International Corruption Perception 2002.

²² Transparency International Corruption Perception Index 2006.

²³ Transparency International Corruption Perception Index 2007.

²⁴ Transparency International Corruption Perception Index 2008.

²⁵ Transparency International Corruption Perception Index 2009.

²⁶ Transparency International Corruption Perception Index 2010.

²⁷ Transparency International Corruption Perception Index 2011.

²⁸ Transparency International Corruption Perception Index 2012. In the 2012 ranking, Nigeria was ranked 14th in West Africa while Cape Verde was ranked first in the region and 39th globally with a score of 60. Ghana was ranked second in West Africa with a global ranking of 64 and a score of 45 while Guinea came last in the sub-region with a global ranking of 154 and a score of 24 out of 100. For more on the 2012 ranking see "Transparency International Ranks Nigeria 35th Most Corrupt Nation," *This Day* 6 December 2012 p. 1.

²⁹ N.J. Udombana, "The Economic and Financial Crimes Commission Act 2004: Equipping the EFCC for a more Effective Role in Justice Administration" F.A.D Yusuf, (ed), *Issues in Justice Administration: Essays in Honour of Justice S.M.A. Belgore (Rtd)* (Lagos: VCG International Ltd 2008), p 358.

Other Related Offences Act³⁰, which created the Independent Corrupt Practices and Other Related Offences Commission (ICPC).³¹

Conceptual Clarification

It will not be out of place to clothe some of the key expressions with meaning, at least contextually, for ease of understanding and facilitation of effective communication.

The word 'independent' is the adjective of 'independence'. According to the *Oxford Advanced Learner's Dictionary*,³² 'independence' means "the freedom to organize your own life, make your own decisions, etc. without needing help from other people." This probably explains why the Independent Corrupt Practices and Other Related Offences Act is replete with many provisions that can guarantee the independence and autonomy of the Independent Corrupt Practices and Other Related Offences Commission (ICPC)³³. For example, by section 3(8) of the Act, the Chairman and members of the Commission can only be removed from office by the President acting on address supported by two-thirds majority of the Senate³⁴. Similarly, in the performance of their duties the Chairman and members "shall not be subject to any other authority".³⁵ This however does not insulate the Commission from the investigative powers of the National Assembly³⁶ and judicial review by the courts³⁷. Besides that, in the performance of their duties the officers of the Commission have all the powers and immunities of police officers.³⁸ Officers of the Commission and other persons assisting them are equally immune from civil or criminal proceedings from any act which is done "in good faith"³⁹. By Section 70 of the Act, the Chairman of the Commission is empowered to

³⁰ No. 5 of 2000.

³¹ Section 3(1) of the ICPC Act .

³² A.S. Hornby, *Oxford Advanced Learner's Dictionary* (United Kingdom: Oxford University Press. 2005), p. 758.

³³ For example, section 3(10) of the ICPC Act provides that in the exercise of their functions in the Chairman and members of the Commission shall not be subject to any authority.

³⁴ Praying that they be removed for inability to discharge the functions of their office (whether arising from infirmity of mind or body or any other cause) or for misconduct.

³⁵ Except as otherwise provided by the Act.

³⁶ See section 88 of the 1999 Nigerian Constitution as amended.

³⁷ See section 6(a)(b) of the 1999 Nigerian Constitution.

³⁸ See section 5(1) of the ICPC Act .

³⁹ Section 65 of the ICPC Act.

make rules for giving effect to the provisions of the Act⁴⁰. He is equally empowered to amend or revoke any order or notice which has been made or given by him in exercise of any power conferred on him by the Act⁴¹.

The expression 'corrupt practices' refers to actions and conducts that engender corruption. The word 'corruption' is not amenable to an easy definition. According to Onigu Otite,⁴² although the ubiquity of corruption is otherwise acknowledged, its magnitude and character are defined by different social and cultural contexts and dimensions⁴³. Corruption connotes the perversion of anything from its original state of purity to a state of infection⁴⁴. Azinge sees corruption as the involvement in dishonest or wicked behaviour which is destructive of the moral fabric of the society⁴⁵. According to *Black's Law Dictionary*, corruption means "depravity, perversion or taint; an impairment of integrity, virtue or moral principle"⁴⁶. *The Oxford Advanced Learner's Dictionary* defines 'corruption' as "dishonest or illegal behaviour especially of people in authority"⁴⁷. To John Girling, corruption is the synthesis of the misfit between the private accumulation ideals of capitalism and the public welfare virtues of democracy,⁴⁸ while Benjamin sees it as any induced or un-induced behaviour within a complex or private organization to falsify its integrity, purpose, value and ethics.⁴⁹ O.B.C Nwolise's definition of corruption is three-pronged. According to him,

Corruption is an act, a condition and a process. As an act, it is doing things that pollute an office, others or society. As a condition, it is a state of being corrupt, while as a process, it is

⁴⁰ Section 70 of the ICPC Act .

⁴¹ The revocation or amendment may contain consequential, ancillary or incidental matters relevant to such revocation or amendment.

⁴² O. Otite, "On the Sociological Study of Corruption", Odekunle, Femi(ed) *Nigeria: Corruption in Development*. (Ibadan: IUP 1982), p. 11.

⁴³ *Ibid.*

⁴⁴ Osipitan, T et al *op. cit* p. 331.

⁴⁵ Garner, B.A. 2009. *Black's Law Dictionary* St. Paul Minn USA p. 397.

⁴⁶ *Ibid.*

⁴⁷ *Op. cit* p. 329.

⁴⁸ Girling, J 1994. *Corruption, Capitalism and Democracy* Routledge, London, chapter I.

⁴⁹ Benjamin, S.A 2006. 'The Role of Civil Society in Fighting Corruption' in Aboyade, B and Ayodele, S (eds), *Fighting Corruption in Nigeria: Challenges for the Future*. Development Policy Centre Ibadan p. 63.

inculcating dishonest, fraudulent and debased culture on other members of the society”⁵⁰

Neither the Criminal Code⁵¹ nor the Penal Code⁵² defines the word ‘corruption’. However, Section 2 of the Corrupt Practices and Other Related Offences Act is to the effect that “corruption includes bribery, fraud and other related offences”.⁵³ According to Paul D. Ocheje, this is a vague definition that may not be useful to anyone who wants to precisely locate the meaning of corruption⁵⁴. In his own view, Muiz A. Banire states that the definition is not only laconic but rather technical and restrictive.⁵⁵ He contends further that the definition appears to be exhaustive in view of the use of the word ‘includes’, as it will encompass the general perception of the term⁵⁶. Despite the differences in the definitions of corruption, a common thread that runs through them is that corruption involves perverted conducts and misuse or abuse of office⁵⁷. The general recognition of and the common agreement on the pervasiveness of corruption do not imply that there is a unanimous evaluation of it in the society.⁵⁸

The word ‘offence’ means “a violation of the law, a crime”⁵⁹. The *Oxford Advanced Learner’s Dictionary* defines offence as “an illegal act, a crime”⁶⁰. According to Martin and Storey the only way in which it is possible to define

⁵⁰ O.B.C. Nwolise, “Corporate Governance, and Corruption: Public and Private Sectoral Approaches”. B. Abovade, and S. Ayodele, (eds) *op. cit* p 106.

⁵¹ Cap C 38, Laws of Federation of Nigeria 2004.

⁵² Cap 89, Laws of Federation of Nigeria, 1990.

⁵³ This definition has been criticized.

⁵⁴ P.D. Ocheje, “Law and Social Change: A Socio-Legal Analysis of Nigeria’s Corrupt Practices and other Related Offences Act, 2000” *Journal of African Law*.(2001) 45(2) p. 179.

⁵⁵ M.A. Banire, Socio-legal and Regulatory Issues in Corruption Control in Nigeria, Onibokun, A and Popoola, A.O. (eds), *Current Perspectives in Law, Justice and Development: Essays in Honour of JusticeAlfa Belgore* (Ibadan: Demm-Dit Projects 2007), p. 243.

⁵⁶ *Ibid.*

⁵⁷ S.A. Igbinedion, “Deconstructing the Edifice of Corruption in Nigeria”, *University of Ibadan Law Journal* (2011) 1(2) pp. 181-183.

⁵⁸ For features, causes and effects of corruption see G.R. Montinola, and R.W Jackman, ‘Sources of Corruption: A Cross-Country Study’ *British Journal of Political Science* 2003(32), p 146-155; E Buscaglia, *Judicial Corruption in Developing Countries: Its causes and Economic Consequences*. (Vienna: Global Programme Against Corruption Technical Guides, 2001), pp 1-5.

⁵⁹ B.A. Garner, *Black’s Law Dictionary op. cit* p. 1186.

⁶⁰ *Op. cit* p 1011.

a crime is that it is conduct forbidden by the state and to which a punishment has been attached because “the conduct is regarded by the state as being criminal”⁶¹. There are four ways of classifying offences. These are by source, by police powers, by type of offence and by place of trial.⁶² However, the ICPC Act does not bother itself with classification of offences.⁶³

The Pre-ICPC Act Legal Framework and Institutional Mechanisms against Corruption

The phenomenon of corruption predates Nigeria’s independence. Therefore, the Corrupt Practices and Other Related Offences Act⁶⁴ is not the first anti-corruption legislation in the country. The pre-existing legal framework and institutional mechanisms for fighting corruption include the Criminal Code⁶⁵ and the Penal Code⁶⁶ both of which have collectively not less than thirty sections regulating different aspects of corruption by public officials.⁶⁷ Others include the Criminal Justice (Miscellaneous Provisions) Decree 1966⁶⁸ which repealed sections 98, 100 and 114 to 116 of the Criminal Code in its application to Lagos and substituted them with a new provision (section 98) which dealt with corruption,⁶⁹ and the Corrupt Practices Decree of 1975.⁷⁰ The efficacy of this Decree was, however, whittled down in 1976 by the promulgation of the Public Officers (Protection Against False Accusation) Decree of 1976.⁷¹ The Corrupt Practices Decree was repealed in 1979.⁷² Mention should also be made of the Recovery of Public Property

⁶¹ Martin, J and Storey, T 2004. *Unlocking Criminal Law* Hodder and Stoughton London p 9.

⁶² *Ibid.*

⁶³ Sections 18 to 26 of the Act only make provisions for “Offences and Penalties”.

⁶⁴ 2000.

⁶⁵ Cap C 38 LFN 2004.

⁶⁶ Cap 89 LFN 1990.

⁶⁷ A. Ibidapo – Obe, “A Legal Analysis of the Nigerian Corrupt Practices and Other Related Offences Act, 2000” *University of Ado Ekiti Law Journal* (2003)2, p 404.

⁶⁸ Decree 34 of 1966.

⁶⁹ The newly introduced section 98 of under the decree did not create separate offences of corruption relating to the administration of justice.

⁷⁰ No 38.

⁷¹ Decree No 11.

⁷² See section 1(b) Constitution of the Federal Republic of Nigeria (Certain Consequential Repeals etc) Decree 105 of 1979.

(Special Military Tribunal) Decree 1984⁷³ under which many former political office holders were tried and detained.

In addition to the above statutes and others too numerous to mention, there were also constitutional provisions against corruption in the country. One of such is the Code of Conduct for Public Officers contained in Part I of the Fifth Schedule to the 1999 Nigerian Constitution.⁷⁴ The Code was first introduced into the Nigerian Constitution in 1979.⁷⁵ It is meant to prevent corruption and abuse of office and to ensure transparency in public officers.⁷⁶ Acts prohibited by the Code include a public officer putting himself in a position where his personal interest conflicts with his duties and official responsibilities.⁷⁷ The Code of Conduct also obligates every public officer to declare his assets upon assumption of office; thereafter at an interval of four years and at the end of his term of office.⁷⁸ The asset declarations are kept by the Code of Conduct Bureau⁷⁹ while the Code of Conduct Tribunal tries breaches of the Code of Conduct.⁸⁰ In addition to the mandatory declaration of assets on assumption of office certain categories of public officers⁸¹ are also obliged to take and subscribe to the oath of allegiance and oath of office before they can discharge the functions of their offices.⁸²

⁷³ Decree No 3 of 1984 as amended by Decree 12 of 1984. See also I.O Adejumo, "Corruption and Crime in Nigeria", B. Aboyade, and S. Ayodele, (eds) *op cit* pp 154 – 155.

⁷⁴ As amended.

⁷⁵ Part I, Fifth Schedule to the 1979 Constitution.

⁷⁶ For the definition of public officers, see paragraphs 1-16, Part II, Fifth Schedule to the 1999 Constitution.

⁷⁷ Paragraph 1 Part I, Fifth Schedule to the 1999 Nigerian Constitution. Others include holding two posts from which he is being paid from public funds, and engaging in the running of private trade or profession while employed on a full time basis. See paragraphs 2(a) and (b), Part I of the Fifth Schedule. For a critique of the Code of Conduct see I.B. Lawal, "The Code of Conduct and the Fight Against Corruption in Nigeria" *Abakaliki Bar Journal* (2006)2 p 107; see also A.O.O. Ekp, "Curbing Corruption in Nigeria: The Role of the Code of Conduct" *University of Benin Journal of Public Law Bureau* (2004)20 pp 68-69.

⁷⁸ Paragraph 11(1)(a) and (b) Part I, Fifth Schedule to the 1999 Constitution. The Code does not state the time frame for declaration after leaving office.

⁷⁹ Paragraph 3(a) Part I Third Schedule to the 1999 Constitution.

⁸⁰ Paragraphs 18(1) and (2), Part I of the Fifth Schedule to the 1999 Constitution

⁸¹ For instance, the President, Vice-President, Governor and Deputy Governors, Legislators and Judicial Officers are constitutionally required to subscribe to the oaths of allegiances and oath of office before assumption of office. See also S.A. Igbinedion, *op. cit* p 184

⁸² The oaths are contained in the Seventh Schedule to the 1999 Constitution

Another constitutional provision against corruption is on the auditing of public accounts. Section 85 of the 1999 Constitution is to the effect that the public accounts of the Federation and of all offices and courts “shall be audited and reported on by the Auditor-General who shall submit his reports to the National Assembly.”⁸³ The Auditor-General is also invested with the power to conduct periodic checks of all government statutory corporations, commissions, authorities, agencies, including all persons and bodies established by an Act of the National Assembly⁸⁴. An important constitutional provision aimed at combating corruption which is of direct relevance to the enactment of the Corrupt Practices and other Related Offences Act is section 15(5) of the 1999 Constitution which provides that: “The state shall abolish all corrupt practices and abuse of power”. Though an item under the Fundamental Objective and Directive Principles of the State Policy, generally regarded as unenforceable,⁸⁵ in the case of *Attorney-General of Ondo State v Attorney General of the Federation and Others*,⁸⁶ the Supreme Court relied on this provision and other relevant provisions of the Constitution⁸⁷ to uphold the constitutionality of the Corrupt Practices and Other Related Offences Act, which was enacted to cure the deficiencies in all the previous legal framework and institutional mechanisms for combating corruption in Nigeria.

The Corrupt Practices and Other Related Offences (ICPC) Act, 2000

The ICPC Act was passed by the Senate on 31 May, 2000 and by the House of Representative on 1st June, 2000. It was signed into law by President

⁸³ Section 85(2) of the 1999 Constitution. For that purpose the Auditor General or any person authorized by him shall have access to all the books, records returns and other documents relating to those accounts.

⁸⁴ Section 85(4) of the 1999 Constitution. For a critique of the auditing of public accounts provision, see B. Owasanoye, Transparency, Accountability and Good Governance under the 1999 Constitution, Ayua, I.A. Guobadia, D.A. and Odekunle, A.O. (eds) *Nigeria: Issues in the 1999 Constitution*. (Lagos: NIALS, 2 001), p. 248. The author argues that the Auditor General's report and the National Assembly's debates thereon should be made public. For the appointment, remuneration and removal of the Auditor-General, see Y. Akinseye.-George, 'Constitutional Framework for Accountability in Nigeria', *University of Ibadan Law Journal* (2011) 1(1) pp. 87-88.

⁸⁵ Section 6(b)(c) of the 1999 Constitution .

⁸⁶ (2002)9 NWLR (Part 772) p 222.

⁸⁷ These are the *proviso* to the section 6(b)(c) of the 1999 Constitution and item 60(a) of the Exclusive Legislative List which imbues the National Assembly with the power of establishment and regulation of authority to promote and enforce chapter II of the Constitution.

Olusegun Obasanjo on 13 June, 2000⁸⁸. According to Paul D. Ocheje⁸⁹, the Act is arguably “the most comprehensively drafted and tightly worded anti-corruption piece of legislation in the history of Nigeria”. The ICPC Act has also been described as representing “the most current legislative measure against corruption in Nigeria” which contains a lot of pious provisions “aimed at checking corruption within the Nigerian socio-economic system”⁹⁰. The objective of the Act, according to Taiwo Osipitan, Oyelowo Oyewo and K.O. Amusa, among others, “is to repair Nigeria’s battered image and provide an enabling environment for foreign and non-foreign investors to operate and ensure development.”⁹¹

Divided into 71 sections, the ICPC Act establishes an Independent Corrupt Practices and Other Related Offences Commission (ICPC)⁹², which is a body corporate with perpetual succession and a common seal⁹³. The Commission consists of a Chairman and twelve other members, two of whom must come from each of the six geo-political zones⁹⁴. The membership of the Commission cuts across many sectors and interests in the society. It includes a retired police officer not below the rank of Commissioner of Police,⁹⁵ a legal practitioner of not less than ten years post-call experience,⁹⁶ a retired judge of a superior court of record,⁹⁷ a retired public servant not below the rank of a director⁹⁸, a woman⁹⁹; a youth not less than 21 years or more than 30 years at the time of appointment¹⁰⁰ and a chartered accountant¹⁰¹. By Section 3(4) of the Act the Commission is to be headed by a Chairman who must be a person

⁸⁸ It became effective on that day.

⁸⁹ P.D. Ocheje, *op. cit* p 172

⁹⁰ M. Ibanga, and I.N.E.Woruji, “Structuring Anti-Corruption Measures for Sustainable Development in Nigeria, *NALT Proceedings of 38th Annual Conference op. cit* p 300

⁹¹ *Op cit* p 333. For more comments on the Act see N. Kofele-Kale, “Change or the Illusion of Change: The War Against Corruption in Africa” *Washington International Law Review* (2006) 38, 697 at 706

⁹² Section 3(1) of the ICPC Act.

⁹³ Section 3(2) of the ICPC Act.

⁹⁴ Section 3(3) of the ICPC Act.

⁹⁵ Section 3(3)(a) of the ICPC Act.

⁹⁶ Section 3(3)(b) of the ICPC Act.

⁹⁷ Section 3(3)(c) of the ICPC Act.

⁹⁸ Section 3(3)(d) of the ICPC Act.

⁹⁹ Section 3(3)(e) of the ICPC Act.

¹⁰⁰ Section 3(3)(f) of the ICPC Act.

¹⁰¹ Section 3(3)(g) of the ICPC Act.

who has held or is qualified to hold office as a judge of a Superior Court of record in Nigeria¹⁰².

The stipulation as to the membership of the Commission being equally spread across the six geo-political zones in the country might not be unconnected with the federal character principle under the Nigerian Constitution¹⁰³. This, however, has the tendency to replace national loyalty with nationaltribal loyalty¹⁰⁴. According to Yemi Akinseye-George, the inclusion of a chartered accountant is one of the most thoughtful amendments introduced by the legislature as the original composition proposed by the President did not include a chartered accountant¹⁰⁵. "The diversity of the composition while commendable", it has been observed, "does not add any advantage to the activities of the Commission," which is basically investigative¹⁰⁶. It is further contended that if the composition were to reflect the singular duty of the Commission, it would consist more of members of relevant discipline like sociology, criminology, psychology, police, sciences, lawyers and accountants of various specialization¹⁰⁷. Furthermore, the qualification of the Chairman of the Commission being a person who has held or is qualified to hold office as a judge of record might be due to a lot of powers with which he is invested under the Act.¹⁰⁸

To ensure the independence and impartiality of the Commission the Chairman and members of the Commission the Chairman and members of the Commission are appointed by the President upon confirmation by the Senate and shall not begin to discharge their duties until they have declared their

¹⁰² This might not be unconnected with the enormous powers of the Chairman of the Commission.

¹⁰³ Section 14(3) of the 1999 Constitution .

¹⁰⁴ J.O. Akande, *Introduction to the 1999 Nigerian Constitution*. (Lagos: MIJ Publishers), p. 55 see also D. Bach, 1996. "Indigeneity, Ethnicity and Federalism." in L. Diamond, A.K.K Green. and O. Oyediran, (eds), *Transition Without End: Nigerian Politics and Civil Society Under Babangida*. Vantage Publishers, Ibadan pp 381-882.

¹⁰⁵ Akinseye – George, Y. 2000. *Legal System, Corruption and Governance in Nigeria*. New Century Law Publishers p. 131.

¹⁰⁶ Ibidapo – Obe, A. *op cit* p. 407.

¹⁰⁷ *Ibid*.

¹⁰⁸ Some of his powers include power to obtain information on any property owned by any suspect under section 44 of the Act; power to apply to court to prohibit a suspect from dealing with property outside Nigeria under section 46 of the Act and the power to revoke or amend any order or notice under section 51 of the Act, among others.

assets and liabilities.¹⁰⁹ Furthermore, the Chairman is to hold office for a period of five years and may be reappointed thereafter, while the members are to hold office a term of four years and may be reappointed for another term of four years. Neither the Chairman nor any of the other members can be reappointed for a third term¹¹⁰. The difference in the tenure of the Chairman and other members is very salutary. In the first place being the chief accounting officer, it ensures that the Chairman outlives the other members of the Commission. Secondly, it prevents a situation where all the members of the Commission would exhaust their tenure at the same time and there would be no person to properly orientate or 'brief' the new members or the Chairman.

The remuneration for members of the Commission is to be determined by the National Revenue Mobilization, Allocation and Fiscal Commission.¹¹¹ The tenure of office and conditions of service of staff of the Commission are to be determined by the Commission.¹¹² The Commission is equally invested with the power to appoint, designate and deploy such member and category of staff and officers required to assist it in the discharge of its functions.¹¹³ Similarly, in the discharge of its duties, the Commission shall not be subjected to direction or control of any other person or authority.¹¹⁴ This, however, does not insulate the Commission from judicial review of its activities¹¹⁵ and the investigative powers of the legislature.¹¹⁶ The Chairman or any member of the Commission may be removed from office by the President acting on an address supported by two-thirds majority of the Senate praying that he be removed from office for inability to discharge the functions of his office.¹¹⁷ This provision is similar to that of the removal of Chairman and members of certain federal executive bodies under the Constitution.¹¹⁸ According to

¹⁰⁹ Section 3(6) of the ICPC Act.

¹¹⁰ Section 3(7) of the ICPC Act.

¹¹¹ Section 3(5) of the ICPC Act.

¹¹² Section 3(11) of the ICPC Act.

¹¹³ Section 3(13) of the ICPC Act.

¹¹⁴ Section 3(14) of the ICPC Act.

¹¹⁵ Section 6(6) (b) of the 1999 Constitution.

¹¹⁶ Section 88 of the 1999 Constitution.

¹¹⁷ Whether arising from infirmity of mind or body on any other cause or misconduct.

¹¹⁸ These are the Code of Conduct Bureau, the Council of State, the Federal Commission, the Federal Civil Service Commission, the Federal Judicial Service Commission, the Independent National Electoral Commission, the National Defence Council, the National Economic Council, the National Judicial Council, the National Population Commission, the National Security Council, the Nigeria National Security Council, the Nigeria Police Council, the

Nwabueze, this provision does not seek to prescribe an exclusive method of removal, as in the case of judges, but merely to limit the President's removal power.¹¹⁹ The removal of the Chairman or member of the Commission for misconduct admits of no argument.¹²⁰ As for their inability to perform their duty, this could either be mental or physical.¹²¹ In either case before the removal of a member of the Commission is effected, it is proposed that the person concerned should be informed of the allegation against him and be given a chance to reply to it in such a way as appropriate, albeit not necessarily by an oral hearing.¹²²

Appointment of Officers of the Commission

By Section 4(6) of the Act there shall be a secretary to the Commission appointed by the President who shall be responsible for keeping the records of the Commission and general administration and control of the staff of the Commission.¹²³ The Act also provides for the appointment of such number of commissioners, deputy commissioners, assistant commissioners, superintendents, assistant superintendents, senior investigators and investigators as may be necessary for the purpose of carrying into effect the purpose of the Act.¹²⁴ Resident anti-corruption commissioners may also be appointed in each state of the Federation and the Federal Capital Territory, Abuja.¹²⁵ The Commission is equally empowered to establish one or more branch offices in each state of the Federation and the Federal Capital Territory, Abuja.¹²⁶ An officer of the Commission shall have such powers as may be conferred on him under the Act and shall be subject to the direction, control and supervision of the Chairman and other officers of the Commission

Police Service Commission and the Revenue Mobilisation Allocation and Fiscal Commission. See Sections 153(1) and 157 of the 1999 Nigerian Constitution.

¹¹⁹ B.O. Nwabueze, *Nigeria's Presidential Constitution 1979-85*. (London: Longman, 1985), p. 297.

¹²⁰ I.B. Lawal, "Public Declaration of Assets in Nigeria: Conflict or Synergy Between Law and Morality?" *African Human Rights Law Journal* (2009) p. 237.

¹²¹ J.O. Sokefun, "Independence of the Judiciary" in Sokefun, J.O. (ed) *Issues in Constitutional Law and Practice in Nigeria*. (Ago Iwoye: Olabisi Onabanjo University, 2001), P. 199.

¹²² *Rees v Crane* 2 AC 1994.

¹²³ Section 4(6) of the ICPC Act.

¹²⁴ Section 4(7) of the ICPC Act.

¹²⁵ Section 7(3) of the ICPC Act.

¹²⁶ Section 7(2) of the ICPC Act. This justifies the appointment of Resident Anti-Corruption Commissioners.

ICPC: Analytical Discourse of Practice Procedure And Mechanisms

superior to him in rank.¹²⁷ An officer of the Commission when investigating or prosecuting a case of corruption, is invested with “all powers and immunities of a police officer¹²⁸”. The Chairman and any four members of the Commission constitute a quorum at its meeting.¹²⁹

The specific listing of the categories of staff that can be appointed by the Commission is aimed at enhancing its efficiency. However, there seems to be a significant omission in the list. There is no mention of appointment of legal officers. This issue is worthy of consideration because the Commission employs fulltime lawyers who prosecute on its behalf or under the leadership or authority of the Attorney-General of the Federation or his representatives.¹³⁰ These in-house lawyers are designated as “superintendents legal” in their letters of appointment and identification cards.¹³¹ When these lawyers are led by the representatives of the Attorney-General, they are all announced in court as ‘legal officers’. When they appear on their own, some still adopt the title of ‘legal officers’ while others stick to their official designations of ‘superintendents legal’. This can lead to confusion in two significant respects. First, why should the prosecutors of an anti-corruption agency be announced by designations different from those on their official identification cards and letters of appointment?¹³² The honest ones who announce themselves by their official designation are also faced with a dilemma that can impede their prosecutorial assignment. This is because the expression ‘superintendent legal’ makes them look like police prosecutors, who are sometimes under some prosecutorial disability.¹³³ The defence counsel in corruption cases can easily take advantage of this to challenge the

¹²⁷ He shall also exercise his powers and discharge his duties in compliance with such directives or instructions as may be given by the Chairman or any such officer. See Section 4(1) of the ICPC Act.

¹²⁸ Section 5(1) of the ICPC Act.

¹²⁹ Section 4(2) of the ICPC Act.

¹³⁰ In practice the officers are seconded from the Federal Ministry of Justice.

¹³¹ Section 4(5) of the ICPC Act provides that: “Every officer of the Commission, when discharging the duties of his office, shall, on demand, declare his office and produce to the person against whom he is acting or from whom he seeks information, evidence of his identity issued by the Commission”.

¹³² Can this not precipitate a case of impersonation?

¹³³ Some statutes preclude police prosecutors from prosecuting under them. See *FRN v Akpan and Others* (2003) FHCLR 119 at 133; See also Tijani, N. 2008. “The Power to Prosecute by Police in Superior Courts of Record in Nigeria”, in Yusuf, A.O. (ed), *Issues in the Administration of Justice in Nigeria: Essays in Honour of Justice S.M.A. Belgore*. VGD, Lagos. Pp. 243-245

competence of lawyers appointed by the Independent Corrupt Practices and Other Related Offences Commission to prosecute them.¹³⁴ Therefore, the ICPC Act should be amended to take care of this *lacuna*.

The establishment of branch offices in each state of the Federation and the Federal Capital Territory, Abuja,¹³⁵ and the power of the Commission to appoint resident anti-corruption commissioners in each state of the Federation and the Federal Capital Territory are highly commendable. According to Yemi Akinseye-George, while also applauding this provision, he argues that the Commission should also have anti-corruption offices in all local government areas in the country.¹³⁶ He further contends that the highly centralized structure is the reason for the ineffectiveness of the Nigerian Police.¹³⁷ The quorum for the meetings of the Commission has, however, been criticized.¹³⁸ The stipulation of the quorum of Commission as four members has been described as 'rather thin' considering that the full panel is thirteen while a quorum of nine members has been suggested to make expression and diversity real.¹³⁹ This figure seems to be on the high side. A quorum of seven members would serve the same purpose.¹⁴⁰

The Duties of the Commission

By section 6 of the ICPC Act the Commission is charged with immense administrative, educational and investigatory duties.

These include:

- (i) receiving and investigating any report of the conspiracy to commit, or the commission of such offence and prosecuting the offenders;¹⁴¹
- (ii) examining the practices, systems and procedures of public bodies and supervising their review;¹⁴²

¹³⁴ Although the chances of success of such defence counsel are very slim, it may still engender delay in prosecution of corruption cases.

¹³⁵ Section 7(2) of the ICPC Act.

¹³⁶ Y. Akinseye-George, *Legal System, Corruption and Governance in Nigeria* op. cit. p. 131

¹³⁷ *Ibid.*

¹³⁸ Ibidapo-Obe, *A op. cit.* p. 408.

¹³⁹ *Ibid.*

¹⁴⁰ This is the minimum as members are expected to attend all meetings.

¹⁴¹ Where reasonable grounds exist for suspecting that any person has conspired to commit or has committed an offence under the Act. Section 6(a), ICPC Act.

ICPC: Analytical Discourse of Practice Procedure And Mechanisms

- (iii) instructing, advising and assisting any officer, agency or parastatals on ways by which fraud or corruption may be eliminated or minimized by such officers agency or parastatal;¹⁴³
- (iv) advising heads of public bodies of any changes in practices, systems or procedures compatible with the effective discharge of the duties of the public bodies to reduce the likelihood or evidence of bribery, corruption and related offences;¹⁴⁴
- (v) educating the public on and against bribery, corruption and related offences;¹⁴⁵ and
- (vi) enlisting and fostering public support in combating corruption.¹⁴⁶

The duties conferred on the Commission are undoubtedly very enormous. According to Akin Ibidapo-Obe, the advisory role of the Commission as contained in section 6(c) of the Act is incongruous with the general duties of the Commission.¹⁴⁷ This view is, however, erroneous because the advisory role is aimed at preventing corruption, which is the core duty of the Commission. Furthermore, by building up managerial and systems skills, a professionally-staffed agency is able to audit anti-corruption arrangements in government departments and public works contracting, and sharply reduce the opportunities for corruption to take place.¹⁴⁸

In the discharge of their duties the officers of the Commission have all the powers and immunities of a police officer.¹⁴⁹ Other powers of officers of the Commission include the power to seize movable or immovable property if in the course of an investigation into an offence under the Act any officer of the Commission has reasonable grounds to suspect that any movable or unmovable property is the subject matter of an offense or of evidence relating to the offence,¹⁵⁰ and the power to break open any outer or inner door or window of any premises, upon obtaining a court warrant, and enter thereto,

¹⁴² Where in the opinion of the Commission, such practices, systems or procedures aid or facilitate corruption. See section 6(b), ICPC Act.

¹⁴³ Section 6(c) of the ICPC Act.

¹⁴⁴ The changes will be at the Commission thinks fit, section 6(d), ICPC Act.

¹⁴⁵ Section 6(e) of the ICPC Act.

¹⁴⁶ Section 6(f) of the ICPC Act.

¹⁴⁷ *Op cit.* p. 411.

¹⁴⁸ Y. Akinseye-George, *op. cit.* p. 134

¹⁴⁹ Section 5(1), ICPC Act

¹⁵⁰ Section 37(1) ICPC Act

search such premises,¹⁵¹ remove by force any obstruction to such entry, search, seizure or removal as he is empowered to effect;¹⁵² or detain any person found in or on any premises or conveyance until such premises or conveyance has been searched,¹⁵³ among others.

Powers of the Chairman of the Commission

The Chairman of the Commission is also invested with immense powers to obtain information from any person reasonably suspected to have committed an offence under the Act.¹⁵⁴ The Chairman may by written notice require such a person to furnish a statement in writing, on oath or affirmation to identify every property¹⁵⁵ belonging to him or in which he has any interest whether legal or equitable, and specifying the date and manner of the acquisition of the property.¹⁵⁶ The person may also be required to identify every property sent out by him during such periods as may be specified in the notice;¹⁵⁷ set out the estimated value and location of each of the identified and if any of such properties cannot be identified, the reasons therefore;¹⁵⁸ set out all other information relating to his properties, business, travel or other activities as may be specified in the notice;¹⁵⁹ and set out all his sources of income. The Chairman may also extend a similar treatment to any relative or associate of the person suspected to have committed an offence under the Act¹⁶⁰. The Chairman may equally require any officer of any bank or financial institution¹⁶¹ to furnish copies of any or all accounts documents and records relating to any person to whom a notice may be issued.¹⁶²

The Act also invests the Chairman of the Commission with the power to have presumption of unjust enrichment against public officers living above their

¹⁵¹Section 36(2)(a), ICPC Act.

¹⁵² Section 36(2)(b), ICPC Act.

¹⁵³ Section 36(2)(c), ICPC Act.

¹⁵⁴ Based on information carried out by an officer of the Commission. Section 44, ICPC Act.

¹⁵⁵ Whether movable or immovable, whether within or outside Nigeria.

¹⁵⁶ Whether by way of dealing, bequest, devise, inheritance or in any other manner. Section 44(1)(a)(i), ICPC Act.

¹⁵⁷ Section 44(1)(a)(ii), ICPC Act.

¹⁵⁸ Section 44(1)(a)(iii), ICPC Act.

¹⁵⁹ Section 44(1)(a)(iv), ICPC Act.

¹⁶⁰ Section 44(1)(b), ICPC Act.

¹⁶¹ Or any other person who is in any manner responsible for the management and control of any bank or financial institution.

¹⁶² Section 44(1)(c), ICPC Act.

means¹⁶³. By section 44(2) of the Act, the Chairman may by written direction require any public officer whom the Chairman has reasonable grounds to believe owns, possesses, controls or holds any interest in any property which is excessive,¹⁶⁴ to furnish a statement on oath or affirmation explaining how he came about the excess, and if he fails to satisfactorily explain the excess he shall be presumed to have used his office to corruptly enrich or gratify himself and charged accordingly.¹⁶⁵

This provision has been commended as being revolutionary because “it will ensure a re-orientation and transformation of our value system.”¹⁶⁶ According to Paul D. Ocheje, the duty of the Chairman of the Commission under this provision is purely administrative.¹⁶⁷ Should the Chairman decide to charge he is merely required to presume that an offence has been committed after carrying out a ‘means’ test on the suspect. It is the suspect’s failure of the test that would activate the presumption of unjust enrichment.¹⁶⁸ “In so far as this remains an administrative presumption,” Ocheje maintains, “it does not offend any constitutional safeguard.”¹⁶⁹

Furthermore, where the Chairman of the Commission is satisfied on information given to him by an officer of the Commission that any movable property, including any monetary instrument or any accretion thereto which is the subject of any investigation under the Act¹⁷⁰ is in the possession, custody of a bank or financial institution, he may by a court order direct the bank or financial institution not to part with, deal in, or otherwise dispose of such property until the order is revoked or varied.¹⁷¹ Non-compliance with the order of the Chairman attracts a fine not exceeding two times the amount which was paid in contravention of the order or fifty thousand naira¹⁷² and to imprisonment to a term not exceeding two years.¹⁷³ The banks and their

¹⁶³ Section 44(2), ICPC Act.

¹⁶⁴ Regard being had to his present and past emoluments, and all relevant circumstances.

¹⁶⁵ By Section 44(3) of the Act every person to whom a notice or direction is sent by the Chairman is obliged to state the truth and disclose all information within his knowledge

¹⁶⁶ T. Osipitan, *et al op.cit* p. 349

¹⁶⁷ P.D. #Ocheje, *op cit.* p. 170

¹⁶⁸ *Ibid.*

¹⁶⁹ *Ibid.*

¹⁷⁰ Or evidence in relation to commission of such offence.

¹⁷¹ This is notwithstanding any other written law or rule to the contrary. See section 45(1) of the ICPC Act.

¹⁷² Whichever is higher.

¹⁷³ Section 45(3), ICPC Act.

employees are however relieved of liability arising from compliance with the chairman's order.¹⁷⁴

By section 43 of the Act, the Chairman can also, by court order, direct in writing for the purpose of an investigation into an offence under the Act, authorize any officer of the Commission to inspect and take copies of any banker's book, bank account or any document belonging to or in the possession, custody or control of the bank or financial institution including compute data, disks, diskettes, printouts and any other electronic medium by which information or data are stored.¹⁷⁵ Such authorized officer can also inspect and take copies of any share accounts, purchase account, expenses accounts or any other accounts of any person kept in the bank,¹⁷⁶ or inspect the contents of any safe deposit box kept in the bank.¹⁷⁷ Failure or refusal to disclose any information or produce any document to the authorized officer is an offence punishable with ten thousand naira fine or two years' imprisonment or both.¹⁷⁸

The Chairman of the Commission is also empowered to seize travel documents of persons being investigated for any offence under the Act.¹⁷⁹ This is, however, subject to a court order and a written notice being personally served on the suspect.¹⁸⁰ The Chairman may also amend or revoke any order or notice given by him in exercise of powers conferred on him under the Act.¹⁸¹ Such revocation may contain consequential, ancillary or incidental matters.¹⁸² Are all these powers not susceptible to abuse?

Genuine concerns have been raised that the enormous concentration of powers in the Chairman may lead to abuse.¹⁸³ There seem to be some precautionary safeguards in the Act against abuse by the Act. One of them is that most of these powers are only exercisable upon a court order.¹⁸⁴ This makes the

¹⁷⁴ Section 45(2), ICPC Act.

¹⁷⁵ Section 43(1) and (2)(a), ICPC Act.

¹⁷⁶ Section 43(2)(b), ICPC Act.

¹⁷⁷ Section 43(2)(c), ICPC Act.

¹⁷⁸ Section 43(4), ICPC Act.

¹⁷⁹ Section 50(1), ICPC Act.

¹⁸⁰ Section 50(2), ICPC Act.

¹⁸¹ Section 51(1), ICPC Act.

¹⁸² Section 51(2), ICPC Act.

¹⁸³ P.D. Ocheje, *op cit.* p. 178

¹⁸⁴ See Sections 43, 44 and 45 of the ICPC Act.

exercise of most of these powers to be subject to the discretion of the court. Furthermore, the nature of the power exercisable by the Chairman of the Commission might be responsible for the provision in the Act the Chairman must be a person who "has held or is qualified to hold office as a judge of a superior court of record in Nigeria".¹⁸⁵ Do some of the powers of the Chairman of the Commission violate people's right to privacy?

The right to privacy is not absolute. Like what obtains under the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), section 45(1) of the 1999 Nigerian Constitution allows derogation from the right to privacy in the interest of defence, public safety, public order and public morality;¹⁸⁶ and for the purpose of protecting the rights and freedoms of other persons.¹⁸⁷ According to Obilade,¹⁸⁸ the limitation with respect to public morality is significant; the idea of using legislative measures as instruments of social progress is modern as classical utilitarianism advocates the use of law as an instrument of social reform. According to Bentham's utilitarian principle, governmental and individual actions should aim at achieving "the greatest happiness for the greatest number".¹⁸⁹ In Bentham's view, law should promote the greatest possible happiness of all members of the community.¹⁹⁰ To him, the public good ought to be the object of the legislator, general utility ought to be the foundation of his reasoning. This is to be done by balancing the interests of the individual and that of the individual.¹⁹¹ Obilade contends that one means of balancing the interests of the individual in acquiring property and the interest of the community is enacting a law on corruption.¹⁹² He, therefore, concludes that the powers of the Chairman under the ICPC Act in relation to the right to privacy are reasonably justifiable in a democratic society. While agreeing with Obilade's view, the Chairman of the Commission is enjoined to exercise his powers

¹⁸⁵ The superior courts of record are listed under section 6(5) of the 1999 Constitution.

¹⁸⁶ Section 45(1)(a) of the 1999 Constitution.

¹⁸⁷ Section 45(1)(b) of the 1999 Constitution.

¹⁸⁸ Obilade, A.O. 2001. "The Corrupt Practices and Other Related Offences Act and the Right to Privacy", in A.O Obilade, et al (eds) *Contemporary Issues in the Administration of Justice: Essays in Honour of Justice Atinuke Ige* Treasure Hall Konsult Ibadan. P. 126

¹⁸⁹ Cited in Obilade A.O. *op cit.* p. 126

¹⁹⁰ *Ibid.*

¹⁹¹ *Ibid.*

¹⁹² In this case the ICPC Act.

under the Act with extreme caution and all sense of responsibility whenever he has a “reasonable cause” to do so.¹⁹³

Investigation: Power of Independent Counsel

In a bid to discourage corrupt practices among immune members of the executive,¹⁹⁴ the ICPC Act provides in section 52 what could be termed a “preliminary to impeachment proceedings.” The section provides for the investigation of corruption against the President, Vice President, Governor and Deputy Governor thus:

“When an allegation of corruption or anything purporting to contravene any provision of this Act is made against the President or the Vice President of Nigeria or against any State Governor or Deputy Governor, the Chief Justice of the Federation shall, if satisfied that sufficient cause has been shown upon an application on notice supported by an affidavit setting out the facts on which the allegation is based, authorize an independent counsel (who shall be a legal practitioner of not less than fifteen years standing) to investigate the allegation and make a report of his findings to the National Assembly in the case of the President or Vice President and to the relevant State House of Assembly in the case of the State Governor or Deputy Governor.”¹⁹⁵

According to this section, before the Chief Justice of Nigeria authorizes an independent counsel to investigate allegation of corruption against the President, Vice President, Governor or Deputy Governor, he must be satisfied that sufficient cause has been shown by an application on notice supported by an affidavit setting out the facts on which the application is based. Thereafter, the report of the investigation, in the case of the President or Vice-President, shall be sent to the National Assembly or the relevant State House of Assembly in the case of the Governor or Deputy Governor.

¹⁹³ This seems to be a condition precedent to the exercise of the most of the powers of the Chairman.

¹⁹⁴Section 308 of the 1999 Constitution grants immunity to the President, the Vice-President, Governors and the Deputy Governors, and for this reason they cannot be prosecuted for any criminal offence while in office.

¹⁹⁵ Section 52(1) of the ICPC Act.

This provision raises some issues worthy of consideration. In the first place, why is it the Chief Justice that will authorize an independent counsel to investigate the allegation?¹⁹⁶ Secondly, why should the application be by motion on notice?¹⁹⁷ These questions are important because from the tenor of the provision, the Chief Justice will constitute himself to a tribunal to hear the matter to determine whether or not an investigation should be ordered. Any dissatisfied person can appeal to the High Court. If the case eventually gets to the Supreme Court then the Chief Justice automatically stands disqualified.¹⁹⁸ If the provision was made on the assumption that the main targets are immune from court proceedings, what about their accomplices in crime?¹⁹⁹

Similarly, the requirement of making the application to the Chief Justice by motion on notice is objectionable. This is because the immune officials must be personally served and they will file their counter affidavit. Bearing in mind the heavy presence of armed security men around them, it might be difficult to get them served except through substituted service which could be very expensive and time consuming since the courts have held that their immunity is not meant to deny them fair hearing. If they are eventually served they may come to plead their immunity and that may effectively terminate the pre-investigation proceedings. On the other hand, if they waive their immunity and attend the proceedings, any ruling against them may be contested up to the Supreme Court. Therefore, it is better to allow the pre-investigation application to the Chief Justice to be by motion *ex parte*.²⁰⁰

Another issue worthy of consideration is the appointment of the independent counsel. On whose recommendation is he presented to the Chief Justice to be authorized to carry out the investigation? Is it on self-recommendation? Is it on the recommendation of the Chief-Justice of Nigeria or that of the Anti-Corruption Commission since the Commission is statutorily required to provide all facilities necessary for him to carry out his functions.²⁰¹ At the end of the investigation, a report of the investigation is to be forwarded by the

¹⁹⁶ Is that not a violation of the principle of separation of powers?

¹⁹⁷ As opposed to motion *ex parte*.

¹⁹⁸ To avoid bias.

¹⁹⁹ This is because some of these immune officials commit crimes through their cronies.

²⁰⁰ He has a discretion to convert it to a motion on notice.

²⁰¹ Section 52 of the ICPC Act provides that: "The Commission shall be enjoined to fully cooperate with such independent counsel and provide all facilities necessary for such independent counsel to carry out this functions".

independent counsel to the National Assembly or to the relevant House of Assembly. If the report does not indict the person concerned, that ends the matter. However, if the report confirms the allegation of corruption, the legislative intent seems to propel the law makers to initiate proceedings to remove the corrupt executive.²⁰² According to Oluyide and Odeku, although an indicting report of an independent counsel made pursuant to the section cannot lead to the prosecution immune officials, it may constitute 'gross misconduct' which may lead to successful impeachment proceedings against them.²⁰³ And once they are removed from office they lose their constitutional immunity and can then be prosecuted in court. The low rate of the prosecution of the immune chief executives who have lost their immunity after completing their terms of office by the ICPC seems to detract from the justification of this provision.

Offences and Penalties under the ICPC Act

The *Oxford Advanced Learner's Dictionary* defines 'offence' as "an illegal act, a crime."²⁰⁴ It equally defines the word 'penalty' as "punishment for breaking a law, rule or contract."²⁰⁵ According to Loewy, the main distinguishing factor between the civil law and the criminal law is punishment.²⁰⁶ Since the criminal law seeks to punish rather than compensate, it is argued that no rational assessment of activities that should be punished can be undertaken without some analysis of the theories or purposes of punishment.²⁰⁷ According to Wilson,²⁰⁸ theories of punishment perform some important functions. In the first place, they may explain how punishment may be morally justified.²⁰⁹ They may also stipulate the conditions governing responsibility in individual cases and the level of punishment.²¹⁰ Finally, theories of punishment would make it easy for us to subject the rules of

²⁰² Oluyide, O. and Odeku, K. 2002. 'Legal Perspectives of Corruption in Nigeria' in Sokefun, J. (ed) *Issues in Corruption and the Law in Nigeria op.cit.* pp. 63-64.

²⁰³ See also Osipitan, T. *et al op cit.* p. 343.

²⁰⁴ *Op cit* p. 1011.

²⁰⁵ *Ibid* at p. 1075.

²⁰⁶ Loewy, A.H. 1981. *Criminal Law* West Publishing Co. St. Paul Minn P. 1.

²⁰⁷ *Ibid* p. 7.

²⁰⁸ Wilson, W. 2003. *Criminal Law: Doctrine and Theory*, Longman/Pearson London. P. 48.

²⁰⁹ *Ibid.*

²¹⁰ *Ibid.*

criminal law to critical scrutiny.²¹¹ The most common theories of punishment are reformation, restraint, retribution and deterrence. The penalties created for offences under the ICPC Act fall under one or more of these theories.

Sections 8 to 26 of the ICPC Act contain a wide range of offences and their penalties. These include the offence of accepting gratification,²¹² giving or accepting gratification through agents,²¹³ counseling offences relating to corruption,²¹⁴ fraudulent acquisition of property,²¹⁵ fraudulent receipt of property,²¹⁶ commission of offences through postal system,²¹⁷ deliberate frustration of investigation by the Commission,²¹⁸ making false statements or returns,²¹⁹ gratifications by or through agents,²²⁰ bribery of public officers,²²¹ using office or position for gratification,²²² bribery in relation to auctions,²²³ bribery for giving assistance in regard to contracts,²²⁴ dealing with property acquired through gratification,²²⁵ making false or misleading statements to the Commission²²⁶ and attempting and abetting criminal conspiracies.²²⁷

According to Ibidapo-Obe, the offences under the ICPC Act can be classified into main offences and ancillary offences.²²⁸ The main offences include gratification or through agents,²²⁹ using office or position for gratification,²³⁰

²¹¹ *Ibid.* The author further contends that if we know why we punish and whom we consider worthy of punishment, the cogency, consistency and fairness of criminal doctrine can be assessed according to objective criteria.

²¹² Section 8 of the ICPC Act.

²¹³ Section 9 of the ICPC Act.

²¹⁴ Section 11 of the ICPC Act.

²¹⁵ Section 12 of the ICPC Act.

²¹⁶ Section 13 of the ICPC Act.

²¹⁷ Section 14 of the ICPC Act.

²¹⁸ Section 15 of the ICPC Act.

²¹⁹ Section 16 of the ICPC Act.

²²⁰ Section 17 of the ICPC Act.

²²¹ Section 18 of the ICPC Act.

²²² Section 19 of the ICPC Act.

²²³ Section 21 of the ICPC Act.

²²⁴ Section 22 of the ICPC Act.

²²⁵ Section 24 of the ICPC Act.

²²⁶ Section 25 of the ICPC Act.

²²⁷ Section 26 of the ICPC Act.

²²⁸ Ibidapo-Obe, A. *op. cit* p.41.

²²⁹ Section 12 of the ICPC Act.

²³⁰ Section 19 of the ICPC Act.

corrupt offers to public officers,²³¹ corrupt demand by persons,²³² counseling offences relating to corruption,²³³ bribery of public officers,²³⁴ bribery in relation to contracts,²³⁵ bribery in relation to auction,²³⁶ failure to report bribery transactions,²³⁷ fraudulent acquisition of property,²³⁸ and dealing with property acquired through gratification²³⁹. The ancillary offences have to do with attempts to impede or obstruct investigation to the main offences. These include deliberate frustration of investigation by the Commission,²⁴⁰ making false statement or returns and making false or misleading statements to the Commission.²⁴¹

While some of the provisions of the ICPC Act are a restatement of the pre-existing anti-corruption laws, others are very novel in the fight against graft. For example, section 8 of the Act dealing with offence of gratification by an official of a “Government department, or corporate body or other organization or institution” is similar to section 98(1) of the Criminal Code.²⁴² According to Bairamian J, in *Biobaku v Police*,²⁴³ the purpose of the provision is to prevent the mischief of receiving or offering of some benefits, reward or inducement which will sway or deflect a person employed in the public service from honest and impartial discharge of his duties. It is punishable by seven years imprisonment.²⁴⁴ Unlike section 98(1) of the Criminal Code which restricts the offence to “any person employed in the public service”, however, the ICPC Act extends it to any matter connected with the functions, affairs or business of a Government department, or corporate body or other organization or institution”.²⁴⁵ The novel provisions in the Act include section

²³¹ Section 9 of the ICPC Act.

²³² Section 10 of the ICPC Act.

²³³ Section 11 of the ICPC Act.

²³⁴ Section 18 of the ICPC Act.

²³⁵ Section 22 of the ICPC Act.

²³⁶ Section 21 of the ICPC Act.

²³⁷ Section 13 of the ICPC Act.

²³⁸ Section 24 of the ICPC Act.

²³⁹ Section 15 of the ICPC Act.

²⁴⁰ Section 16 of the ICPC Act.

²⁴¹ Section 25 of the ICPC Act.

²⁴² Cap C38 LFN 2004.

²⁴³ (1951) 20 NLR 30.

²⁴⁴ Section 8(ii) ICPC 1980.

²⁴⁵ Section 8(i) ICPC Act.

ICPC: Analytical Discourse of Practice Procedure And Mechanisms

23 of the Act on duty to report bribery transactions,²⁴⁶ section 25 on making false and misleading statements to the Commission,²⁴⁷ section 44 on presumption of unjust enrichment,²⁴⁸ section 47 on forfeiture of property acquired through corruption and abuse of office²⁴⁹ and section 52 which empowers an independent counsel to investigate allegations of corruption against the President, Vice President, the Governor and Deputy Governor.²⁵⁰ Other highly unconventional provisions include section 39 which empowers a High Court Judge, upon an application made to him in relation to an investigation into any offence under the Act, to order a legal practitioner to disclose information available to him in respect of any transaction relating to any property liable to seizure under the Act,²⁵¹ and section 43 which empowers an officer of the Commission upon a written order of the court and for the purpose of investigation under the Act, to inspect and take copies of any banker's book, bank accounts or any document in custody or control of the bank or financial institution including computer data, disks, diskettes, print-outs and any other electronic medium by which information or data are stored.²⁵² In line with the modern trends in the fight against graft, the Act also allows the admissibility of all photographic and electronic evidence "in any proceedings against any person for an offence under this Act."²⁵³ The novel provisions in the ICPC Act are undoubtedly meant to strengthen the ICPC in the fight against corruption in the country.

The ICPC Act also prescribes various penalties for the different offences. These are usually in form of terms of imprisonment or options of fine, or both imprisonment and fine. The punishments range from one year or fifty

²⁴⁶ Failure to report attracts a fine or an imprisonment for two years or a fine of one hundred thousand naira or both fine and imprisonment.

²⁴⁷ A breach of this section attracts a fine of one hundred thousand naira or two years imprisonment.

²⁴⁸ Section 44(2), ICPC Act.

²⁴⁹ Where the property liable to forfeiture under section 47 cannot be traced, or has been disposed of the court shall order the accused to pay as penalty a sum which is equivalent to the amount of the gratification received by the accused.

²⁵⁰ This is because their immunity does not shield them from being investigated. See *Fawehinmi V IGP and Others* (2002) 7NWLR (Part 740) 606.

²⁵¹ Provided that no court shall require an advocate or solicitor to disclose any privileged information or communication which came to his knowledge for the purpose of prosecuting any pending proceeding.

²⁵² By section 40 of the ICPC Act, refusal attracts six months imprisonment or ten thousand naira fine.

²⁵³ Section 57 (d) of ICPC Act.

thousand naira fine,²⁵⁴ to ten years and one hundred thousand naira fine.²⁵⁵ Section 68 of the Act further prescribes a fine not exceeding ten thousand naira or imprisonment for a term not exceeding two years for any person convicted of an offence under the Act for which there is no specific penalty.²⁵⁶ In addition to punishments prescribed under sections 8 to 19 of the Act, section 20 further provides that a public officer or other person found guilty of soliciting, offering or receiving gratification “shall forfeit the gratification” and pay a fine not less than five times the sum or value of the gratification²⁵⁷ or ten thousand naira, whichever is higher.

Offences and penalties under the ICPC Act have not run short of criticisms. According to Yemi Akinseye-George²⁵⁸ the ICPC Act has streamlined the provisions that were scattered all over the Criminal Code together, and in some cases “presented them in simpler forms to reflect contemporary realities”. He further states that the confusing classification of offences into “felonies and misdemeanours and others” has been avoided by the Act.²⁵⁹ To Justus Sokefun, the arrangement of sections 8, 10 and 11 on official corruption is inelegant. He argues that sections 10 and 11 of the Act should have formed one single section to differentiate them from section 8.²⁶⁰ The breach of professional confidentiality in under Sections 39²⁶¹ and 43²⁶² of the Act is the concern of Oluyide and Odeku²⁶³. To them the compulsion to disclose confidential information between a counsel and his client “is condemnable absolutely.”²⁶⁴ They, however, see nothing wrong in the erosion of confidentiality between a banker and his customer.²⁶⁵ They contend that

²⁵⁴ Section 25(2) of the ICPC Act.

²⁵⁵ The most common punishment for offences under the act is a term of seven years’ imprisonment followed by five years.

²⁵⁶ The section provides that: “Any person convicted for an offence under this Act for which no penalty is specifically provided shall be liable to a fine not exceeding ten thousand naira or to imprisonment for a term not exceeding two years or both”.

²⁵⁷ Where such gratification is capable of being valued, or is of pecuniary nature.

²⁵⁸ Y. Akinseye-George, *Legal System Corruption and Governance in Nigeria op. cit. p. 149.*

²⁵⁹ *Ibid.*

²⁶⁰ J. Sokefun, *op. cit. p. 208.* Section 8 creates the offence of official corruption punishable with seven years imprisonment.

²⁶¹ This section requires a lawyer to disclose confidential information upon a court order.

²⁶² This section obliges banks and financial institutions to disclose information about their customers in their custody.

²⁶³ *Op. cit. p. 61*

²⁶⁴ *Ibid.*

²⁶⁵ *Ibid.*

this is excusable as an exception to the principle of secrecy in banker and customer relationships as enunciated in *Tournier v National Provincial Bank*²⁶⁶. They assert that this exception can be assumed under exception by compulsion of law or public policy.²⁶⁷

The reason for the distinction in the breaches of confidentiality in counsel-client relationship and banker-customer relationships is unclear. This is because in both cases the breach is consequent upon a court order by the Independent Corrupt Practices and Other Related Offences Commission.²⁶⁸ Furthermore, the Act seems to be more lenient on the legal practitioner as the provision requiring him to supply information does²⁶⁹ not contain any punishment for refusal.²⁷⁰ This can be contrasted with section 43(1) of the Act which obligates banks and financial institutions to provide confidential information to the Commission upon the pain of a fine of ten thousand naira or two years imprisonment or to both fine and imprisonment for refusal.²⁷¹ The provisions on breach of professional confidentiality under the ICPC Act are also an improvement on the mandatory disclosures under section 10 of the Money Laundering (Prohibition) Act.²⁷² Section 12 of the ICPC Act attracts the attention of Atsegbua and Odigie.²⁷³ The section provides that any public officer, not being a member of a registered joint stock company consisting of more than twenty persons, who acquires a private interest in any contract or investment connected with the department or office in which he is employed²⁷⁴ is guilty of an offence and liable to seven years imprisonment on conviction. The duo query the rationale behind excluding public officers in public companies having more than twenty members from liability when they acquire private interest in contracts emanating from their departments, from liability.²⁷⁵ This, they contend, is unsatisfactory as the public officers in highly subscribed joint stock companies could have also used their influence in the

²⁶⁶ (1924) IKB 461

²⁶⁷ Oluyide and Odeku *op. cit* p.61

²⁶⁸ The breach can therefore be justified on the basis of public policy.

²⁶⁹ Section 39 of the ICPC Act.

²⁷⁰ But section 40 of the Act does.

²⁷¹ Section 43(4) of the ICPC Act.

²⁷² By section 10 of the Money Laundering (Prohibition) Act, 2004, legal practitioners are included in the definition of "designed non-financial institutions" required to make 'mandatory disclosures' under the Act.

²⁷³ Atsegbua, L.A. and Odigie, D.U. 2002. An Overview of Offences and Penalties created by the Anti-Graft Act 2002 5(1) *Nigerian Educational Law Journal* p.154.

²⁷⁴ Or which is made on account of public service.

²⁷⁵ Atsegbua and Odigie *op.cit* p.154

public companies to get contracts from their departments or offices.²⁷⁶ They further contend that the prohibition should be absolute.²⁷⁷ They also frown on the silence of the Act on culpability of companies despite the fact that companies have separate legal personalities distinct from their members.²⁷⁸ We are in total agreement with this view.

Akin Ibidapo-Obe takes a swipe at the same penalties prescribed for the main offences and ancillary offences.²⁷⁹ He argues that since ancillary offences deal with “attempts, preparations and abetments”, there is no justification for punishing them “as if the full offences had been committed”.²⁸⁰ He contends that this is contrary to the general trend in criminal punishment where attempts and preliminary offences get half the punishment for the full offence.²⁸¹ When a conspiracy, attempt and preparation have not matured into full offence,” Ibidapo-Obe maintains, “it is difficult to imagine how the offences may be proved and how full penalties can be justified”.²⁸² The justification for the parity in the punishment for the main and ancillary offences, it is submitted, might not be unconnected with the need to redeem the country’s image in its unenviable corruption rating.²⁸³

Ibidapo-Obe also frowns at the disparity in punishment between similar offences under the Act.²⁸⁴ According to him, the most common penalty for the main offences under the Act is seven years imprisonment while a second group of offences carries five years imprisonment.²⁸⁵ He claims that there seems to be no parameter for the disparity in penalty.²⁸⁶ Ibidapo-Obe also wonders why the five-year term imprisonment imposed under section 18 for bribery of public officers is to be served ‘with hard labour’.²⁸⁷ He argues that

²⁷⁶ *Ibid.*

²⁷⁷ *Ibid.*

²⁷⁸ *Ibid.* See also the case of *Salomon V Salomon* (1897) A.C. 22.

²⁷⁹ Ibidapo-Obe *op.cit* p.411

²⁸⁰ *Ibid.*

²⁸¹ *Ibid.*

²⁸² *Ibid.*

²⁸³ For example, when the ICPC Act was passed in 2000, Nigeria had been rated the most corrupt country two times, that is 1996 and 1997. It was also rated the most corrupt country in 2000 when the Act was passed.

²⁸⁴ Ibidapo-Obe *op.cit* p.411.

²⁸⁵ *Ibid.*

²⁸⁶ *Ibid* at p. 412.

²⁸⁷ The only time such specification is made under the Act.

the stipulation is contrary to the norms of rehabilitation and re-association.²⁸⁸ Ibidapo-Obe also expresses dissatisfaction with the seven years imprisonment and one million naira fine prescribed for contract fixing under section 27, and three year imprisonment in addition to time at the current price for a relatively similar offence of bribery in relation to public auction under section 21.²⁸⁹ He is also of the view that the three years imprisonment and one hundred thousand naira fine imposed on public officers who award contract outside budgetary allocation is too lenient.²⁹⁰ Finally, Ibidapo-Obe queries the rationale behind imposition of fines in addition to mandatory terms of imprisonment under the Act.²⁹¹ He contends that since fines are reformatory and imprisonment is retributive, if the offence is severe enough to warrant imprisonment there is no need for additional imposition of fines.²⁹² Said he:

“Fine is a pecuniary punishment whilst imprisonment deprives a person of his liberty. What is the logic of combining custodial with non-custodial punishment? If the offence is severe enough to warrant imprisonment why latch on a fine on to it? A fine, by its nature is reformatory whilst imprisonment is retributive, at least in contemporary assessment.”²⁹³

The inadequacy in the scope of the offences covered by the ICPC Act is the main focus of Igbinedion’s criticism.²⁹⁴ According to him, while the ICPC Act criminalizes various types of bribery of public officials, it does not specifically criminalize embezzlement.²⁹⁵ He argues that although sections 12,²⁹⁶ 16,²⁹⁷ and 19²⁹⁸ of the Act are relied upon by prosecutors to charge offenders for embezzlement, the provisions are quite inadequate or

²⁸⁸ Ibidapo-Obe *op.cit* p. 412.

²⁸⁹ *Ibid.* He argues that understanding that the on-going sale of public enterprises in Nigeria by public actions is a billion dollar business and that subverted bids could cost the nation substantial sums, the three years imprisonment is rather lenient.

²⁹⁰ *Ibid.* p 413.

²⁹¹ *Ibid.*

²⁹² *Ibid.*

²⁹³ *Ibid.*

²⁹⁴ S.A Igbinedion., *op. cit.* pp 190-191.

²⁹⁵ Embezzlement is the fraudulent appropriation of property by a person to whom such property has been entrusted, or into whose hands it has lawfully come. See *Moore v. United States* 160 U.S. 268, 269 (US Supreme Court 1895).

²⁹⁶ Fraudulent acquisition of property.

²⁹⁷ Making false statement or return.

²⁹⁸ Using office or position for gratification.

inappropriate.²⁹⁹ He states further that section 19 appears to be preferable of the three sections because “the available becomes the best in a situation where the best is unavailable”.³⁰⁰ Igbinedion further contends that although bribery is committed more than looting and embezzlement, illicit proceeds plundered from the latter “constitute the largest source of criminal proceeds”.³⁰¹ To drive home his point, Igbinedion graphically uses the corrupt conducts of Abacha and Babangida to illustrate his argument. According to him, while several specific sections of the ICPC Act would easily apply to Abacha’s receipt or bribes, only the residual provision of section 19 may be applicable to the duo’s plunder of the treasury.³⁰² “The implication”, Igbinedion maintains, is that, “while an accused person convicted for the basic offence of bribery is liable to a maximum of 7 years imprisonment, the person convicted for momental corruption under section 19 is subjected to a maximum of 5 years!”³⁰³ Igbinedion, therefore, suggests that an effective anti-corruption drive should incorporate penalties proportionate to the size of proceeds derived by the offender.³⁰⁴

Like Igbinedion, Ocheje is also concerned with inadequacies in the provisions of the ICPC Act. According to Ocheje, there are two serious omissions in the ICPC Act “regarding those who may come into his jurisdictional orbit”.³⁰⁵ In the first category are persons who may not be classified as public officers but who have had access to public funds in the past, for example, the spouses and children of public officer holders.³⁰⁶ He argues that the special position of such quasi-public officers should be properly acknowledged in a statute like the ICPC Act.³⁰⁷ The second omission, according to Ocheje, “relates to the position of public officers who, although they probably do not corruptly benefit from their own conduct, facilitate corruption through negligence in the

²⁹⁹ S.A. Igbinedion, *op. cit* pp. 191-192.

³⁰⁰ *Ibid.*

³⁰¹ *Ibid* at p. 193

³⁰² *Ibid.*

³⁰³ *Ibid.* He concludes that the manner in which the country equalizes every type of corruption is an invitation to the high profile offender to loot or embezzle as much as possible with the consolation that even when prosecuted he will suffer no peril greater than the penalty a person guilty of petty corruption would face.

³⁰⁴ *Ibid.*

³⁰⁵ *Op. cit* p. 180.

³⁰⁶ *Ibid.*

³⁰⁷ *Ibid.*

performance, or neglect, of their duties”.³⁰⁸ While submitting that the last category of conduct may not fit neatly into “corruption” he asserts that “it certainly comes into despoliation”.³⁰⁹ He therefore recommends that the ICPC Act be amended to take care of this omission.³¹⁰

Ocheje’s observation is highly commendable. This is because it will help the country to curb monumental waste and despoliation arising from error of judgment and negligence from the acts of public officers and ‘quasi public officers’. Having such a provision in our statute would help to reduce the execution of white elephant projects like the proposed building for the African First Ladies that the Nigerian government is planning to construct for billions of naira when millions of fresh graduates roam the streets, joblessly and our hospitals lack basic drugs.³¹¹ If there is no law specifically on waste and mismanagement of public fund, and the Federal Government makes budgetary allocation for the proposed building with cash backing, then section 22(5) of ICPC Act will be helpless in redressing the situation.³¹²

Prosecution of Offences under the ICPC Act

One of the duties of the Independent Corrupt Practices and Other Related Offences Commission (ICPC) is to prosecute offenders.³¹³ Prosecution for an offence shall be initiated by the Attorney General of the Federation, or any person to whom he shall delegate his authority.³¹⁴ To avoid any technical hitch that might result from the timely delegation of prosecutorial authority by the Attorney-General, it is further provided that every prosecution for offences under the Act or any other law prohibiting bribery shall be deemed to be done

³⁰⁸ Ocheje maintains that certain egregiously poor judgment and mismanagement on the part of decision-makers have cost Nigeria a fortune; and in most cases the result is massive waste and excess.

³⁰⁹ *Ibid.*

³¹⁰ *Ibid.*

³¹¹ While condemning the budgetary allocation made for the African First Ladies’ Mansion, Professor Wole Soyinka says it is wrong to make budgetary allocations for First Ladies because according to him, they are nothing but constitutional ghosts. See Soyinka W, 2013. “Ghost Missions on the Gravy Train” *The Nation* 21 March 2013 p. 18.

³¹² Section 22(4) of the ICPC Act provides that any public officer who awards or signs contract without budget provision, approval and cash backing shall be guilty of an offence punishable with three years imprisonment or a fine of one hundred thousand naira.

³¹³ Section 6(a) of the ICPC Act

³¹⁴ Section 26(2) of the ICPC Act

with the consent of the Attorney-General.³¹⁵ To avoid undue delay in the prosecution of corruption cases, the Chief Judge of a State or the Federal Capital Territory, Abuja, is obligated to designate a court or judge or such number of judges he deems appropriate to 'hear and determine' corruption cases arising under the Act and a court so designated shall not while being so designated hear or determine any other case.³¹⁶ Although the offences created by the ICPC Act are federal offences³¹⁷ the state High Courts are invested with the jurisdiction to try these offences by virtue of section 286(1)(b) of the 1999 Constitution which provides that:

“Where by the Law of a State jurisdiction is conferred upon any court for the investigation, inquiry into, or trial of persons accused of offences against the Laws of the State and with respect to the hearing and determination of appeals arising out of any such trial or out of any proceedings connected therewith, the court shall have like jurisdiction with respect to the investigation, inquiry into, or trial of persons for federal offences and the hearing and determination of appeals arising out of the trial or proceedings.”³¹⁸

The conferment of jurisdiction on state high courts to try federal offences is one of the unique features of the Nigerian Constitution. This is unlike the situation under the United States Constitution where there are federal courts exercising exclusive jurisdiction in matters within federal legislative competence, and state courts exercising exclusive jurisdiction in matters within the legislative competence of the states.³¹⁹ This according to Akande is because the general picture of the judicial structure in Nigeria is a system of courts “exercising unified jurisdiction from the High Court through the Court of Appeal to the Supreme Court in all matters”.³²⁰ This is because all courts

³¹⁵ See sections 61(1) and 26(2) of the ICPC Act.

³¹⁶ Section 61(3) of the ICPC Act. However, all corruption cases pending in any court before the commencement of the Act shall continue to be heard and determined by the court.

³¹⁷ For meaning of 'federal offence' see *Abass v COP* (1998) 12 NWLR (Part 577) 308; *AG, Ondo State v AG Federation and Others* (2002) 9 NWLR (Part 772) p. 222.

³¹⁸ Section 286(1)(c) further provides that: 'The jurisdiction conferred on a court of a state pursuant to the provision of this section shall be exercised in conformity with the practice and procedure for the time being prescribed in relation to its jurisdiction over civil or criminal causes other than federal causes'.

³¹⁹ J.O. Akande, *op. cit* pp. 397-398. See also Mason and W.M. Beancy, *American Constitutional Law* (USA: Prentice Hall 2001), p. 2.

³²⁰ J.O. Akande, *op. cit* p. 398. See also *Newbury Water Co vs City of Newbury Port* 193 US (1904), *Laveringa Garnques Co v. Morrin* 289 US 738 (1824).

which are presided over by persons qualified to practice as legal practitioners in Nigeria will exercise jurisdiction both in the matters within the legislative competence of the state and those within the legislative competence of the Federation.³²¹ It should, however, be noted that prosecuting corrupt public officers only in state high courts where the accused persons are resident is not without its drawbacks.

In the first place, the accused persons may be able to enjoy undue sympathy from the members of their community and other beneficiaries of the proceeds of corruption, which may likely impede the smooth prosecution of the case.³²² Furthermore, since most of the state judges are appointed by the governors on the recommendation of the National Judicial Council,³²³ some of the judges may be very lenient in imposing penalties on these governors and their cronies being prosecuted for corruption. They may also be manipulated into granting frivolous injunctions against the anti-corruption agencies.³²⁴ Some corrupt state governors even build high courts in their villages towards the completion of their second terms despite the existence of high courts in their state capitals in order to mobilize the support of the local folks in frustrating successful prosecution by anti-corruption agencies.³²⁵ The tendency of the corrupt state officials to mobilize local support against the prosecutors of the anti-corruption agencies may make the latter to feel unsafe and insecure when prosecuting these officials in their respective states. It is therefore recommended that the ICPC Act be amended to confer jurisdiction on both the Federal High Court or State High Courts in trying corruption cases as provided under Section 19(1) of the Economic and Financial Commission (EFCC) Act 2004.³²⁶ We are equally not unmindful of the fact that the federal judges may also be manipulated by corrupt federal public officers. It is however better to give the anti-corruption prosecutors the freedom to prosecute in whichever court they feel comfortable with.

³²¹ Akande, J.O. *op. cit* p. 398

³²² For example, they may mobilize crowds to the court room to intimidate both the judge and the prosecuting counsel.

³²³ Section 20(c) Part I, Third Schedule to the 1999 Constitution.

³²⁴ Many judges have been relieved of their jobs as a result of this.

³²⁵ An example is Chief Lucky Igbinedion, the former Governor of Edo State who built a High Court in his village in anticipation of being tried by the ICPC on completion of his tenure. Unfortunately, he was tried by the EFCC at a Federal High Court.

³²⁶ Section 19(1) of the EFCC Act provides that "The Federal High Court or High Court of a state or the Federal Capital Territory High Court shall have jurisdiction to try offences under this Act"

The ICPC Act also enjoins the Commission to have mutual and symbiotic relationship with other law-enforcement agencies in prosecuting offenders. For instance, section 5 of the Act obligates the officers of the Commission to notify the Director of Public Prosecution,³²⁷ if in the course of investigation or prosecution of an offence under the Act, another offence is disclosed under any other written law, not being an offence under the Act.³²⁸ The Director of Public Prosecutions or any other person responsible for prosecution of criminal cases is empowered to issue such “direction as shall meet the justice of the case.”³²⁹ This provision is probably meant to make the ICPC to concentrate on prosecution of corruption cases alone and to avoid the distraction of venturing into other criminal cases.

By section 67 of the ICPC Act, the provision of the Act shall apply to a prescribed offence regardless of whether the prosecution or any other proceedings in respect of such offences are instituted or taken by an officer of the Commission, a police officer or customs officer having powers to investigate, prosecute or take any proceedings in respect of such offence.³³⁰ The Act also preserves the powers of the police to investigate and prosecute any offence under the Act.³³¹ In order to avoid duplicity of charges and prevent unnecessary delay in prosecution, it is further provided in section 62 that where a person is accused of more than one offence under the Act, he may be charged with and tried with any number of offences within the space of any length of time.³³²

In prosecution for an offence under the Act the court is obliged to make an order for the forfeiture of any property which is proved to be the subject-matter of the offence where the offence is proved against the accused,³³³ or where the offence is not proved against the accused but the court is satisfied that the accused is not the true and lawful owner of such property,³³⁴ and that no other person is entitled to the property as a purchaser in good faith for

³²⁷ Or any other officer charged with the responsibility of prosecution of criminal cases.

³²⁸ Irrespective of whether the offence was committed by the same person or any other person.

See Section 5(2) of the ICPC Act.

³²⁹ *Ibid.* Section 5(2) of the ICPC Act.

³³⁰ Notwithstanding any other written law to the contrary.

³³¹ Section 69 of the ICPC Act.

³³² For a contrary view see *Ibidapo-Obe op.cit.* p.412.

³³³ Section 47(1) (a) of the ICPC Act.

³³⁴ Section 47(1) (b)(i) of the ICPC Act.

valuable consideration.³³⁵ Where the offence is proved against the accused or the property which is the subject-matter of the offence has been disposed of,³³⁶ the court is further obliged to order the accused to pay as a penalty a sum which is equivalent to the amount of gratification, or is in the opinion of the court, the value of the gratification received by the accused.³³⁷ On the other hand, where in respect of the property seized there is no prosecution or conviction for an offence the Chairman of the Commission may, before the expiration of twelve months from the date of the seizure apply for an order of forfeiture of that property if he is satisfied that such property had been obtained in breach of the Act.³³⁸ Where the court is satisfied that the seized property is the subject-matter of an offence under the Act³³⁹ and there is no *bona fide* purchaser for valuable consideration of the property it shall make an order for the forfeiture of the property.³⁴⁰ According to Osipitan, Oyewo and Amusa,³⁴¹ the provisions of sections 47 and 48 are meant to prevent the unjust enrichment of corrupt people and also to ensure restitution by preventing them from keeping the fruits of corruption.

In order to create a conducive environment for the operatives of the ICPC while investigating the prosecuting offences section 5 of the Act provides that officers of the Commission “shall have all powers and immunities of a police officer under the Police Act” while investigating or prosecuting cases of corruption.³⁴² Does this extend to the carrying of arms and ammunition by all officers of the Commission? It is suggested that all the investigators of the Commission should be trained for and allowed to carry arms because they interact more with the suspects.

By section 65 of the Act no legal proceedings³⁴³ shall be instituted against any officer of the Commission or any other person assisting such officer for any act or omission which is done “in good faith” by such officer or other person. The ouster clause contained in this section seems to be a violation of section 4(8) of the 1999 Nigerian Constitution which prohibits the National Assembly

³³⁵ Section 47(1) (b) (ii) of the ICPC Act.

³³⁶ Or cannot be traced.

³³⁷ Section 47(2) of the ICPC Act. Any such penalty is also recoverable as a due.

³³⁸ Section 48(2) of the ICPC Act.

³³⁹ Section 48(3) (a) of the ICPC Act.

³⁴⁰ Section 48(3) (b) of the ICPC Act.

³⁴¹ Osipitan *et al op.cit.* p.341.

³⁴² Section 5(1) of the ICPC Act.

³⁴³ Civil or criminal.

from enacting a law that ousts or purports to oust the jurisdiction of a court of law or judicial tribunal except as stated in the Constitution. It is also a violation of section 6(6) of the Constitution which vests the courts with the judicial powers to adjudicate disputes between persons.³⁴⁴ The provision may therefore not be able to withstand a curial challenge.

Prosecution of cases under the Corrupt Practices and Other Related Offences Act commenced in May 2001 with a charge filed on 23 May 2001 before His Lordship Justice Oniyangi of the High Court of the Federal Capital Territory, Abuja.³⁴⁵ Subsequently, more charges were filed in many other High Courts across the country, but all these cases could not be heard until after 7 June 2002 because the constitutionality of the ICPC Act was challenged by some of the accused persons in these cases.³⁴⁶ In the ensuing case of *Attorney-General of Ondo State v. Attorney-General of the Federation and 36 others*,³⁴⁷ by an originating summons filed in the Supreme Court, the plaintiff sued the first defendant and joined the second to the thirty-sixth defendants as parties whose rights may be affected by the action and asked, among others, for the following reliefs:

- (1) 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 any State of the Federal Republic of Nigeria (including Ondo State).³⁴⁸
- (2) A determination of the question or whether or not the Attorney General of the Federation or any person authorized by him can lawfully initiate legal proceedings in any court in Ondo State in respect of any of the provisions of the said Corrupt Practices and Other Related Offences Act, 2000.³⁴⁹

³⁴⁴ Section 6(6) of the 1999 Constitution provides that the judicial powers shall "extend to all matters between persons, or between government or authority and to any person in Nigeria, and to all actions and proceedings relating thereto, for the determination of any question as to the civil rights and obligations of that person."

³⁴⁵ Onuogu, C.I. 2002. "Administration of the Anti-corruption Act," in Sokefun, J. (ed) *op.cit* p.229.

³⁴⁶ *Ibid.*

³⁴⁷ (2002) 9NWLR (Part 772) p.222.

³⁴⁸ *Ibid.* p.230

³⁴⁹ *Ibid.* Other reliefs include a declaration that the ICPC Act, 2000, is not in force as a law in Ondo State, and a declaration that it is unlawful for the Attorney General of the Federation or any other person authorized by him to initiate legal proceedings in respect of criminal offences created by the ICPC Act.

It was contended on behalf of the plaintiff that the fundamental objectives and directive principles of state policy are not justifiable and therefore cannot be subject of any enactment or law. The Supreme Court held³⁵⁰ that by virtue of sections 4(2) and section 15(5) of the 1999 Constitution, the National Assembly has the power to legislate against corruption and abuse of office even as it applies to persons not in authority under public or government office.³⁵¹ It was further held that by virtue of item 60(a) of the Exclusive Legislative List in Part I of the Second Schedule to the 1999 Constitution, to talk of enforcing the observance of fundamental objectives and directive principles, suggests that there is a law in place and the only means by which the state can abolish corruption and abuse of power is through legislation, being the only means by which the citizens can know what constitutes corruption or corrupt practices.³⁵² This, according to the court, can only be spelt out in a law with sanctions and the National Assembly is the body which has the power to make such laws.³⁵³

The Supreme Court, however, applied the blue pencil rule when all the seven justices that heard the case unanimously held that the plaintiff's action succeeded in part by holding that the ICPC Act is generally constitutional while voiding sections 26(3) and 35 of the Act. Section 26(3) provides that the prosecution for offences under the Act must be concluded within ninety working days³⁵⁴ while section 35 empowers the Commission to arrest and detain any person served with its summons until the person complies with the summons. The former provision was invalidated because it is against the principle of separation of power³⁵⁵ while the latter was voided for being inconsistent with the guarantees of personal liberty.³⁵⁶ The constitutionality of the ICPC Act was reaffirmed by the Supreme Court in *Olafisoye v Federal Republic of Nigeria*.³⁵⁷ Commenting on the above cases, Banire is of the view that it would appear that there is now a tendency for the Supreme

³⁵⁰ Per Uwais, CJN at p 306.

³⁵¹ *Ibid.*

³⁵² *Ibid.*

³⁵³ Per Ejiwunmi, JSC at p.455.

³⁵⁴ There is a *proviso* that the jurisdiction of the court to continue to hear the case 'shall not be affected' where good grounds exist for a delay.

³⁵⁵ See also *Unongo v Aku* (1983) 2 SCNLR 332; *Attorney General of the Federation* (2002) 6 NWLR (Part 763) 264.

³⁵⁶ See Section 35 of the 1999 Constitution.

³⁵⁷ (2004) 4 NWLR (Part 864) 662.

Court to expand the legislative competence of the National Assembly “by seeking for relevant provisions in Chapter II”³⁵⁸

Similarly, in *Federal Republic of Nigeria v Austin Eonna Ogbonna*,³⁵⁹ the applicant who was being tried under Section 25 of the ICPC Act dealing with making false and misleading statements at the Enugu High Court, filed a notice of preliminary objection challenging the competence of the and the jurisdiction of the court. The grounds of the preliminary objection are that the court lacked jurisdiction to entertain and determine the charge and that the accused person was not a public officer.³⁶⁰ Justice D.N. Oluedo held that the application lacked merit and dismissed it. He subsequently ordered the accused person to take his plea.

One case that restored the confidence of Nigerian in the prosecutorial powers of the ICPC is *Federal Republic of Nigeria v Ruth Adehwe Aweto and Another*.³⁶¹ The accused persons, Ruth Adehwe Aweto and Adekanye Komolafe were the provost and bursar respectively, of the Federal Co-operative College, Ibadan.³⁶² By a complaint filed on 3 February 2009, the accused persons were charged to an Ibadan High Court on an eight-count charge of offences of conspiracy and using documents which were defective with intent to deceive and mislead their principal contrary to Section 26(1) (c)³⁶³ and punishable under section 17(1) of the ICPC Act 2000.³⁶⁴ The accused persons were alleged to have submitted, between October 2004 and January 2005, a budget proposal to the Federal Government on behalf of the College in which they stated that the forty one casual staff of the college who were entitled to N3,690,000.00 as total annual emoluments for the year 2005,

³⁵⁸ M Banire, *op cit* p. 155. See also *Attorney General of Lagos State v Attorney General of Federation and others* (2003) 12 NWLR (Part 833)1.

³⁵⁹ Suit No E/9C/2012. Unreported judgement of Enugu High Court delivered on 8 November 2012.

³⁶⁰ *Ibid.*

³⁶¹ Suit No I/1/ICPC/2009. Unreported judgement of an Ibadan High Court delivered on 29 January 2013.

³⁶² *Ibid.*

³⁶³ The section provides that any person who abets or is engaged in a criminal conspiracy to commit any offence “shall be guilty of an offence and shall, on conviction, be liable to the punishment provided for such offence.”

³⁶⁴ The section prescribes five years imprisonment for any person who being an agent, knowingly gives a receipt, account or any document which is erroneous or defective ‘in any material particular’ to his principal.

were permanent staff of the college entitled to emoluments totaling N7,041,861.15 for the year 2005.³⁶⁵

In a judgment delivered on 29 January 2013, the trial judge, Justice Mashud A.A. Abass held that the accused persons were not guilty of counts 1, 2, 3 and 4 and were discharged and acquitted on them accordingly.³⁶⁶ He, however, found them guilty of the remaining four counts and sentenced each of the accused persons to one year imprisonment for each of the four counts without an option of fine.³⁶⁷ Coming barely few days after John Yakubu Yusufu who allegedly embezzled N23 billion naira from Police Pension Fund was convicted and sentenced to two years imprisonment with an option of fine, the ICPC judgment was highly commended by the generality of Nigerians.³⁶⁸

According to Mrs. C.I. Onuogu,³⁶⁹ the Head of Legal Services and Prosecution Department of the ICPC, at the inception of the Commission most of the offences filed by the Prosecution Department were brought under sections 8 to 10 of the ICPC Act dealing with accepting gratification and corrupt demands by persons; section 16 dealing with false statement, or returns;³⁷⁰ section 18 dealing with bribery of public officers,³⁷¹ and section 19 dealing with using office or position for gratification.³⁷² However, almost all the offence sections in the Act are being used for prosecution.³⁷³ The major problem faced by the ICPC prosecutors is the delay mechanism usually employed by the counsel to corrupt persons in order to frustrate the successful prosecution of corruption cases. The matter is further worsened by the invalidation of section 26(3) of the Act which prescribes a time limit within which corruption cases should be concluded.³⁷⁴

³⁶⁵ *FRN v Ruth Adehwe Aweto and Anor op cit.*

³⁶⁶ *Ibid.*

³⁶⁷ *Ibid.* The section does not provide an option of fine.

³⁶⁸ John Yakubu Yusufu, a former Director of Pensions with the Police Affairs Ministry, was on Monday 28 January convicted of conspiring with other civil servants to steal twenty three billion naira from Police Pension Fund by Justice Abubakar Thalba of an Abuja High Court. See *The Nation* 29 January 2013 p. 1.

³⁶⁹ *Op cit.* p. 232

³⁷⁰ *Ibid.*

³⁷¹ *Ibid.*

³⁷² *Ibid.*

³⁷³ For example, in *FRN v Aweto and Another* the accused persons were convicted under sections 26 and 17 of the ICPC Act.

³⁷⁴ *A-G, Ondo State v A-G, Federation* (2002) 9 NWLR (Part 772) 222

Presumption, Burden of Proof and Evidential Issues Under the ICPC Act

According to the *Black's Law Dictionary*,³⁷⁵ a presumption is a legal inference or assumption that a fact exists based on the known or proven existence of some other facts or group of facts. It otherwise means a mandatory deduction which the law directs to be made, having regard to rules of law and practice laid down for court's use.³⁷⁶ It is a rule of law which provides that if a party proves a certain fact (the primary fact) then another fact (the presumed fact) will also be taken to be proved, unless evidence is adduced by the opponent to rebut the presumption.³⁷⁷ On the other hand, burden of proof is "a party's duty to prove a disputed assertion or charge."³⁷⁸ According to Niki Tobi, apart from the exceptional cases where the law presumes the existence of a particular fact or facts without proof, the facts relied upon in a case have to be established by evidence. This, he contends, "is the essence of burden of proof."³⁷⁹

The ICPC Act contains a number of presumptions in relation to certain offences. By section 53 of the Act, in proceeding against any person for an offence under sections 8 to 19 of the Act where the elements of any of the offences are proved it will be presumed until the contrary is proved.³⁸⁰ According to Ocheje,³⁸¹ what is at issue here is not the burden of proof, which never shifts from the prosecution, but the evidential burden "which shifts constantly between the accused and the prosecutor throughout a proceeding."³⁸² He, therefore, rightly contends that what the Act prescribes is in conformity with the constitutional provision that an accused person is "presumed innocent until proved guilty."³⁸³ Section 53(4) of the ICPC Act also raises a similar presumption in relation to the proceedings under the Custom and Excise Act.³⁸⁴

³⁷⁵ *Op cit.* p. 1354

³⁷⁶ S.A. Awomolo, 2007. 'Presumptions' in A Babalola, (ed), *Law and Practice of Evidence in Nigeria*. (Sibon Books Ltd.) P. 361

³⁷⁷ Murphy, P. 1997. *Murphy on Evidence* Blackstone Press Ltd, London p. 94

³⁷⁸ *Black's Law Dictionary op. cit* p. 223

³⁷⁹ N. Tobi, 'Burden and Standard of Proof' in Babalola, A (ed), *op. cit* p. 278.

³⁸⁰ Section 53(1) of the ICPC Act.

³⁸¹ P.D. Ocheje, *op cit* p. 181

³⁸² *Ibid.*

³⁸³ *Ibid.* See also section 36(5) of the 1999 Constitution

³⁸⁴ Cap C 45 Laws of Federation of Nigeria, 2004.

ICPC: Analytical Discourse of Practice Procedure And Mechanisms

By section 40 of the ICPC Act, every person required by an officer of the Commission to give any information on any subject,³⁸⁵ which is in that person's statutory power to give, is obliged to give the information. Refusal to provide such information is punishable with six month imprisonment or a fine of ten thousand naira.³⁸⁶ Since a suspect or an accused person is constitutionally entitled to the right to keep silent, this provision seems to be a violation of this right.³⁸⁷ It is also a breach of the presumption of innocence.³⁸⁸

Section 56(1) of the Act seems to run foul of the constitutional guarantee of the right of fair hearing.³⁸⁹ It is to the effect that in any trial by court into any offence under the Act any statement by the accused person or in the hearing of the officer of the Commission, "whether or not interpreted to him by any officer of the Commission"³⁹⁰ shall be admissible in evidence.³⁹¹ Section 36(6)(a) of the Constitution provides that an accused person is entitled to be informed in the language he understands the nature of the offence.³⁹² He is also entitled to 'have without payment' the assistance of an interpreter if he does not understand the language used at the trial of the offence.³⁹³

Section 44 of the ICPC Act creates a rebuttable presumption of unjust enrichment. It is to the effect that the Chairman of the Commission, if he has reasonable grounds to believe³⁹⁴ that any offence has been committed under the Act, may by written notice require the suspect to furnish a statement in writing, on oath or affirmation and state every property he possesses,³⁹⁵ how he came into their possession, set out all other information about his properties,³⁹⁶ the estimated value and location of each of the properties³⁹⁷ and his sources of income.³⁹⁸ If the Chairman has reasonable grounds to believe

³⁸⁵ Which is the duty of such officer to inquire into under the Act.

³⁸⁶ Section 40 of the ICPC Act.

³⁸⁷ See Section 35(2) of the 1999 Constitution.

³⁸⁸ Section 36(5) of the 1999 Constitution.

³⁸⁹ Section 36 of the 1999 Constitution.

³⁹⁰ Notwithstanding any written law or rule of law to the contrary.

³⁹¹ Provided that the officer who procured such statement shall make himself available at the trial for the purpose of cross examination.

³⁹² *Board of Customs and Excise v Garba Katsina* (1973) INMLR 179.

³⁹³ Section 36(6)(e) of the 1999 Constitution. See also *Rufai v State* (2001) WRN 129.

³⁹⁴ After an investigation carried out by an officer of the Commission.

³⁹⁵ Section 44(1) (a)(i) of the ICPC Act.

³⁹⁶ Section 44(1) (a)(v) of the ICPC Act.

³⁹⁷ Section 44(1) (a)(iii) of the ICPC Act.

³⁹⁸ Section 44(1) (a)(vi) of the ICPC Act.

that the suspect “owns possesses controls or holds any interest in any property which is excessive”,³⁹⁹ the Chairman may require him to explain how he came about such excess and if he fails to explain such excess satisfactorily, “he shall be presumed to have used his office to corruptly enrich or gratify himself” and charged accordingly. As contended earlier, this is an administrative presumption by the Chairman. It is only when the suspect cannot satisfactorily explain how he came about his excessive wealth that he will be prosecuted for using his office to corruptly enrich himself.⁴⁰⁰

Section 54 of the ICPC Act deals with public evidence of corroboration. It provides that in any proceedings against any person for an offence under the Act, it may be proved that at or about the time of the alleged offence,⁴⁰¹ the accused or any of his relatives or associates held any property for which they are unable to give a satisfactory account of how they came into its “ownership, possession, custody or control,”⁴⁰² the evidence in relation thereto shall be presumed to corroborate any evidence relating to the commission of the offence.⁴⁰³ Like what obtains under Section 44, this is a rebuttable presumption which only becomes operative if the accused person or his associates are unable to explain how they came about the property in question.⁴⁰⁴ It does not offend any constitutional safeguards on right to fair hearing.⁴⁰⁵

Section 55 of the Act allows the admissibility of evidence of accomplices and *agent provocateur*. By section 198 of the Evidence Act,⁴⁰⁶ an accomplice is a competent witness against the defendant and a conviction is not illegal merely because “it proceeds upon the uncorroborated testimony of an accomplice.”⁴⁰⁷ However, such testimony should be held with utmost circumspection because an accomplice may want to implicate his partner in crime in order to exonerate himself. Hence the importance of the *proviso* to section 198 (1) of

³⁹⁹ Having regard to his present or past emoluments.

⁴⁰⁰ See also P.D. Ocheje *op. cit* p. 181

⁴⁰¹ Or any time thereafter.

⁴⁰² Section 54(a) of the ICPC Act.

⁴⁰³ Section 54(b) of the ICPC Act.

⁴⁰⁴ See also Section 136(1) of Evidence Act 2011.

⁴⁰⁵ Section 36 of the 1999 Constitution.

⁴⁰⁶ 2011.

⁴⁰⁷ Section 198(1) of the Evidence Act 2011.

the Evidence Act.⁴⁰⁸ With regards to an *agent provocateur*, the view has been held that admissibility of his evidence especially where there is entrapment is against the trend in the modern criminal justice.⁴⁰⁹ However, we must also bear in mind that the admissibility of the evidence of an *agent provocateur* can still be justified in Nigeria placing reliance on the words of Lord McDermott C.J in *R v Murphy*⁴¹⁰ after admitting that it is a form of “detection by deception,” that:

“...Regrettable through the fact may be, the day has not come when it would be safe to say that the law and order could always be enforced and the public safety protected without occasional resort to it.”⁴¹¹

Furthermore, the courts have a discretion to exclude any evidence if they find it to be improperly obtained.⁴¹² The ICPC Act also allows the admissibility of all photographic and electronic evidence.⁴¹³ Similarly, where any document which is to be used in any proceedings against any person is in a language other than the English Language, a translation of such document into English Language is admissible provided that the translation is accompanied by a certificate by the translator stating that it is a true and faithful translation.⁴¹⁴ Given the fact that the provision on admissibility of electronic evidence by the ICPC Act predates that of the Evidence Act 2011, the provision is very revolutionary. This is because the admissibility of electronically generated evidence used to be a highly contentious issue under the Nigerian law.⁴¹⁵ The admissibility of translated documents into the English Language is also meant to engender the effective performance of the

⁴⁰⁸ It states that the court shall direct itself that it is unsafe to convict upon only the uncorroborated evidence of an accomplice.

⁴⁰⁹ *Ibidapo-Obe, op. cit* p. 414.

⁴¹⁰ (1953) N1 138 at 147-8.

⁴¹¹ See also T.A Aguda, *Law of Evidence* (Ibadan: Spectrum. 2001), pp. 291-292. The author argues that the only contentious issue is that whether the evidence of an *agent provocateur* requires corroboration or not.

⁴¹² Section 14 (b) of the Evidence Act 2011.

⁴¹³ Section 58(1) of the ICPC Act. See also section 84 of Evidence Act, 2011 on computer evidence.

⁴¹⁴ Section 59(1) of the ICPC Act. The translation should also have been done at the instance of the Chairman or an officer of the Commission.

⁴¹⁵ *Ogwuma Associated coys ltd v IBWA* (1988) NWLR (Part s73) 658; *Ogolo v IMB* (1995). See also I. Akomolede, “Evidential Issues in E-Commerce in Nigeria: An Overview” *Igbinedon University Law Journal* (2008) 6 pp. 157-164.

prosecutorial function of the Commission and protect the right of fair hearing of the accused person.⁴¹⁶

Section 60 of the Act renders inadmissible evidence of custom as a defence in proceedings under the Act. It provides that:

“In any proceedings under this Act, evidence shall not be admissible to show that any such gratification mentioned in this Act is customary in any profession, trade, vocation or calling or on a social occasion.”

This seems to be contrary to paragraph 6 of the Code of Conduct for Public Officers under the Nigerian Constitution,⁴¹⁷ which allows a public officer to accept gifts or benefits from relatives or personal friends “to such an extent and such occasions as are recognized by custom.”⁴¹⁸ According to Yemi Akinseye George, the non-prohibition of gifts by customs may be exploited to continue with the practice of corrupt gift-giving.⁴¹⁹ The situation is worsened by using ‘relatives’ and ‘personal friends’ to describe persons whose gifts the public officer may be allowed.⁴²⁰ According to Ocheje, Section 60 of the Act raises an important issue relating to the “contextuality of corruption.”⁴²¹ This is because it is sometimes argued that corruption is a cultural relative phenomenon and perhaps what is considered as corruption in Nigeria is actually a cultural practice that is acceptable to indigenous cultures.⁴²² Debunking this view, Ocheje contends in spite of intellectual sophistication of the cultural relativist argument there is no direct or automatic connection between the identified traditional practice and corruption.⁴²³ He concludes that the Act has adopted a progressive position on the issue of culture and corruption by outlawing the defence of custom.⁴²⁴

⁴¹⁶ Section 36 of the 1999 Constitution.

⁴¹⁷ As amended

⁴¹⁸ Paragraph 6(3) Part I, Fifth Schedule to the 1999 Constitution.

⁴¹⁹ Akinseye-George, Y, *Legal System, Corruption and Governance op. cit* p. 92

⁴²⁰ *Ibid.* See also Lawal, I.B. 2009. “Public Declaration of Assets in Nigeria: Conflict or Synergy Between Law and Morality?” (2009) 9 *African Human Rights Law Journal*, p. 230

⁴²¹ Ocheje, P.D. *op cit* p. 181

⁴²² *Ibid.*

⁴²³ *Ibid.* p 183. He states further that gift connotes voluntariness while gratification is not, and that resort to cultural relativism conjures up spectre of expediency which has become evident in the use of culture by African ruling elites.

⁴²⁴ *Ibid.*

Institutional Constraints of the ICPC

Like any other public institution, the Independent Corrupt Practices and Other Related Offences Commission is faced with many institutional challenges. These include the prosecutorial powers of the Attorney-General, the immunity clause, the hostile attitude of the legislature, inadequate funding, the attitude of defence lawyers and reluctance of the generality of Nigerians to report corruption cases, among others.

a. The Prosecutorial Power of the Attorney General

By Section 174 of the 1999 Nigerian Constitution,⁴²⁵ the Attorney General of the Federation is vested with the authority to institute and undertake criminal proceedings against any person before any court of law in Nigeria.⁴²⁶ He is also imbued with the powers to take over and continue any such criminal proceedings, that may have been instituted by “any other authority or person”,⁴²⁷ and the power to discontinue at any stage before judgment is delivered any such criminal proceedings instituted by him or any other authority or person.⁴²⁸

Section 26(2) of the ICPC Act provides that prosecution for offences under the Act shall be initiated by the Attorney-General of the Federation or any other person to whom “he shall delegate his authority”. Section 61 is to the effect that prosecution for offences under the Act “shall be deemed to be done with the consent of the Attorney-General.”⁴²⁹ The implication of these two provisions is that the ICPC is at liberty to either allow prosecution for offences under the Act to be initiated by the Attorney-General or his delegate,⁴³⁰ or to initiate the prosecution by its in-house prosecutors. Whichever option the Commission takes, the prosecution is still subject to the Attorney – General’s powers to “take over and continue”⁴³¹ or “to discontinue” at any stage before the judgment is delivered. There is usually no much problem with the power of the Attorney-General to take over and continue the prosecution of criminal cases.⁴³² The only controversial issue is

⁴²⁵ As amended.

⁴²⁶ Other than a court martial.

⁴²⁷ Section 174(1)(b) of the 1999 Constitution.

⁴²⁸ Section 174(1)(c) of the 1999 Constitution.

⁴²⁹ Section 61(1) of ICPC Act.

⁴³⁰ Which is normally the case.

⁴³¹ Section 174(1)(a) of the 1999 Constitution.

⁴³² Apart from deflation of ego

the power to discontinue which is usually exercised by filing a *nolle prosequi*. This has been subject to a lot of abuses. For example, during the First Republic, the power was used to discontinue prosecution instituted against government party activists and supporters.⁴³³ The trend also continued in the Second Republic.⁴³⁴ An Attorney was removed in Imo State because he had abused his power of *nolle prosequi* to terminate a criminal case pending against his own client before he was appointed the Attorney General.⁴³⁵ The abuse of the power of *nolle prosequi* is still very rampant even under the current dispensation especially in relation to corruption cases. On 21 February 2011, ten civil society groups demanded the immediate resignation of the Attorney-General of the Federation, Mr. Mohammed Bello Adoke for allegedly withdrawing twenty five corruption cases under ten months in office.⁴³⁶ His predecessor Micheal Aondoaka had also fought hard to bring the anti-corruption agencies under him, took over high profile cases involving politicians and discontinued them.⁴³⁷ He was eventually disgraced out of office and became the only Senior Advocate to have his rank suspended for professional misconduct.⁴³⁸ All these cases of abuse of the power of *nolle prosequi* seem to make a mockery of the constitutional provision that in exercising his powers, the Attorney-General shall have regard to the “public interest, the interest of justice and the need to prevent abuse of legal process.”⁴³⁹ It is, therefore, suggested that the powers of the Attorney-General should be amendable to judicial review.

b. The Immunity Clause Under the Constitution

Section 308 of the 1999 Nigerian Constitution grants immunity to the President, Vice President, Governors and Deputy Governors. By this provision “no civil or criminal proceedings shall be instituted or continued

⁴³³ B.O. Nwabuezeop. *cit* p 309.

⁴³⁴ A.A. A Ekundayo, *Constitutional Provisions on Nolle Prosequi. A Blessing or a Curse?* (Lagos: NIALS 2008), P. 26.

⁴³⁵ For a detailed discussion of the abuse of *nolle prosequi* in the First and Second Republics, see A.O. Popoola, “The Jurisprudence of *Nolle Prosequi* in A.O. Popoola, and E.O. Adodo, (eds) *Current Legal Developments in Nigeria: Essays in Memory of Professor J.D. Ojo*. OAU Press P. 327.

⁴³⁶ “10 Civil Society Groups Demand Resignation of Ministers for Withdrawing 25 Corrupt Cases in 10 Months”, *The Nation* 22 February, 2011 p. 4.

⁴³⁷ G. Omotosho, “An Attorney-General At Work”, *The Nation* 28 July 2011 p.64.

⁴³⁸ *Ibid.*

⁴³⁹ Section 174(3) of the 1999 Constitution.

against a person to whom this section applies during his period of office;⁴⁴⁰ nor could he be arrested or imprisoned during that period either in pursuance of the process of any court or otherwise.⁴⁴¹ Furthermore, no process of any court requiring or compelling the appearance of a person to whom the section applies "shall be applied for or issued."⁴⁴²

It is a known fact that most of these immune public officials have abused this privilege through influence-peddling, insensitivity and imperviousness to the yearnings of the people, nepotism and involvement in economic crimes and corrupt practices. Although there are statutory⁴⁴³ and judicial authorities to the effect that they can be investigated while in office, such investigation can never be thorough because they cannot be arrested or made to appear before the court. In addition, whatever pieces of evidence already gathered against them might have lost their potency before their four year term. Some of the prosecution witnesses might also have died or relocated or threatened to withdraw from the case.⁴⁴⁴ *A fortiori*, the matter is worsened if the culpable immune official is able to secure another term of four years.⁴⁴⁵ Hence, there have been calls in many quarters that the immunity clause be expunged from our constitution.⁴⁴⁶ The most worrisome of the matter is that the immune officials who are convicted of corruption related offences after leaving office are granted state pardons through the abuse of the powers of prerogative of mercy.

c. Abuse of the Power of Prerogative of Mercy

One of the executive powers of the President and Governors under the 1999 Nigerian Constitution is that of the exercise of prerogative of mercy.⁴⁴⁷ By Section 175 of the Nigerian Constitution, the President is invested with a

⁴⁴⁰ Section 308(1)(a) of the 1999 Constitution.

⁴⁴¹ Section 308(1)(b) of the 1999 Constitution.

⁴⁴² Section 308 (1) (c) of the 1999 Constitution. However, this section does not apply to civil or criminal proceedings in which he is only a nominal party. See section 308(2) of the 1999 constitution.

⁴⁴³ For instance, Section 52 of the ICPC Act.

⁴⁴⁴ *Fawehinmi v IGP* (2002) 2NWLR (Pt 740) 606.

⁴⁴⁵ There may also be financial inducement, or threat of assassination.

⁴⁴⁶ Maximum term allowed under the Constitution. For a critique of the immunity clause see I.B. Lawal, "Is Executive Immunity Coterminous with Executive Corruption?" *International Journal of Law and Contemporary Studies* (2006) 1(1and 2), pp 325-346.

⁴⁴⁷ See Sections 175 and 212 of the 1999 Constitutions in respect of the President and the Governors respectively.

discretionary power to grant any person concerned with or convicted of any offence created by an Act of the National Assembly a pardon, either free or subject to lawful conditions.⁴⁴⁸ The power of the President in relation to the prerogative of mercy is exercisable in consultation with the Council of State.⁴⁴⁹ This is probably meant to prevent abuse.

The prerogative is not an arbitrary monarchical right of grace and favour,⁴⁵⁰ but constitutional safeguard against mistakes.⁴⁵¹ A pardon may also be free or subject to lawful conditions. A free pardon is used to remove the “pains, penalties and punishments” which flow from conviction from a criminal offence, but does not eliminate the conviction itself.⁴⁵² The effect of pardon is to make the offender a new man (*novo homo*), to acquit him of all corporal penalties and forfeitures annexed to the offence pardoned.⁴⁵³ Even though the Nigerian Constitution obliges the President to exercise his power to prerogative of mercy in consultation with the Council of State, there have been many instances of abuse.

For example, in *Okongwu v. The State*,⁴⁵⁴ the appellant was convicted of contempt of court and sentenced to twenty one days imprisonment. On that same day, in exercise of his powers of prerogative of mercy under Section 192 of the 1979 Constitution, the Governor of Anambra state, Chief Jim Nwobodo granted free pardon to the appellant.⁴⁵⁵ Similarly, in the year 2000, President Olusegun Obasanjo granted pardon to the former Speaker of House of Representative, Salisu Buhari, shortly after conviction for perjury and falsification of age and educational certificates.⁴⁵⁶ The most recent abuse of the power of prerogative of mercy is the pardon granted to the former Governor of Bayelsa State Chief Diepreye Alamieyeseigha⁴⁵⁷ by the President

⁴⁴⁸ Section 175 (1) of the 1999 Constitution.

⁴⁴⁹ Section 175 (2) of the 1999 Constitution.

⁴⁵⁰ *Burt v Governor General of New Zealand* (1993) 3 NZLR 672 at 681

⁴⁵¹ *R v Secretary of State for Home Department, Ex parte Bentley* (1994) QBD 394; see also Lord Hailsham *Halsbury Laws of England* – (London: Butterworths Vol. 8(2) 1996), p.483 parag 824.

⁴⁵² *R v Foster* (1985) QBD 115; *Searle v Williams* (1618) Hob 288 at 293.

⁴⁵³ Per Musdapher, JCA in *Falae v Obasanjo & Ors* (No. 2) (1999) 4NWLR (Pt 599) 721.

⁴⁵⁴ (1986) 5NWLR (Pt 44) p.721.

⁴⁵⁵ *Ibid.*

⁴⁵⁶ For a full account of the offences committed by the former Speaker, see *Commissioner of Police v Salisu Buhari* (2000) FWLR (Part 1) 164.

⁴⁵⁷ The impeached Governor of Balyesa State was convicted and sentenced to twelve years' imprisonment for corruption and money laundering offences in 2007.

Goodluck Jonathan on 13 March 2013. The government action has been roundly condemned by the generality of Nigerians.⁴⁵⁸ The haste with which corrupt public officials are granted pardon is a great disincentive to the fight against corruption in Nigeria.

d. The Hostile Attitude of the Legislature

Legislatures are the catalyst for development in any democratic state because of the important functions they perform.⁴⁵⁹ The main function of the legislature is to make laws for the good governance of the people or to “superintend the making of such laws by other bodies as be stipulated by the Constitution.”⁴⁶⁰ Apart from their law-making functions, legislatures also play an important role in policy formulation and execution through the control of public funds and expenditure,⁴⁶¹ control of other arms of government through the legislative investigations committees⁴⁶² and confirmation of appointments made by the executive, among others. The powers of investigation conferred on the National Assembly are exercisable for the purpose of enabling it to make laws with respect to any matter within its legislative competence and correct defects in existing laws.⁴⁶³ They are also exercisable in order to enable it to “expose corruption, inefficiency or waste” in the execution or administration of laws within its legislative competence and in the disbursement or administration of funds appropriated by it.⁴⁶⁴

A casual examination of the purposes of the legislative powers of investigation gives an impression that they are meant to complement the work of the anti-corruption agencies.⁴⁶⁵ The reality on ground, however, seems to point otherwise. At the inception of the Independent Corrupt Practices and Other Related Offences Commission (ICPC), the Commission received

⁴⁵⁸ For some of the reactions see “Soyinka Faults Alamiyeseigha’s Pardon”, *The Nation* 12 March 2013; Oluwajuyitan, J. 2013. The Many ‘Enemies’ of Ijaw Governor-General, *The Nation* 21 March 2013 p.22

⁴⁵⁹ For example, section 4(2) of the 1999 Constitution vests the National Assembly with the power to make laws for the “peace order and good governance of the Federation or any part thereof...”

⁴⁶⁰ Aguda, O. 2002. *Understanding the Nigerian Constitution of 1999*. MIJ Publishers, Lagos. p 30.

⁴⁶¹ See Sections 80-83 of the 1999 Constitution.

⁴⁶² Section 88 of the 1999 Constitution.

⁴⁶³ Section 88 (2)(a) of the 1999 Constitution.

⁴⁶⁴ Section 88 (2) (b) of the 1999 Constitution

⁴⁶⁵ Especially the ones meant to expose “corruption, inefficiency and waste.”

petitions on allegation of corruption against some members of the leadership of the National Assembly.⁴⁶⁶ These petitions were investigated and the Commission was set to prosecute some of the members of the National Assembly.⁴⁶⁷ The National Assembly alleged that the Commission was being used by the executive to witch-hunt its members.⁴⁶⁸ The National Assembly therefore initiated moves to repeal the ICPC Act.⁴⁶⁹ The amended ICPC bill was forwarded to the President for assent. Meanwhile, four members of the House of Representatives led by Bala Kaoje had gone to court to challenge the purported amendment of the Act on the ground that the National Assembly did not form a quorum when the amended ICPC Bill was passed.⁴⁷⁰

In the ensuing case of *Honourable Bala Kaoje & Others v The National Assembly and Others*,⁴⁷¹ on 12 April 2003, Justice Wilson Egbo-Egbo of the Federal High Court Abuja granted an injunction that the *status quo* be maintained.⁴⁷² On the strength of the injunction the President did not give his assent to the amended ICPC Bill and communicated his decision to the National Assembly.⁴⁷³ In defiance of the court order on 7 and 8 May 2003, the Senate and the House of Representatives respectively overrode the President's purported veto and passed the amended Bill.⁴⁷⁴ On 21 May 2003, Justice Wilson Egbo Egbo voided the amended ICPC Act.⁴⁷⁵ Striking down the amended Act, the learned judge held that:

“Law makers who cannot obey a simple order of a court established by the Constitution cannot arrogate to themselves the power to pass a law in contravention of a valid order of a court and expect members of the public to obey such a law. The law passed by the National Assembly is tainted with irregularity and this court possesses the power to declare it null and void as the suit is still pending before this court.”⁴⁷⁶

⁴⁶⁶*The Punch* 8 May 2003. P.2

⁴⁶⁷*Ibid.*

⁴⁶⁸*Ibid.*

⁴⁶⁹*The Guardian* 22 May 2003, pp. 1-2

⁴⁷⁰*Ibid.*

⁴⁷¹ Suit No FHC/AB/ABJ/CS/93/2003. Unreported judgment of Federal High Court Abuja, delivered on 12 April, 2003.

⁴⁷²*Ibid.*

⁴⁷³*Ibid.*

⁴⁷⁴*Ibid.*

⁴⁷⁵*Ibid.*

⁴⁷⁶*Ibid.*

His Lordship further held that:

What the National Assembly has craftily done is to circumvent section 4(8) of the 1999 Constitution and oust the jurisdiction of the court. This is unconstitutional and illegal. For reasons stated above I hereby declare the said Act passed by the National Assembly null and void and of no effect. It is struck down forthwith.⁴⁷⁷

Unfortunately, despite the fact the purported amended ICPC Act has been struck down since 2003, it is still listed as Chapter C 31, Laws of Federation of Nigeria⁴⁷⁸ while the original ICPC Act is omitted. This is capable of causing confusion and impeding the fight against corruption. Commenting on the voided Act, Banire is of the view that it was meant to whittle down and out to curb the powers of the Commission.⁴⁷⁹ The vindictive nature of the voided Act is also reflected in the some of its provisions. For example, it provided that the Chairman of the Commission “shall be a serving Judge of the Court of Appeal” unlike a person “who has held or is qualified to hold office as a Judge of a superior court of record” under the original Act.⁴⁸⁰ The tenure of office of the Chairman was also reduced to a single term of five years under the voided Act unlike the two terms under the original Act.⁴⁸¹ Finally, section 56 of the voided Act sought to prematurely terminate all appointments made under the 2000 Act. It is submitted that the fear of untimely termination of the appointments of all the staff of Anti-corruption Commission at one fell swoop is enough to grind the activities of the Commission to a halt.

e. Inadequate Funding

The problem of funding is another impediment to the smooth functioning of the ICPC. This is largely due to the fact that whatever budget proposals made by the executive for the anti-corruption agencies are subject to the approval and review by the legislature before being passed into an Appropriation Act. A friendly legislature would like to appropriate enough funds to the anti graft

⁴⁷⁷ *Ibid.* For a critique of this case, see I.B. Lawal, “Legislative Immunity and Contempt of Court”, Ogungbe, M.O. (ed), *Nigerian Law: Contemporary Issues, Essays in Honour of Chief G.O Igbinedion*. (Faculty of Law, Igbinedion University, Okada 1996), p. 288-299.

⁴⁷⁸ 2004.

⁴⁷⁹ M. Banire, *op.cit* p. 271.

⁴⁸⁰ Section 3(4) of the ICPC Act No. 5 of 2000.

⁴⁸¹ See Section 3(10) of the Voided Act.

agencies, while a hostile one would want to cripple their activities by starving them of funds. The ICPC has been described as a “lame duck” because of poor funding.⁴⁸² According to Retired Justice Mustapha Akanbi, the pioneer Chairman of the ICPC, based on the problem of funding and the fact that the National Assembly overplayed its oversight function, “the ICPC trudges on listlessly like a famished orphan”.⁴⁸³

f. Attitude of Defence Counsel

The right to counsel is one of the fundamental rights of an accused person being tried for a criminal case. However, many defence counsel have abused this right in order to frustrate and unduly delay the prosecution of corruption cases. They have turned themselves into the ‘mouthpiece’ of the accused persons to file all sorts of interlocutory applications and preliminary objections. These defence counsel would not conduct their cases in the tradition of highest standards required by the profession.⁴⁸⁴ If they do not succeed in stalling the trial, then the judge becomes the target. He would be accused of bias to prepare the ground for application for transfer to another judge.⁴⁸⁵ According to Ribadu, this occasions delays, frustrate trials and wastes resources on both sides. For example, in *Amadi v NNPC*,⁴⁸⁶ an interlocutory application took a period of thirteen years before being finally determined by the Supreme Court. Similarly, in *Federal Republic of Nigeria v Olafisoye and Others*,⁴⁸⁷ the accused persons being tried under the ICPC Act since 2001 challenged the constitutionality of the ICPC Act after the Supreme Court Judgment in *Attorney General of Ondo State v Attorney General of the Federation and Others*.⁴⁸⁸ The judgment re-affirming the constitutionality of the Act was delivered in 2004. The substantive case is still pending before the High Court of the Federal Capital Territory Abuja more than ten years after filing it. This delay tactics by defence counsel should be highly deprecated to enhance the fight against corruption in the country.

⁴⁸² M. Akanbi, 2005. Five Years of Nightmares *Tell Magazine* 24 October 2005 p.31.

⁴⁸³ See also A. Ozoemena, ‘Money Laundering Under the Nigerian Law’. Yusuf, F.A.O. (ed). *The Nigerian Judiciary Perspectives and Profiles*, (Lagos FHL Publishers, 2006) p.296.

⁴⁸⁴ Ribadu, N. 2007. ‘Problems Associated with the Enforcement of Economic Crimes,’ Paper delivered at the NBA Annual Conference, Abuja from 23-27 August 2007 pp 6-7.

⁴⁸⁵ *Ibid.*

⁴⁸⁶ (2000) 10 NWLR (Part 674) 76 at 80.

⁴⁸⁷ (2004) 4 NWLR (Pt 864) 662.

⁴⁸⁸ (2002) 9 NWLR (Pt 772) 222.

ICPC: Analytical Discourse of Practice Procedure And Mechanisms

Other problems of the ICPC include frivolous granting of interlocutory applications by some judges, poor investigation by anti-corruption investigators, lack of diligent prosecution, congestion of courts, high costs of investigating and prosecuting corruption cases, the general apathy of Nigerians towards reporting corruption cases and the problem of corruption, among others.

Conclusion

Corruption has not only been the bane of Nigeria's socio-economic and political development, it also manifests social injustice and is symptomatic of societal degeneration. Apart from causing inequity in the distribution of public benefits and costs, it has also led to cynicism to, and disruption of government programme as well as international condemnation and embarrassment⁴⁸⁹. One of the legal mechanisms put in place by the Nigerian government to combat the scourge of corruption is the Corrupt Practices and Other Related Offences Act.⁴⁹⁰ It is meant to restore sanity and transparency into the Nigerian economy and prevent corruption and abuse of office among public officers and private persons alike. The Act created the Independent Corrupt Practices and Other Related Offences Commission (ICPC).⁴⁹¹ This paper has attempted an analytical discourse of the practice, procedure and mechanisms of the ICPC and has found out that there is room for improvement.

In addition to the suggestions already offered in the body of the work, it is proposed that the Act should be amended so that the designations of the in house lawyers prosecuting for the Commission should reflect the ones they use in the court room. Furthermore, the fact that the ICPC prosecutes offenders in the high courts of their various states put the Commission at a disadvantage because some of the highly placed corrupt public officers can easily manipulate the court or mobilize their supporters to either disrupt proceedings or intimidate the court.⁴⁹² It is recommended that both the High Courts of States and the Federal High Courts be given jurisdiction to try cases under the ICPC Act as obtainable under the Economic and Financial Crimes Commission Act.⁴⁹³ Similarly, the provision requiring an independent counsel

⁴⁸⁹ As evident in the country's unimpressive corruption rating.

⁴⁹⁰ No. 5 of 2000.

⁴⁹¹ Section 3(1) of the ICPC Act.

⁴⁹² As being done by many former governors and political office holders.

⁴⁹³ Section 19 (1) of the EFCC Act.

investigating immune public officials to make an application to the Chief Justice by motion on notice before being authorized to investigate these officials is objectionable.⁴⁹⁴ This is because it is not usually very easy to get these officials served except through substituted service;⁴⁹⁵ and if they are eventually served they may contest any ruling against them up to the Supreme Court⁴⁹⁶. Therefore, it is better to allow the pre-investigation application to the Chief Justice to be by motion *ex parte*.

The offences and penalties under the ICPC Act also deserve some comments. While the Act is commended for blurring the distinction between the main and ancillary offences, the disparity in the punishment of some similar offences seems improper. For example, the rationale for the seven years imprisonment and one million naira fine prescribed for contract fixing under section 27, and the three years' imprisonment in addition to fine "at the current price" prescribed for a relatively similar offence of bribery in relation to public auction under section 21, has been queried.⁴⁹⁷ So also has the combination of pecuniary punishment with custodial punishment been criticized.⁴⁹⁸

Some inadequacies have also been noticed in the provisions for offences under the Act. One of them is that while the Act makes copious provisions for collection of bribes with severe penalties, no specific provision is made for the embezzlement of public funds. Offenders could only be prosecuted for this offence under the residual provision of section 19⁴⁹⁹ which carries a less severe penalty. Similarly, in addition to the administrative and judicial presumptions under the Act it has also been suggested that there should be a specific provision on illicit enrichment.⁵⁰⁰ This is in line with the Article 20 of the United Nations Convention Against Corruption.⁵⁰¹ Other *lacunae* observed in the Act relate the position of "quasi public officers", like the

⁴⁹⁴ It may lead to undue delay.

⁴⁹⁵ For which a court order is required.

⁴⁹⁶ This delay is to the advantage of the corrupt persons.

⁴⁹⁷ *Ibidapo* – *Obe op. cit* p.413.

⁴⁹⁸ *Ibid.*

⁴⁹⁹ Using office or position for gratification.

⁵⁰⁰ *Igbinedon, S.A. op. cit* p. 108.

⁵⁰¹ Article 20 of the United Nations Convention Against Corruption, 2003, provides that: "Subject to the Constitution and the fundamental principles of its legal system, each State Party shall consider adopting legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, illicit enrichment, that is, a significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income".

spouses and children of public officers, and public officers who may not corruptly benefit from their own conduct, but nevertheless facilitate corruption through their negligence.⁵⁰² Even though the act of the negligent public officers may not fit neatly into 'corruption' it fits into "despoliation" and should be appropriately punished.⁵⁰³ It is contended that the special position of the spouses of public officers should be acknowledged under the ICPC Act because they have access to public funds which they use to execute white elephant projects or deliberately squander, pilfer or mismanage to the detriment of the country. The need for an urgent provision to capture the squandermania, recklessness and outright corruption of these quasi public offers is further underscored by the recent move by the Nigerian government to make budgetary allocation of four billion naira for the construction of African First Ladies Mansion in Abuja.⁵⁰⁴

Prosecution for offences under the ICPC Act is subject to the general prosecutorial powers of the Attorney General of the Federation.⁵⁰⁵ The Attorney General is enjoined to exercise his powers with genuine regard to "public interest, the interest of justice and the need to prevent the abuse of legal process."⁵⁰⁶ A situation where the Attorney-General withdraws high profile corruption cases against government loyalists and supporters or for personal aggrandizement⁵⁰⁷ is neither in the public interest nor in the interest of justice. To avoid this abuse it is suggested that the office of the Attorney-General be separated from the Minister of Justice. Alternatively, the power of the Attorney-General should be amenable to judicial review. Similarly, the immunity clause under the Constitution should be restricted to civil matters only, while the executive should see the power of prerogative of mercy as a means of correcting genuine errors in judgment and rehabilitating *bonafide* repentant convicts; and not an instrument to reward political patronage.

⁵⁰² Ocheje, P.D. *op. cit* p. 180.

⁵⁰³ *Ibid.*

⁵⁰⁴ Professor Wole Soyinka is of the view that it is wrong to make budgetary allocation to the African First Ladies Mansion. He suggests that the First Ladies should source their funds from private individuals and non-governmental organizations. See Soyinka W. 2013, "Ghost Missions on the Gravy Train", *The Nation* 21 March, 2013 p. 18.

⁵⁰⁵ See sections 26(3) and 61 of the ICPC Act and section 174 of the 1999 Nigerian Constitution.

⁵⁰⁶ Section 174(3) of the 1999 Constitution.

⁵⁰⁷ As being done in the country.

The legislature should also be more friendly with the anti-corruption agencies since some of the oversight functions of the legislature are aimed at exposing “corruption, inefficiency and waste.”⁵⁰⁸ The members of the legislature should work in synergy with all anti-corruption agencies by approving adequate budgetary allocations to them, avoiding undue friction with them as well as avoiding corrupt practices that may engender conflict between them and the anticorruption agencies. On their own part, the anti-corruption agencies including the ICPC should recognize and respect the oversight functions of the legislature as the representative of the people and respond timeously to their invitation or politely explain any reason for delay.

The defence counsel in corruption cases should also conduct their cases with the highest professional standards and avoid unnecessary delays and frivolous adjournments. They should not see themselves as the ‘mouthpiece’ of the accused persons but as ‘ministers in the temple of justice.’⁵⁰⁹ The judges should also be alive to their responsibilities. They should sit on time and avoid all frivolous adjournments and interlocutory applications. The court rooms should also be well equipped with modern gadgets to aid quick hearing of corruption cases. The National Judicial Council should also intensify its current effort of relieving corrupt judges of their appointments.⁵¹⁰ The oral directive given by the former Chief Justice of Nigeria, Justice Dahiru Musdapher in November 2011, that corruption cases should be concluded within six month is highly commendable.⁵¹¹ It is suggested that the oral directive be converted to a proper practice directive to all judges in order to hasten the hearing of corruption cases. *A fortiori* the fact that the provision in the ICPC Act that corruption cases should be concluded within ninety days has been invalidated by the Supreme Court⁵¹² makes the issuance of a formally documented practice directive highly imperative.

The powers conferred on the Chairman by the ICPC Act are enormous and can be susceptible to abuse. The Chairman of the ICPC is therefore enjoined to exercise his powers with great caution and utmost circumspection. This

⁵⁰⁸ Section 88 of the 1999 Constitution.

⁵⁰⁹ See the *dictum* of Lord Denning in *Rondel v Worsley* (1966) 3 All ER 657.

⁵¹⁰ Section 21(b) and (d), Part I Third Schedule to the 1999 Constitution invests the National Judicial Commission with the powers to recommend judges for removal.

⁵¹¹ Justice Musdapher said this while delivering a lecture entitled: “The Nigerian Judiciary: Towards Reform of the Bastion of Constitutional Democracy”, organized by the Nigerian Institute of Advanced Legal Studies on 10 November 2011.

⁵¹² *A.G. of Ondo State v A.G. Federation* (2002) 9 NWLR (Pt. 772) 222

probably explains why section 35 of the ICPC Act was struck down by the Supreme Court for being contrary to the constitutional guarantee of personal liberty in the 1999 Constitution.⁵¹³ The striking down of some of the provisions of the ICPC Act, coupled with some of the deficiencies earlier highlighted in the Act reinforces the need to amend the Act in order to improve it and let the generality of Nigerians know the real content of the Act. But can the current membership of the National Assembly be entrusted with this duty? The question is necessitated by the way the National Assembly hurriedly and mischievously passed the subsequently invalidated Corrupt Practices and Other Related Offences Act 2003.⁵¹⁴

The government should also demonstrate enough political will in fighting corruption by avoiding selective prosecution of corrupt persons, and funding anti-corruption agencies adequately. The staff of the anti-corruption agencies, especially the ICPC, should also avoid the temptation to be compromised or corrupted by corrupt individuals being investigated or prosecuted by them. The ICPC should also update its website with a comprehensive account of all its activities, including the number of cases successfully prosecuted so far and the status of all its cases. On the whole the ICPC seems to have improved to significantly on its performance with more cases being filed in court and the conviction rate getting higher by the day. However, there are still room for improvement.

Finally, the generality of Nigerians should be well educated on the evils of corruption by the mass media, the Nigerian Bar, the academia and the non-governmental organizations. The battle against corruption must be won; fight it we must!

⁵¹³ Section 35 of the 1999 Constitution

⁵¹⁴ Cap C3 Laws of Federation of Nigeria, 2004.