

WORKABILITY OF THE NORMS OF TRANSPARENCY AND ACCOUNTABILITY AGAINST CORRUPTION IN NIGERIA

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ABSTRACT

This paper discusses the workability of the existing norms of transparency and accountability in the battle against corruption in Nigeria. Incontrovertibly, high level corruption pervades every nook and cranny of the country to the detriment of its citizens. Although anti-corruption norms exist in the Nigerian legal order, high profile corruption remains endemic, suggesting that the norms are unworkable.

This paper argues that the unworkability of transparency and accountability norms in Nigeria is largely attributable to the contradictions, inconsistencies or deficiencies inherent therein. Consequently, the paper suggests ways of putting the norms to work against corruption in Nigeria.

Keywords: Corruption, Governance, Sustainable Development

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1. INTRODUCTION

Corruption has become a fact of life in Nigeria, ravaging the country's socio-political and economic sectors.¹ Though corruption arguably exists in every country, its effects, extent and magnitude vary from one country to another. In Nigeria, corruption is arguably so rampant that any breaking news on another billion plundered from the national treasury no longer outrages an average Nigerian, who has over time learnt to endure it.² This has earned the country the unenviable status of one of the most corrupt countries in the world,³ it has also opened the Pandora box of those who, claiming to rule Nigeria, ruin the country and its economy by looting its patrimony.⁴ It is therefore no coincidence that in a country where the corrupt swim in the ocean of affluence and extravagance,⁵ over 70 per cent of Nigerians live in abject poverty.⁶ Unfortunately, efforts to tackle corruption have yielded no appreciable results.

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- 1 See, e.g., David Imhonopi and Moses Urim Ugochukwu, 'Leadership Crisis and Corruption in the Nigerian Public Sector: An Albatross of National Development' (2013) 13: 1 *The African Symposium* 78; N Ikpeze, 'Fusion of Anti-Corruption Agencies in Nigeria: A Critical Appraisal' (2013) 1: 1 *Afe Babalola University Journal of Sustainable Development Law and Policy* 148, 149; Adeyemi O Oluwatobi, 'Corruption and Local Government Administration in Nigeria: A Discourse of Core Issues' (2012) *European Journal of Sustainable Development* 183, 190; Joseph C. Ebegbulem, 'Corruption and Leadership Crisis in Africa: Nigeria in Focus' (June 2012) 3:11 *International Journal of Business and Social Science* 221 at 222, 223.
 - 2 See, e.g., John Mukum Mbaku (ed), *Corruption and the Crisis of Institutional Reforms in Africa* (The Edwin Mellen Press 1998) 54-55.
 - 3 E.g., from 1996 to 2005, the Corruption Perception Index (CPI) of the Transparency International (TI) consistently perceived Nigeria to be in the category of the six most corrupt countries in the world. Breakdown shows that Nigeria featured in the CPI in the following descending order: 1st position (1996, 1997 and 2000); 2nd position (1999, 2001 – 2003); 3rd position (2004); 5th position (1998); and 6th position (2005). See generally Transparency International, Corruption Perception Index <<http://www.transparency.org/research/cpi/overview>> accessed 28 August 2013. Any indication that the country has improved is betrayed by the fact that the country remains very corrupt as evident by the frequency and intensity with which public officials despoiled national assets in billions and even trillions of Naira.
 - 4 See, e.g., United States Department of State, 'Nigeria 2012 Human Rights Report' (detailing how high profile Nigerian officials – including former Minister of Works and Housing Hassan Lawal, former Speaker of the House of Representatives Dimeji Bankole and his deputy Usman Nafada, former governors Timipre Sylva {Bayelsa State}, Otunba Gbeniga Daniel {Ogun State}, Adebayo Alao-Akala {Oyo State}, Alhaji Aliyu Doma {Nasarawa State}, Muhammed Danjuma Goje {Gombe State} and James Ibori {Delta State}, amongst others – fraudulently or allegedly misappropriated billions of dollars belonging to the people of Nigeria) 41-44 <<http://www.state.gov/documents/organization/204365.pdf>> accessed 31 March 2014.
 - 5 *ibid.*
 - 6 See Microfinance Nigeria, 'CBN boss: People living below poverty rise to 70%, approves three credit bureaus' (18 January 2011) <<http://www.microfinancenigeria.com/latest-news/cbn-boss-people-living-below-poverty-rise-to-70-approves-three-credit-bureaus/>> accessed 8 February 2014.

This paper examines the workability of the norms of transparency and accountability against high profile corruption in Nigeria. Against this background, the paper considers the norms of transparency and accountability, which are reflected in existing legal machinery against corruption. The paper argues that though the norms are designed to aid corruption control, their inherent contradictions, inconsistencies or deficiencies have largely crippled the anti-corruption machinery.

The paper is divided into five sections, this introduction being the first. Section two considers the subject matter of corruption and its impacts on sustainable development in Nigeria, while section three explores existing norms of transparency and accountability. Section four critically examines the contradictions, inconsistencies and deficiencies inherent in such norms. Finally, section five concludes the discussion with some suggestions.

2. OVERVIEW OF THE NATURE AND EFFECTS OF CORRUPTION

Corruption is the misuse or exploitation of public power, position or patrimony for personal or familial benefits.⁷ It may be categorized on the basis of several criteria such as the status of offenders, size of the plundered assets, etc. Based on this, corruption may be *petty* or *grand*. Grand corruption, which is the focus of this paper, is the plunder of humongous assets by high profile public officials.

According to Rose Ackerman, it is the corruption typology that pervades the highest levels of a national government, leading to a broad erosion of confidence in good governance, the rule of law and economic stability.⁸ For reasons of confidentiality, secrecy or security, many offenders engage in corrupt conducts with the assistance of service providers, including family members, friends, business partners, financial intermediaries and professional consultants.⁹ Corruption may be bilateral or autogenic. It is bilateral where

7 See, e.g., Imhonopi and Ugochukwu (n 1) 79; and John Mukum Mbaku, 'Bureaucratic Corruption in Africa: The Futility of Cleanups' (1986) *Cato Journal* 101-2.

8 Cited in United Nations, 'The Global Programme Against Corruption: Anti Corruption Toolkit,' 13 n2 <[http://www.icclr.law.ubc.ca/Site%20Map/compendium/Compendium/Tools/UN%20AntiCorruption_toolkit%202003.pdf#search='Global%20Programme%20against%20Corruption\]](http://www.icclr.law.ubc.ca/Site%20Map/compendium/Compendium/Tools/UN%20AntiCorruption_toolkit%202003.pdf#search='Global%20Programme%20against%20Corruption'])> accessed 27 August 2013. See also Seumas Miller, et al, *Corruption and Anti-Corruption: An Applied Philosophical Approach* (Pearson Prentice Hall 2005) 20.

9 E.g., The Late dictator Sani Abacha plundered national wealth with the aid of these agents: US, 'Minority Staff Report for Permanent Subcommittee on Investigations Hearing on Private Banking and Money Laundering: A Case Study of Opportunities and Vulnerabilities' (hereinafter *Minority Staff Report*) (1999) 43-50.

its consummation requires at least two parties, for example, bribery.¹⁰ Auto-genic corruption relates to corruption typology whose commission is complete without the necessity of binary relations, for example, embezzlement. Whatever the typology, corruption is arguably a commonplace across the length and breadth of Nigeria. Amidst such aura, public offices have become commercial enterprises where corrupt public officials trade off or barter away their entrusted positions for illicit wealth. A distinguishing feature of the crime is the *situs* of the proceeds derived therefrom. With the aid of aforementioned service providers, offenders locate or relocate their booty from the *locus delicti commissi* or *locus criminis* through the medium of money laundering to foreign jurisdictions such as Europe, Americas, and other financial centres.¹¹ In sharp contrast with the wealthy and luxurious lifestyles of offenders is the penurious and parlous existence of over 70 per cent of Nigerians.¹²

In the next subsection, we shall consider the effects of corruption as a background to our examining the extant norms of transparency and accountability.

2.1 Effects of Corruption

With the exception of functionalists – such as Samuel Huntington, Friedrich and Merton – who claimed that corruption is beneficial,¹³ there is a general consensus that it is detrimental to the rule of law, good governance and sustainable development.¹⁴ Rule of law emphasizes the equality of all before the law. But corruption destabilizes such order. It achieves this by serving as a medium for concentrating public wealth in a few hands, such wealth constituting unjust enrichment. Consequently, it complicates inequality between the rich and the poor.¹⁵ In a country where 70 per cent of citizens are below the poverty line, the impact of corruption on rule of law is unimaginable.

10 Thus, there must be an offeror (giver) on the one hand and offeree (receiver) on the other.

11 See, e.g., Minority Staff Report (n 9) 11-42 (profiling the laundering activities of Raul Salinas of Mexico, Asif Ali Zardari of Pakistan, Omar Bongo of Gabon and the children of Abacha of Nigeria). Regarding the Abachas' laundering activities, see also Swiss Federal Banking Commission (SFBC), 'Abacha Funds at Swiss Banks' (Report of the Swiss Federal Banking Commission) (30 August 2000) 13.

12 See (n 6).

13 See Syed Hussein Alatas, *Corruption: Its Nature, Causes and Functions* (Gower Publishing Company Limited 1990) ch 6.

14 See United Nations (n 8) 14 n.2; and the 7th preamble to the UNCAC which recognizes that illicit acquisition of wealth can be particularly damaging to democratic institutions, national economies and the rule of law.

15 See Nicholas A Goodling, 'Nigeria's Crisis of Corruption: Can the UN Global Programme Hope to resolve this Dilemma?' (May 2003) 36 *Vanderbilt Journal of Transnational Law* 997, 1003.

It is worse that those who perpetrate corruption are high ranking public officials usually perceived by a large spectrum of the people as role models. It is in this context of such symbiotic nexus between corruption and public office that the conduct is said to catalyze or generate other crimes.¹⁶ In other words, the involvement of such role models in corrupt conduct weakens societal sense of moral and legal responsibility and ultimately constitutes a technique of neutralization of guilt or rationalization of wrongs¹⁷ in the consciousness of those engaging in criminal activities.

Secondly, good governance is a normative principle of administrative law which obliges the State to perform its functions in a manner that promotes the values of efficiency, non-corruptibility, and responsiveness to civil society.¹⁸ Good governance is an anti-corruption tool with five cardinal attributes of transparency, responsibility, accountability, participation and responsiveness.¹⁹ In Nigeria, corruption has overwhelmed such noble attributes, with elected or appointed public officials regarding themselves as demi-gods. They picture themselves more as masters than servants, recklessly failing to deliver the goods and services, or the dividends of democracy to citizens. Since such offenders comprise top level public officials who symbolize national sovereignty and institutions of governance, citizens tend to associate the plunder of national wealth with government, as a result of which governmental institutions are discredited and denied of their trust and loyalty.²⁰

Lastly, corruption has deleterious effects on sustainable development,²¹ which includes social, economic and environmental components. In relation to social development, corruption has so hardened the conscience and con-

16 See Oluwaseun Bamidele, 'Corruption, Conflict and Sustainable Development in African States' (June 2013) 13: 1 *The African Symposium* 42 at 47-48; see also Obi N I Ebbe, 'Heads of State: The Vice Kings and Narcotic Barons' (1990) 14:2 *International Journal of Comparative and Applied Criminal Justice* 285 (contending that when a head of state commits such crimes as embezzlement and bribery, etc, he creates future regimes of criminals); and S O Osoba, 'Corruption in Nigeria: Historical Perspectives' (1996) 69 *Review of African Political Economy* 372, 384 (arguing that the magnitude of petty corruption reflects the size of grand corruption).

17 Gresham Sykes & David Matza, cited in Obi N I Ebbe, 'Political Corruption in Africa,' in Rick Sarre, et al (eds), *Policing Corruption: International Perspectives* (Lexington Books 2005) 105.

18 See N Chowdhury and E Skarstedt, 'The Principle of Good Governance' (Draft Working Paper: A Legal Working Paper in the CISDL 'Recent Developments in International Law Related to Sustainable Development' Series – Oxford March 2005) 4.

19 *ibid* 5. See also Office of the UN High Commissioner for Refugees, 'What is Good Governance?' <<http://www2.ohchr.org/english/issues/development/governance/index.htm>> accessed 20 June 2013.

20 See OECD, *Public Sector Corruption: An International Survey of Preventive Measures*.

21 See, e.g., Mamman Lawan, 'Underdevelopment, Corruption and Legal Disorder in Nigeria: Exploring a Nexus' (2012) *NIALS Journal of Law and Public Policy* 75, 91 – 95.

sciousness of the average Nigerian that the corrupt massively loot national patrimony to the detriment of people-oriented social developmental programmes²² while the rest of Nigerians – being too upset with the helplessness of the Nigerian State amidst such plunder – have been driven to the state of anomie under the influence of which they now believe in the inevitability of corruption. Economically, corruption distorts the character of government expenditure²³ and poses negative consequences for foreign investment.²⁴ In terms of the environment, corruption undermines attempts by the Nigerian State to safeguard the environment for the present and future generations, as evident in the neglect of road construction, failure to repair dilapidated structures, environmental pollution, misallocation of environmental resources, and diversion of public funds from conservation and preservation²⁵ into private estates and bank accounts, amongst others. Undoubtedly, all these corrupt manifestations violate the right to development.²⁶

The negative implication of corruption for sustainable development is compounded by the fact that derived proceeds are laundered out of jurisdiction into private accounts domiciled in foreign banks.²⁷ For example,

22 cf the 3rd and 7th Preambles to the United Nations Convention Against Corruption (UN-CAC) 2003; 6th and 7th Preambles to the African Union Convention on Preventing and Combating Corruption 2003; and 4th Preamble to the Council of Europe Criminal Law Convention on Corruption 1999.

23 See Philip M Nichols, 'The Psychic Costs of Violating Corruption Laws' (2012) *Vanderbilt Journal of Transnational Law* 145 at 157 – 159; Mbaku (n 7) 102-103 ("Corruption allows inefficient producers to remain in business, encourages governments to pursue perverse economic policies, and provides opportunities to bureaucrats and politicians to enrich themselves through extorting bribes from those seeking government favours.... the firms offering the highest bribes are not necessarily the most economically efficient ones but the ones that are efficient in rent seeking"); and Susan Hawley, 'Exporting Corruption: Privatization, Multinationals and Bribery,' (Corner House Briefing 19, 2000) 6 <<http://www.thecornerhouse.org.uk/sites/thecornerhouse.org.uk/files/19bribe.pdf>> accessed 23 August 2013 (arguing that bribery inflates the cost of goods and services and increases a country's stock of external debts where the loan is used in paying for the contract costs).

24 See Paolo Mauro, 'The Effects of Corruption on Growth, Investment, and Government Expenditure: A Cross-Country Analysis,' in Kimberly Ann Elliot (Editor), *Corruption and the Global Economy* (Institute for International Economics 1997) 90-91 (suggesting an inverse relationship between corruption and investment).

25 See USAID, 'Corruption and the Environment' (November 2002) pp 4-7 <http://pdf.usaid.gov/pdf_docs/PNACT876.pdf> accessed 23 May 2014..

26 See, e.g., the two Covenants (ICCPR 1966 and ICESCR 1966); the United Nations General Assembly (UNGA) Declaration on the Right to Development (41/128, adopted on 4 December 1986); and the UNGA Millennium Declaration (A/Res/55/2, adopted on 8 September 2000). See also the Johannesburg Declaration on Sustainable Development (4 September 2002) <<http://www.un-documents.net/jburgdec.htm>> accessed 25 August 2013.

27 See, e.g., 'Abacha's Loot Traced to 130 Banks,' *Tell Magazine* (Lagos, 24 July 2000) 12-18 (indicating that funds plundered by Abacha were routed through or hidden in banks located in foreign capitals of the world such as London, Geneva, Zurich, New York and Frankfurt). Similarly, in March 1990, the French *Le Monde* had lamented that "every franc we give impoverished Africa comes back to France or is smuggled into Switzerland and even Japan." George BN Ayittey, *Indigenous African Institutions* (Transnational Publishers 1991) 418.

between mid-1980s and 1999, an amount in excess of \$100 billion was corruptly exported out of Nigeria alone.²⁸ Having considered the nature and the effects of corruption, we now proceed to examine existing norms of transparency and accountability preparatory to examining the contradictions, inconsistencies or deficiencies therein.

3. EXISTING NORMS OF TRANSPARENCY AND ACCOUNTABILITY

A norm is a model or standard accepted voluntarily or involuntarily by a society or other large group, against which society judges someone or something.²⁹ In legal theory, it is a binding rule of engagement and, to Kelsen, the ‘meaning’ of an act by which a certain behaviour is commanded, permitted or authorized.³⁰ In this wise, a norm is a legally binding law, or body of rules. ‘Transparency’ and ‘accountability,’ which are some of the cardinal principles of good governance,³¹ mean ‘openness’ and ‘holding public officials responsible for their actions’³² respectively.

Therefore, norms of transparency and accountability are tools aimed at undermining waste of public resources and disconnecting the network of corruption. They are programmed to brighten every dark alley in public administration and geared towards rolling away the frontiers of plunder of collective patrimony. Basically, the anti-corruption norms manifest in the form of preventive and penal measures contained in the Nigerian legal order. In the subsections below, we shall consider existing norms of transparency and accountability – including the norms of establishing anti-corruption agencies, code of conduct for public officers, and oversight functions on governmental institutions, and the norm of criminalization.

28 See *The Financial Times* (London, 20 July 1999), quoted in ‘Multilateral Instruments and Strategies Against Corruption: The Role of the United Nations Helping Member States Build Integrity to Curb Corruption’ (Ethics in Multilateral and International Organizations Workshop: The United Nations, Brisbane: 4 – 7 October 2002) 8; and Festus Iyayi, ‘The Primitive Accumulation of Capital in A Neo-Colony: The Nigerian Case’ (1986) 35 *Review of African Political Economy* 27, 37 (observing that the erstwhile Nigeria’s head of State, General Buhari, reported in February 1985, for example, that Nigerian politicians had salted away an estimated staggering sum of over £ 6 billion in British banks alone).

29 Bryan A Garner (ed), *Black’s Law Dictionary* (8th edn, Thomson West 2004) 1086.

30 See L B Curzon, *Jurisprudence* (Lecture Notes Series) (2nd edn, Cavendish Publishing Ltd 1995) 120.

31 See Chowdhury & Skarstedt, (n 18) 4.

32 World Bank, cited in Ndiva Kofele-Kale, ‘Change or Illusion of Change: The War against Official Corruption in Africa’ (2006) 38 *The Geo. Wash. Int’l L. Rev* 697, 698 n3.

3.1 *Anti-Corruption Agencies (ACAs)*

One of the norms of transparency and accountability that international legal regime against corruption transmits to domestic legal orders is that of prevention against corruption. Thus, pursuant to the *United Nations Convention Against Corruption (UNCAC) 2003*,³³ the machinery for preventing corruption includes, amongst other things, anti-corruption agencies (ACAs),³⁴ and the code of conduct for public officers³⁵ (to be discussed in sub-section 3.2). The creation of a specialized ACA is necessary when corruption is so pervasive and the law enforcement agencies so corrupt that acts of corruption are neither investigated nor prosecuted.³⁶ Within the Nigerian Police Force (NPF) is the Special Fraud Unit (SFU), which has been the body charged with the duty of handling fraud-related cases. But it failed to live up to expectation despite mounting cases of corruption. Consequently, Nigeria enacted the *Independent Corrupt Practices and other related offences Commission (ICPC) Act 2000*,³⁷ which set up the Independent Corrupt Practices Commission (ICPC),³⁸ and the *Economic and Financial Crimes Commission (EFCC) Act 2002*³⁹ (now *EFCC Act 2004*) that established the Economic and Financial Crimes Commission (EFCC). The ICPC Act charges the ICPC with the responsibility of preventing corruption by, inter alia, examining the practices, systems and procedures of public bodies.⁴⁰ The Act also imposes the duty of corruption control on the agency through, amongst other things, prosecution of offenders⁴¹ and the seizure, freezing or forfeiture of their assets.⁴² Similarly, under the EFCC Act, the EFCC has the duty to, *inter alia*, prevent economic and financial crimes,⁴³ to prosecute offenders and to recover their illicit assets.⁴⁴

33 Adopted on 31 October 2003 and entered into force on 14 December 2005. Nigeria signed and ratified the Convention on 9 December 2003 and 14 December 2004 respectively.

34 UNCAC, art 6(1).

35 UNCAC, art 8.

36 United Nations Office for Drugs Control and Crime Prevention (UNODCCP), Draft United Nations Manual on Anti-Corruption Policy (June 2001) 50.

37 Dated 13 June 2000. See *Attorney General of Ondo State v Attorney General of the Federation* [2002] 9 NWLR 222, 417 (where Uwaifo, JSC, held that the Act is meant to render justiciable by legislation the declared State Policy to abolish corrupt practices and abuse of power).

38 The 13-member Commission comprises a Chairman and 12 other members.

39 By virtue of the Economic and Financial Commission Act (EFCC) 2002.

40 See generally, the ICPC Act, s 6. See also *James v Okereke* [2008] 13 NWLR (Pt. 1105) 544 CA.

41 See, e.g., ss 6 and 27.

42 See ss 36-37, 45, 47-48.

43 See the EFCC Act, s 6(f).

44 See, e.g., ss 26 & 30.

3.2 Code of Conduct for Public Officers

The norms of transparency and accountability also manifest in the form of the Code of Conduct for Public Officials, which is scheduled to the *Constitution of the Federal Republic of Nigeria (CFRN) 1999*.⁴⁵ There are two institutions set up to enforce the provisions of the Code: the Code of Conduct Bureau (CCB) and the Code of Conduct Tribunal (CCT), which are respectively saddled with the responsibility of administering the Code and prosecuting violators.⁴⁶ The Code mandates public officials to, *inter alia*, avoid conflict of interest,⁴⁷ declare their assets,⁴⁸ refrain from operating foreign accounts,⁴⁹ and not to accept gifts, loans or bribes.⁵⁰ Conflict of interest is any situation in which an individual or corporation is in a position to exploit a professional or official capacity in some way for their personal or corporate benefit.⁵¹ Its practical manifestation is seen in the privatization of public wealth through high profile corruption. Incontrovertibly, when a private individual is appointed to public office, he assumes dual personality: being simultaneously a private person and a public official. In the course of his duties, the public official is faced with the dilemma of separating the private from the public especially where relevant rules are lacking or inadequate. Essentially, the Code is meant to aid the public official weather the storm of conflict of interest emanating from the interplay of forces of personal interests and public interests in the course of performing his duties.

3.3 Oversight Functions on Governmental Institutions

The seed of transparency and accountability, expressed in the power to conduct investigations into the management of public finance, is also sown in the enabling instruments which establish public institutions performing legislative, executive and judicial functions. For example, S. 88(2)(b) of the CFRN 1999 empowers the National Assembly to conduct investigations

45 See Part II of the *Fifth Schedule to the Constitution of the Federal Republic of Nigeria (CFRN) 1999*.

46 See s 153(1) of the Constitution, Part I of the Third Schedule, and Parts I and II of the Fifth Schedule to the Constitution.

47 s 1.

48 s 11.

49 s 3.

50 s 6-8.

51 Adekunle Ojo, 'Conflict of Interest in Public Office – Legal provisions and Strategies for Enforcement' (a paper delivered at the National Summit on 'Conflict of Interest in Public Office' organized by Zero Corruption Coalition held at Hotel Rosbud, Garki, Abuja on 13 July 2005) 3.

into any matter over which it has power to make laws for the purpose of, *inter alia*, exposing corruption, inefficiency or waste in the execution or administration of laws within its legislative competence. Pursuant thereto, the National Assembly has had occasions to set up panels of inquiry to investigate cases of corruption or maladministration in ministries, parastatals and agencies. Recent attempts culminated in Power Probe,⁵² Security and Exchange Commission (SEC) Probe,⁵³ Pension Scam Probe,⁵⁴ and Fuel Subsidy Probe.⁵⁵

3.4 Criminalization

In reflecting the norms of transparency and accountability, every legal system prohibits some form of public sector corruption.⁵⁶ Essentially, it does so from the perspective of bribery.⁵⁷ Thus, the ICPC Act incriminates various types of bribery such as passive and active bribery,⁵⁸ trading in influence,⁵⁹ gratification through agents,⁶⁰ bribery in relation to voting for a

52 The Government of former President Olusegun Obasanjo allegedly spent about US\$16 billion dollars to provide electricity for Nigeria yet the country remains in darkness and the beneficiaries of the loot in luxury. See D Elombah, 'Olusegun Obasanjo versus Ndudi Elumelu,' <http://www.elombah.com/index.php?option=com_content&view=article&id=803:olusegun-obasanjo-versus-godwin-elumelu&catid=52:daniel-elombah&Itemid=73> accessed 20 November 2010.

53 Hearings at the House of Representatives' Committee on Capital Market revealed large-scale fraud and mismanagement of public resources. See e.g., 'Between Oteh And Hembe' at <<http://www.nigeriavillagesquare.com/jideofor-adibe/between-oteh-and-hembe.html>> accessed 3 August 2012; and 'Arunma Oteh at House capital market probe, Okereke-Onyiuke blew N186m on Rolex watches' <<http://www.thenationonlineng.net/2011/index.php/news/45880-arunma-oteh-at-house-capital-market-probe-okereke-onyiuke-blew-n186m-on-rolex-watches.html>> accessed 3 August 2012.

54 According to Senator Aloysius Etok-led Senate Joint Committee on Public Service and Establishment and States and Local Government Administration, top government officials looted N273.9 billion from pension funds between 2005 and 2011. To the Committee, it was 'syndicated and institutionalised corruption, fraud and embezzlement in the management of pension funds in the country.' See *Daily Trust* (Lagos, 21 June 2012).

55 According to the Report of the Ad-hoc Committee on Fuel Subsidy, the difference between the N245 billion appropriated for fuel subsidy in 2011 and the N1.3 trillion actually paid to marketers largely represented plunder of national wealth. For details, see 'House of Representatives Report of the Ad-Hoc Committee 'To Verify and Determine the Actual Subsidy Requirements and Monitor the Implementation of the Subsidy Regime in Nigeria' Resolution No. (HR.1/2012)' <<http://www.nigerianmuse.com/wp-content/uploads/2012/04/House-of-Reps-Report-on-Fuel-Subsidy-Probe-April-2012.pdf>> accessed 3 August 2012.

56 See John T Noonan, Jr., *Bribes* (Macmillan Publishing Company 1984) 702.

57 See, e.g., *Biobaku v Police* [1951] 20 NLR 30, where Bairamian J. defined corruption in terms of bribery when, subsequent to his characterizing 'corruptly' to mean 'improperly,' he stated that impropriety referred to the "receiving or offering of some benefit as a reward or inducement to sway or deflect the receiver from the honest and impartial discharge of his duties."

58 ss 8 and 9.

59 ss 10. It does so by prohibiting bribery by any person who receives a benefit by reason of what a public official has done, omitted to do, or will do.

60 ICPC Act, s 17; Criminal Code, s 494.

decision,⁶¹ bribery regarding auctions,⁶² and bribery for giving assistance concerning contract award.⁶³

The norms considered in this section are norms which should ordinarily be able to control corruption. Although relevant law enforcement agencies have made some attempts to prosecute some offenders,⁶⁴ such attempts are like a drop in an ocean. In fact, corruption is so pervasive in the country that one could argue that while prosecution increases in arithmetic progression, corruption grows in geometric progression. In the face of the inability of anti-corruption norms to stem the tide of corruption in the country, it is submitted that, more than anything else, corruption remains persistent in the land due largely to the package of contradictions, inconsistencies or deficiencies inherent in the normative coalition against corruption. This is the subject of examination in the next section.

4. WORKABILITY OF THE ANTI-CORRUPTION NORMATIVE ORDER

Against the background of some existing norms of transparency and accountability considered in the last section, this section argues that the extant anti-corruption normative order is unworkable largely because it is weighed down by an array of inherent contradictions, inconsistencies or deficiencies. It is the case that because the family of norms simultaneously contains corruption-reducing and corruption-enhancing norms, the anti-corruption regime appears to approve and reprobate at the same time. Such parasitic relationship between the two opposites renders the machinery against corruption equivocal, ambiguous, inefficacious and ultimately unworkable. We intend to do justice to the argument advanced herein by examining anti-corruption agencies (ACAs), code of conduct for public officers, oversight functions over governmental institutions, criminalization and exclusion of civil society from corruption control.

61 s 18.

62 s 21.

63 s 22.

64 See, e.g., *Attorney General of Ondo State v Attorney General of the Federation & Others* [2002] 9 NWLR 222,247, SC; *Federal Republic of Nigeria v Anache* [2004] 3 M]SC 1; *Federal Government of Nigeria v Tafa Balogun & Others* (Unreported) Charge No. FHC/AB/CR/14/2005; and *Federal Republic of Nigeria v Nwude & Others* (Unreported) Charge No. ID/92C/04.

4.1 *Anti-Corruption Agencies (ACAs)*

Truly, Nigeria started well by formally establishing the ACAs, including the ICPC and the EFCC. But the country appears to have ignored the certain obligations imposed upon states parties to the UNCAC (including Nigeria). *Article 6(2)* of the UNCAC requires each state party to, *inter alia*, grant ACAs the necessary independence (freedom from undue influence) and material resources to enable them carry out their functions effectively. The independence of the ACAs is measured by so many indices including security of tenure, the source of their authority in discharging their duties and the trigger of their powers. Regarding tenurial security, the appointment and removal of ICPC members are effected by the President of Nigeria subject to the confirmation of the Senate.⁶⁵ Such senatorial confirmation serves to secure the tenure of ICPC members because the President is thereby incapacitated from capriciously appointing or removing a member without the concurrence of the Senate. But similar provision is lacking in respect of the EFCC. EFCC members are appointed by the President for a term of four years at the expiration of which they may be reappointed for another one term⁶⁶ subject to the confirmation of the Senate.

However, any member of the Commission is liable to removal from office by the President for inability to discharge the functions of his office or for misconduct or if the President is satisfied that it is neither in the interest of the Commission nor of the public that the member should continue in office *without any reference to the confirmation or support of such decision by the Senate or the National Assembly*.⁶⁷ This method of removal seriously impairs the security of tenure and, *ipso facto*, the independence of the Commission whose members may have to dance to the tune of the President in order to avoid unwarranted removal from office. Evidently, President Yaradua relied on this provision to ignominiously remove Nuhu Ribadu as the Chairman of the EFCC in questionable circumstances. In December 2007, the EFCC arrested the ex-governor of Delta State James Ibori, who plundered the assets of his State. Though the move pleased overwhelming number of Nigerians, it was distasteful to the then President Yaradua and the Attorney General of the Federation (AGF) Michael Aondoakaa because Ibori was their very close ally. Two weeks later, Ribadu was unceremonious-

65 See the ICPC Act, s 3(3), (6) & (8).

66 EFCC Act, s 3(1).

67 See EFCC Act, s 3(2). Emphasis added.

ly removed from the EFCC.⁶⁸ No matter how disagreeable EFCC's action against Ibori was, the President could not have so whimsically removed him the way he did if there were requirement for senatorial approval. Thus, the current situation where EFCC members work in constant fear of the probability of the President removing any of them at will contradicts the spirit of independence that is required to be part and parcel of such agency. Such presidential power ultimately compromises the capacity of the EFCC and, of course, the workability of the norm authorizing the EFCC to prevent and control corruption.

In connection with the trigger of their powers, the enabling statutes generally vest authority in the ACAs to investigate and prosecute matters concerned with corruption and financial crimes. However, the ICPC Act does not grant the ICPC the autonomy to do so except it is acting on the report or petition of a victim of corruption. S. 6(a) of the Act authorizes the Commission to receive and investigate reports which shall, by virtue of S. 23(2), be rendered by any public officer to whom gratification is given, promised or offered, or any person from whom gratification has been solicited or obtained. Much as both sections create an avenue for victims of corruption (bribery) to ventilate their grievances, and for the ICPC to gather intelligence reports, they are deficient because they unduly restrict ICPC's freedom of action by constituting the agency into a reactive, rather than a proactive, body. Therefore, it is submitted that pre-conditioning the investigatory powers of the ICPC upon the willingness of the aggrieved victims of corruption to complain or petition the anti-corruption agency is ridiculous and inconsistent with the contemporary practice of granting proactive, active and reactive powers to ACAs.⁶⁹

Furthermore, the provision on the material resourcing of the ACAs contradicts the enormous work with which the agencies are saddled. For example, the ICPC is starved of funds.⁷⁰ This state of affairs is deplorable when considered against the backdrop of the fact that, in a country like Nigeria that is faced with systemic corruption, recording remarkable success in the battle

68 See Human Rights Watch, 'Corruption on Trial? The Record of Nigeria's Economic and Financial Crimes Commission' (August 2011) <<http://www.hrw.org/sites/default/files/reports/nigeria0811WebPostR.pdf>> accessed 28 August 2013.

69 cf EFCC Act, s 7(1).

70 E.g., see ICPC, *The Anti-Corruption Digest* (a quarterly newsletter of the ICPC: September 2005) 1.

against corruption demands huge financial commitment.⁷¹ For instance, notwithstanding the fact that the Commission budgeted N9 billion (about \$70 million) for its capital expenditure for the fiscal year 2002, the government approved only a paltry sum of N1 billion (about \$7.7 million),⁷² a step that seriously hindered the operations of the Commission.

4.2 Code of Conduct for Public Officers

Although the Code of Conduct for Public Officers aims at tackling multi-faceted official misconduct, it is intended here to interrogate the duty of assets declaration, prohibition against operating foreign accounts, and silence on ownership of property located abroad. The purpose of assets declaration is to infuse in every public official the virtue of living within his means. Its *raison d'être* lies in the fact that where the accretion in the public official's assets cannot be explained by his lawful earnings, he is deemed or presumed to have illicitly enriched himself by that amount and, therefore, liable to account.

However, public officers are generally cold towards the duty imposed on them. And law enforcement agents lack the political will to invoke legal process against such defaulters. Thus, upon the assumption of office by a new civilian administration in 1979, only the President and the Vice President declared their assets⁷³ yet no disciplinary action was taken against defaulters. In 2007, upon his assumption of office, President Yaradua publicly declared his assets; his deputy, Vice President Jonathan did same reluctantly. Subsequently, upon Jonathan's succession to the throne of presidency in 2011, he displayed his aversion for assets declaration.⁷⁴

71 In contrast, Hong Kong (which has become an example of a success story in corruption control) has 1,300 employees in its payroll and spends \$90 million yearly on anti-corruption activities. See Femi Odekunle, 'Implementation of the Provisions of the Corrupt Practices and Other Related Offences Act (2000): Criminological Perspectives' (a paper presented at the National Conference on the Problems of Corruption in Nigeria organized by the Nigerian Institute of Advanced Legal Studies at the National Centre for Women Development in Abuja on 26-29 March 2001) 17.

72 See 'Why anti-corruption war is weak' *Punch* (Lagos: 29 February 2012); and M.M.A. Akanbi, 'Why Anti-graft War is slow, by Akanbi' (an interview the erstwhile Chairman of the ICPC chairman granted to *Vanguard Newspapers* (Lagos, 31 May 2002).

73 John Erero and Toyin Oladoyin, 'Tackling the Corruption Epidemic in Nigeria' in Kempe Ronald Hope, Sr, and Bornwell C Chikulo (ed), *Corruption and Development in Africa: Lessons from Country Case-Studies* (Palgrave 2000) 284.

74 'Jonathan under attack over assets declaration The Nation (Lagos, 26 June 2012) (quoting the President to have said that: ...I don't give a damn about that [assets declaration]. The law is clear about it and so, making it public is no issue and I will not play into the hands of the people. I have nothing to hide. I declared (assets publicly) under the late President Umaru Musa Yar'Adua because he did it, but it is not proper. I could be investigated when I leave office. You don't need to publicly declare it and it is a matter of principle. It is not the President declaring assets that will change the country.

Even in cases of apparent compliance, public officers consider it a mere formality as they casually make false declaration or under-declare their assets. Violation of the Code is a criminal offence and, where a public official fails to declare his assets or makes false declaration, he is liable upon conviction under s. 18 of the Code to an order of vacation from office or seat in a legislative house, disqualification from membership of a legislative house and from holding any public office for a period not exceeding ten years, and seizure and forfeiture to the State of any property acquired in abuse or corruption of office.⁷⁵ In relation to enforcement, the Code of Conduct Bureau (CCB) lacks the competence or integrity to verify such claims unless they relate to persons who have fallen short of governmental grace or glory. Such lukewarm attitude from both public officials and law enforcement agents are contrary to the noble cause of eliminating corruption from the country.

It is true that the country prohibits certain categories of public officials from maintaining or operating foreign account⁷⁶ in order to cure the mischief of laundering assets plundered from the forum in foreign jurisdictions. But experience has shown that this provision is violated more than honoured as the cases of Sani Abacha,⁷⁷ Diepreye Alamieyeseigha,⁷⁸ Joshua Dariye⁷⁹ and James Ibori⁸⁰ demonstrate.⁸¹ However, such prohibition is outdated and inconsistent with the spirit of globalization which favours free movement

75 See s 18(2)(a) – (c).

76 See s 3 of the Code which provides: “The President, Vice-President, Governor, Deputy Governor, Ministers of the Government of the Federation and Commissioners of the Governments of the States, members of the National Assembly and of the Houses of Assembly of the States, and such other public officers or persons as the National Assembly may by law prescribe shall not maintain or operate a bank account in any country outside Nigeria.”

77 The Abachas allegedly maintained numerous foreign accounts in the UK and Switzerland, amongst other countries. See, e.g., the Financial Services Authority, ‘FSA Publishes Results of Money Laundering Investigation’ (FSA/PN/029/2001: 8 March 2001); and Swiss Federal Banking Commission, ‘Abacha Funds at Swiss Banks’ (Report of the Swiss Federal Banking Commission) (30 August 2000) 4.

78 Alamieyeseigha – former governor of Bayelsa State – who was arrested in London on September 2005, was found to have foreign bank accounts in excess of £ 5 million. See Chika Amanze-Nwachuku, ‘Alamieyeseigha docked, faces 40-count charge,’ *The Guardian* (Lagos, 20 December 2005).

79 Ex-governor Dariye of Plateau State – who was arrested in London by the British Police on 2 September 2004 for money laundering – was discovered to have eight foreign accounts worth more than £ 1 million. See Yusuph Olaniyonu, ‘Dariye: London Police in Nigeria, Consult EFCC - To quiz gov next Tuesday in Britain,’ *Thisday* (Lagos, 10 December 2004).

80 Ibori has been prosecuted and jailed for laundering the proceeds of corruption committed in Nigeria within the jurisdiction of the UK. See ‘U.S. Seizes Over \$3 Million in Looted James Ibori Assets’ <<http://news2.onlinenigeria.com/news/breaking-news/183549-u-s-seizes-over-3-million-in-looted-james-ibori-assets.html>> accessed 24 July 2012.

81 The findings of the EFCC, the National Intelligence Agency (NIA) and other security agencies in early 2004 indicated that a minimum of 25 governors, and many ministers and members of the National Assembly were discovered to be maintaining foreign accounts. See ‘Corrupt Governors: Why More May Go to Jail,’ *Tell Magazine* (Lagos, 17 October 2005) 27.

of persons, goods, services and finance across jurisdictions. Ordinarily, this is beneficial to the economies of such jurisdictions and the private fortunes of investors involved. But within the context of high profile corruption in Nigeria, a law prohibiting officials from maintaining or operating bank account abroad is understandable because such accounts would probably be filled with assets looted from the public treasury. Yet Nigeria appears to have taken it too far in stripping its officials of the benefit of running bank account abroad simply because stolen wealth may find their way to those accounts. Moreover, it is noteworthy that the Code criminalizes foreign ownership of bank account without simultaneously proscribing ownership of property abroad. But cases have shown that corrupt Nigerians launder their ill-gotten wealth either through ownership of foreign bank accounts or acquisition of foreign-based assets such as real estate, hotels, shares and stocks. The Code can ill-afford such contradiction between prohibiting foreign bank account maintenance or operation and silence on the legitimacy or otherwise of owning assets abroad.

4.3 Oversight Functions on Governmental Institutions

The tool of oversight functions performs the important role of infusing transparency and accountability into the running of governmental institutions and in the process eliminates waste and mismanagement so that assets appropriated for projects and programmes would be available for disbursement. But experience has shown that the report produced by such investigative tool easily runs into somewhat contrived troubled waters because of the resilience of the institution of corruption and its promoters to viciously fight back and frustrate every effort aimed at tackling corruption. For instance, the Power Probe Panel, led by Ndidi Elumelu, found that the \$16 billion that President Obasanjo's government invested in the power sector went with the wind. On the eve of the submission of the Panel's Report containing such incriminating information, the law enforcement agents accused and indicted the Chairman of the Panel and others of N5.2 billion fraud in connection with contracts awarded for Rural Electrification Project.⁸² That signaled the death of the Report! Yet the court case was subsequently struck out by an Abuja High Court in June 2013 because the prosecution failed to establish a

82 The particulars of the indictment included breach of due process, criminal conspiracy, diversion and misappropriation of public funds See Freedom Online, 'N5.2bn REA scam: Court grants Elumelu, others' no-case submission' <<http://freedomonline.com.ng/n5-2bn-rea-scam-court-grants-elumelu-others-no-case-submission>> accessed 20 January 2014.

prima facie case.⁸³ Similarly, there was the Fuel Subsidy Probe Panel headed by Farouk Lawan. A few weeks after the Panel submitted a report which implicated many corporations and individuals for ripping the nation off by trillions of naira, the Chairman of Zenon Oil, Mr. Otedola, accused Lawan of accepting \$620,000 bribe from him. Consequently, attention now shifted from the Report to Otedola's allegations. Presently, the Report is in limbo while Lawan and his accomplice have been arraigned in court.⁸⁴

Interestingly, the fate that befalls these probes has precedent in history. The executive arm of government has had ample opportunities to institute panels of inquiry⁸⁵ into the mismanagement and plunder of national assets in national institutions⁸⁶ including the Nigerian National Petroleum Corporation (NNPC) Probe Panel (1993); the Nigeria Police Force Probe Panel (1994); Nigerian Customs Service Probe Panel (1994); Judiciary Probe Panel (1994); Human Rights Violations Investigations Commission (1995); and the Central Bank of Nigeria (CBN) Probe Panel (1994). Unfortunately, however, although these Panels submitted their reports, the government neither published nor implemented them.⁸⁷ What then is the wisdom in spending huge human and material resources in setting up panels of inquiry only to dump their reports in the thrash can? Thus, with the country having a record of unimplemented probe panel reports, the legitimacy of the institution of probe panels is discredited.⁸⁸

4.4 Criminalization

Nigerian law relies heavily on bribery as the focal point of its prohibition of corruption. Surely, bribery is the paradigm of corruption.⁸⁹ However, despite the utility of its copious reach against bribery, the ICPC Act is deficient because it presumes that only bribery makes up the family of corruption. It

83 *ibid.*

84 '\$620,000 Bribery Scam: Lawan, Emenalo Arraigned Remanded In Kuje Prisons,' *The Guardian* (Lagos, 1 February 2013).

85 The regime of Abacha generously used this mechanism in the investigation of corruption and official misconduct in government parastatals.

86 See Gani Fawehinmi, 'Probing Corruption in Nigeria' <<http://nigeriaworld.com/feature/publication/fawehinmi/012604.html>> accessed 17 January 2014.

87 '400 Probe Panels in 12 years, no action on Reports' <<http://igede.org/2011/06/11/400-probe-panels-in-12-years-no-action-on-reports>> accessed 20 January 2014.

88 The major demerit of the probe system is that the findings of a probe panel are subject to the decision of acceptance or rejection of the government. In the majority of cases, the government fails to take any such decision, or issues a White Paper in rejection of the findings. See Osoba (n 16) 385; Nwankwo, (n 1)194 – 195; and Fawehinmi (n.86).

89 See, e.g., Peter J Henning, 'Public Corruption: A Comparative Analysis of International Corruption Conventions and United States Law' (2001) 18 *Arizona Journal of International and Comparative Law* 825.

is a faulty assumption. When considered from the perspective of the parties to the crime, corruption can be categorized into two: bilateral corruption and autogenic corruption. Bilateral corruption is a product of bargain or negotiation, for example, bribery. On the other hand, autogenic corruption is the conduct that dispenses with bilateral transactional settings, for instance, embezzlement. But, while the ICPC Act provides adequately for bribery, it fails to do so in respect of embezzlement. Such approach tends to blur the reality of the dichotomy between the two.

It is conceded that S. 315 of the *Penal Code*⁹⁰ adequately provides against embezzlement.⁹¹ But the snag is that the Penal Code applies only to the Northern part of the country, implying that the law enforcement agencies cannot utilize the section to prosecute embezzlement committed in Southern Nigeria. Although the Code predates the ICPC Act, the National Assembly failed woefully to replicate s. 315 thereof in the ICPC Act⁹² resulting in a situation where the crime of embezzlement cannot be evenly and adequately tackled throughout the country. Unfortunately, because of the vacuum created by the absence of an apt provision against embezzlement, prosecutors seeking to indict offenders in the southern part of the country are left to improvise s. 19⁹³ to prosecute offenders. The section criminalizes abuse of functions, a key ingredient in the definition or characterization of corruption. It is an omnibus, residual or general section that can be activated in the absence of a specific provision against a particular corrupt conduct. Therefore, a situation where prosecutors rely on a general provision to deal with the specific crime of embezzlement is unsatisfactory.

Such lop-sided anti-corruption measure, which creates escape route from responsibility for many offenders who plunder the treasury through means other than by bribery, has the potential to fuel corruption for the following reasons. First, though bilateral corruption is committed the most, illicit assets derived therefrom are smaller than those generated from auto-

90 Cap 89, LFN, 1990. The Code is applicable exclusively to the Northern part of Nigeria.

91 It provides: "Whoever, being in any manner entrusted with property or with any dominion over property in his capacity as a public servant ... commits a criminal breach of trust in respect of that property shall be punished with imprisonment which may extend to fourteen years and shall also be liable to fine."

92 cf UNCAC, art 17.

93 It provides: any public officer who uses his office to gratify or confer any corrupt or unfair advantage upon himself or any relation or associate of the public officer or any other public officer shall be guilty of an offence and shall on conviction be liable to imprisonment for five (5) years without option of fine.

genic corruption.⁹⁴ Therefore, from the viewpoint of criminal justice policy, the crime which produces larger assets ought to attract greater legislative attention. But in failing to reflect this in legislation, the National Assembly appears to have sent out an erroneous message of handsome payoff awaiting those who dare to commit autogenic corruption. Secondly, upon the presumption that autogenic corruption (from which larger illicit assets derive) causes greater harm to the society, such corruption ought to be punished more severely than bilateral corruption. However, because the National Assembly fails to recognize such harm differential (as a result of which it adopts an unrealistic and disproportionate penal measure), autogenic corruption is punished even more leniently than bilateral corruption.⁹⁵

From the foregoing, our criminal justice system tends not to have been guided by principal penological theories of retribution and deterrence⁹⁶ which are primarily geared towards making offenders or convicts atone for their conduct proportionate to the harm inflicted upon the society. This submission is painfully confirmed by unduly lenient sentences the courts have been handing down to accused persons in some recent cases including those involving former Inspector General of Police (IGP) Tafa Balogun,⁹⁷ who was sentenced to six months, former Governor of Bayelsa State Alamieyeseigha⁹⁸ (2 years), former Nigeria Ports Authority Chairman and ruling PDP stalwart Olabode George (2 and half years),⁹⁹ and Cecilia Ibru (6 months).¹⁰⁰ Such low tariff or huge discount in sentencing, which constitutes an incentive to offenders, deserves a drastic review.

94 See S A Igbinedion, 'Grand Corruption, Recovery and Repatriation of Derived Proceeds: International Criminal and Comparative Law Perspectives: The Case of Nigeria' (2008) 15 *Gakushuin University Law Review* 15.

95 Thus, whereas the maximum penalty for bribery is 7 years, the maximum for autogenic corruption is 5 years! See the ICPC Act, s 8 cf s 19.

96 Charles F Abel and Frank H Marsh, *Punishment and Restitution: A Restitutionary Approach to Crime and the Criminal* (Greenwood Press 1984); and Jules L Coleman (ed), *Philosophy of Law: Crimes and Punishment* (Vol. 4, Garland Publishing Inc. 1994).

97 See *Federal Government of Nigeria v Tafa Balogun & Others* (Unreported) Charge No. FHC/AB/CR/14/2005. The former Inspector General of Police (IGP) was indicted under s 14 of the defunct *Money Laundering Act 2003* and s 14 of the extant *Money Laundering Act 2004* on a 56-count charge of laundering the proceeds he derived from his theft and embezzlement of about ₦17 billion (about US\$132million). Upon his guilty plea, he was sentenced to a ridiculous 6-month imprisonment. See S A Igbinedion, 'A Critical Appraisal of the Mechanism for Prosecuting Grand Corruption Offenders under the United Nations Convention Against Corruption 2003' (2009) 6:1 *Manchester Journal of International Economic Law* 56, 62.

98 He was convicted on a six-count charge of fraud involving billions of naira. *ibid.*

99 (Unreported) Charge No. ID/71C/2008. In over ₦85 billion fraud for which he was prosecuted with 5 other accused persons, he was convicted for contract splitting, inflation, abuse of office and disobedience to lawful order. See 'Nigerian Ports Authority Contract Bazaar: Bode George Jailed 28 Years' <<http://www.modernghana.com/news/2/246153/1/nigerian-ports-authority-contract-bazaar-bode-geor.html>> accessed 7 January 2014.

4.5 *Exclusion of Civil Society from Corruption Control*

The reality of globalization impels states to, amongst other things, cede some form of power to individuals and civil society especially in the face of the failure of many states to efficiently perform their traditional roles. Therefore, Article 13(1) of the UNCAC mandates states parties to actively involve civil society in the prevention and control of corruption. Realizing that state or government is not an embodiment of superior wisdom, the provision seeks to demonopolize state overbearing presence in the management of matters having to do with the patrimony and welfare of their citizens. Such liberalization of functions is meant to pave way for civil society's active participate in efforts against corruption.

It appears Nigerian legislation allows civil society involvement in processes leading to corruption control. The ICPC Act permits any person (including civil society) and public officials to report corruption matters to the ICPC which shall thereafter investigate the contents therein for the purpose of, *inter alia*, prosecuting offenders.¹⁰¹ Hopefully, the *Freedom of Information Act (FOIA) 2011*¹⁰² will enhance the capacity of informants in this regard. A person or official wishing to petition the ICPC can do so in either of two ways: online submission or hard copy submission.¹⁰³ Although online submission of complaint poses no major problem, hard copy submission does. This is because a complainant or informant who chooses to submit a complaint or report by hand is required to furnish the Commission with 16 copies thereof together with the same number of copies of all relevant documents and annexure. Such procedure for paper submission – which includes the duty of the informant to produce, at his own expense, 16 copies of each complaint (and its supporting documents) – constitutes a disincentive for those who might be willing to report corruption case in the prescribed manner. Again, it is considered too formalistic and bureaucratic to condition the reportage of information on written documentary evidence since other media of whistle-blowing corrupt conducts such as phone call, fax, and e-mail can effectively serve as good notification to ICPC officials and other law enforcement agents. Notably, most jurisdictions have simplified the way

100 The former Managing Director of defunct Oceanic Bank plc was prosecuted for criminal manipulation of bank records and depositors' funds running into hundreds of millions of dollars. See *ThisDay* (Lagos, 8 October 2010). See also *Federal Republic of Nigeria v Cecilia Ibru* (Unreported) Charge No. FHCL/297C/2009, per Justice Abutu.

101 See, e.g. ICPC Act, s 6(a) and 23(2).

102 Enacted on 24 May 2011 and entered into force on 28 May 2011.

103 See 'Petition Guidelines' <<http://icpc.gov.ng/petition/>> accessed 20 August 2013.

and manner citizens report cases of corruption to relevant authorities. In the US, for example, all that the Federal Bureau of Investigation (FBI) requires members of the public to do in order to whistle blow corruption is to call any of its corruption hotlines. Instructively, it is salutary to note that S. 64 of the ICPC Act provides for the protection of informants and sanctity of information.¹⁰⁴

However, it is noteworthy that the foregoing discussion relates only to civil society administrative participation in corruption control, meaning that it can operate only as an appendage of public officials or governmental institutions. Consequently, civil society is incapacitated in the face of official reluctance to activate anti-corruption machinery against offenders. Therefore, the law empowering civil society participation is deficient because it fails to grant some level of independence to civil society willing to act against corruption where there is such official or governmental reticence.

In discussing this section, one recurrent decimal was manifest: the legal regime against corruption is riddled with contradictions, inconsistencies or deficiencies. Because they operate at cross-purposes, they are more of liability than assets in the battle against corruption. It is submitted that this circumstance explains the reason why the anti-corruption battle appears to be unworkable, generating heat without fire, and motion without movement. Consequently, the next section proffers some suggestions for reform.

5. SUGGESTIONS FOR REFORM

Since we have diagnosed the normative order against corruption to be unworkable largely by reason of its inherent contradictions, inconsistencies or outright deficiencies, we will in the sub-sections below proffer some useful suggestions that could help put the norms to work.

5.1 Restructuring ACAs

The two existing ACAs are the Independent Corrupt Practices Commission (ICPC) and the Economic and Financial Crimes Commission (EFCC). Although both were set up to generally prosecute the anti-corruption war, their separate existence is bound to generate duplication of functions because the element of breach of trust or misuse of entrusted power characterizes both 'corrupt practices' and 'economic and financial crimes.' Therefore,

104 cf UNCAC, art 33 (protection of reporting persons).

it is suggested that the ICPC and the EFCC be merged into one body comprising specialized departments or units to handle different types of corruption, and economic and financial crimes. Expectedly, such departments or units should, inter alia, include that which is empowered to treat high profile public sector corruption (grand corruption) and associated money laundering. Adherence to this suggestion could pave way for the emergence of an institutionalized ACA whose units will have the capacity to cover their allotted field of operations. Definitely, there is need to astronomically increase government funding of the ACAs unlike the situation where extant ACAs are not adequately funded.¹⁰⁵ But a more enduring measure of opening up credit lifeline for ACAs would be to make it legally possible for them to, like the present EFCC, receive funds from non-governmental authorities and persons. It should be recalled that in addition to its being funded by government, the EFCC is permitted by S. 35(3) of the EFCC Act to accept gifts of land, money or other property within and outside Nigeria upon such terms and conditions as may be specified by the donor, provided the terms and conditions are not contrary to the objectives and functions of the Commission.

5.2 Location of Assets

It was submitted in section 4 that the legislation prohibiting public officials from maintaining or operating a foreign account is outdated and inconsistent with the reality of globalization. Basically, depositing illicitly sourced money into a bank account or using it to acquire assets is widely recognized as an abuse of the financial system and cited for money laundering across several jurisdictions. It is such abuse, not the use, of a foreign bank account or other financial outlets that Nigeria should tackle. Public officials who are so interested in maintaining or operating a foreign account should not be inhibited from so doing because money lodged into such accounts will yield interests or profits. Interestingly, assets targeted for confiscation or forfeiture include such interests or profits. Ditto for assets purchased abroad. We believe the mischief against which such legislation (prohibiting foreign account ownership) was enacted can be overcome when the country takes a couple of remedial steps. Firstly, whoever opens, maintains, operates or owns a bank account or acquires assets in a foreign jurisdiction must expressly state that fact in

105 'Nigeria: Tambuwal Calls On FG to Fund Anti-Graft Agencies,' *ThisDay* (Lagos, 9 April 2013).

the assets declaration form. Secondly, Nigeria should conclude mutual legal assistance treaties (MLATs) with as many foreign jurisdictions as possible. In the third place, the country should cooperate with regional arrangements on corruption, money laundering and assets recovery, for example, by acceding to the *OECD Convention 1997*.¹⁰⁶ Against this background, whoever is found to have assets in the country and abroad in excess of his lawful income must be made to face the music. In addition to the domestic measures that would be meted out to such official, the country should invoke the mutual legal assistance mechanism by contacting relevant jurisdictions for the purpose of enabling the requested states to take any provisional (seizure or freezing) and permanent (confiscation or forfeiture) measures against relevant assets.

But it must be noted that one of the starting points of investigation should be the assets declaration form to which the public now has access by virtue of the *Freedom of Information Act (FOIA) 2011*. However, because declarants are economical with the truth, the Code of Conduct Bureau must be rejuvenated and sufficiently empowered to verify claims contained in the assets declaration form. Moreover, civil society should be encouraged to constantly and consistently conduct investigations into the information contained in the form on the one hand and the information relating to the actual acquisitions of public officials on the other. Such information can be fed to relevant ACAs for necessary action.

5.3 Character of Probe

In Nigeria, the institution of probe has become notorious for achieving the opposite of what it is meant to do. If we must be able to hold persons accountable and responsible, the machinery of probe must be sacrosanct by genuinely predicating governmental action on its findings, reports and recommendations. Obviously, it is counter-productive for the government to issue a White Paper, as is its usual practice, which seeks to weaken the substance of such report. Therefore, it is suggested that government should, in good faith, immediately publish any report submitted by a probe panel and set in motion the process of engaging the criminal or civil responsibility of persons indicted. As appropriate, such persons must be prosecuted or sued and, amongst other measures, made to restore proceeds from illicit origin constituting unjust enrichment in their hands. But in instituting such

106 Convention on Combating Bribery of Foreign Public Officials in International Business Transactions 1997.

a probe panel, care must be taken not to include persons whose character or pedigree may likely undermine the integrity of the panel's report.¹⁰⁷ There must be a procedure whereby a prospective member of such panel is made to declare any material fact that may disqualify his membership and even to undertake to indemnify the country in the event of loss or dent to the report by reason of his failure to disclose such disqualifying fact, or his subsequent complicit conduct (e.g., accepting bribe in respect of the panel's work). In other words, persons of questionable character must not find their way into a probe panel. The invitation to participate in a probe is a moral calling and members of the panel must, like Caesar's wife, be above board. Where a member or some members of a panel are found to have compromised themselves, their report should not be totally discarded. We should avoid this habit of throwing the baby out with the bath water. Where possible, only the tainted part of the document should be severed and so discarded. But in the (un)likely event of all the members being found to have compromised themselves necessitating the abandonment of the report, another panel must be set up with dispatch.

5.4 Penal Reform

It was observed in Section 4 that there is disharmony between the crime of corruption and the punishment thereof. In order to restore the equilibrium, there is the need to introduce proportionate penalization in our legislation so that penalty for corruption will reflect the harm to citizens and the country. In this way, high profile corruption offenders should receive the highest form of penalty, for example, 30 years imprisonment upon conviction. For the purpose of uniform application of the suggested maximum jail term of 30 years throughout the country, it is important to expressly repeal S. 315 of the Penal Code. Additionally, because corruption is committed with economic consideration, a convicted person must be made to disgorge whatever gain he ever got from his criminal conduct. This can be achieved by imposing heavy fine on him and confiscating or forfeiting assets he acquired from the criminal enterprise. Notably, Article 20 of the *ICPC Act 2000* obligates a person convicted of giving bribe to a public official to pay a fine of not less than five times the sum of the value of the gratification. Unfortunately, the section is seldom applied. A golden opportunity for such application was frustrated by the Attorney General of the Federation (AGF) Adoke Mo-

107 E.g., this will counter the mischief of the scandal involving the Chairman of the Fuel Subsidy Probe Panel, Farouk Lawan.

hammered who, in a bid to protect certain multinational companies (MNCs) such as Halliburton, Siemens and Julius Berger from prosecution, imposed ridiculously low administrative fines on them.¹⁰⁸ Instructively, such ministerial imposition lacked legal foundation. Therefore, the imposition of administrative fines should be generally discouraged. Where it becomes inevitable, then the administrator of such fines must be obligated to impose fines that are realistically based on existing law, not on his whim. Regarding confiscation or forfeiture, both home-based and foreign-based assets of offenders must be vigorously pursued through bilateral procedures. Moreover, judges must be sensitized to the calamitous consequences of corruption so that they would appreciate the necessity of privileging the corrective justice of depriving offenders of the fruits of their criminal ventures over diversionary technicalities relied upon by offenders who are out to make life worthless for most Nigerians.¹⁰⁹

5.5 Engaging Civil Society in Corruption Control

Beyond the administrative services that civil society may render in the battle against corruption, there is the need to adequately empower it to, in civil or criminal cases, independently proceed against persons who plunder the common wealth in circumstances where public officials or institutions authorized to do so fail to do so. Under the current legal order, the capacity of civil society to so act is seriously undermined by the common law doctrine of *locus standi*. A person is said to have locus standi if he has shown sufficient interest in the matter by demonstrating that his civil rights and obligations have been or are in danger of being infringed.¹¹⁰ Locus standi is the qualification or eligibility of a litigant to sue or to be heard in court. Such litigant must demonstrate special interest over and above everyone else in the subject matter of complaint or dispute. Locus standi can arise in both criminal and civil cases.

In criminal cases, S. 174(1)(a) of the CFRN invests the Attorney General of the Federation (AGF) with the sole superior authority to institute

108 See S A Igbinedion, 'Culpability of AGF in multinational companies' corporate liability,' *The Guardian* (Lagos, 23 August 2011).

109 See, e.g., *FRN v Ibori* (Unreported) Charge No: FHC/ASB/IC/09 which was unfortunately resolved in favour of the accused person and others by reliance on the *ejusdem generis* rule. However, it is the same Ibori that was subsequently prosecuted for fraud and money laundering and sentenced to 13 years imprisonment in the UK.

110 See, e.g., the *A-G of Adamawa State v A-G of the Federation* [2005] 18 NWLR (Pt. 958) 581 at 263. See also *Olagunju v Yahaya* [1998] 3 NWLR (Pt. 542) 501; *Ogbuehi v Gov. of Imo State* [1995] 9 NWLR (Pt. 417) 53; and *Okafor v Asob* [1999] 3 NWLR (Pt. 593) 35.

and undertake criminal proceedings against any person in Nigeria.¹¹¹ Notably, S. 174(3) requires the AGF to do so having regard to public interest, the interest of justice and the need to prevent abuse of legal process. What happens where the AGF fails, refuses or neglects to prosecute offenders in blatant violation of the obligation imposed upon him by S. 174(3)? Specifically, for example, what measures ought to be taken against the incumbent AGF Mohammed Adoke who handled the \$180 million worth corruption case involving Halliburton¹¹² in an ‘administrative’ manner that subverted and sabotaged such obligation? Instead of prosecuting the complicit natural and juristic persons under extant law and exacting restitution in favour of the state, the AGF gave them administrative reprieve upon their payment of a pittance in full and final settlement of the case.¹¹³ Similarly, his immediate predecessor under President Yaradua, Mike Aondoakaa, misconducted himself by openly frustrating the efforts of the EFCC to prosecute James Ibori who plundered millions of dollars from the treasury of Delta State.¹¹⁴ It is noteworthy that when Ibori finally escaped the country, he was convicted for fraud and money laundering-related offences in the UK.¹¹⁵ Unfortunately, even where the performance of the AGF violates the proviso to S. 174, the law expects citizens to do nothing but to endure pending when it pleases the appointor of the AGF to relieve him of his duty. This state of the law is highly unsatisfactory. Though there is no serious objection to AGF’s being the alpha and the omega in prosecution, such monopoly should be broken in deserving cases, for instance, where, amidst his refusal to prosecute obvious cases of corruption, there are persons willing to undertake such prosecution.

Under the existing law, no private person can undertake criminal prosecution unless he has been directly or indirectly instructed to do so by the AGF or, at any rate, he must have sought and obtained the fiat of the AGF.¹¹⁶ Although the Supreme Court initially toed a liberal line in *Fawehinmi v. Akilu*¹¹⁷

111 See *Commissioner of Police v Joseph Tobin* [2009] 10 NWLR (Pt. 1148) 62 CA. For equivalent provision relating to the Attorney General of a State of the Federation, see CFRN 1999, s 211(1)(a).

112 ‘Halliburton paid \$180 million in bribes to senior Nigerian government officials’ (4 September 2008) <<http://royaldutchshellplc.com/2008/09/04/halliburton-paid-180-million-in-bribes-to-senior-nigerian-government-officials/>> accessed 15 March 2014.

113 See *Igbinedion, Culpability of AGF (n 108)*.

114 ‘Revealed: Another Aondoakaa/EFCC memo to discard Ibori’s case’ (20 August 2009) <<http://saharareporters.com/report/revealed-another-aondoakaefcc-memo-discard-ibori-case?page=1>> accessed 5 February 2014.

115 ‘Former Nigeria governor James Ibori jailed for 13 years’ (17 April 2012) <<http://www.bbc.co.uk/news/world-africa-17739388>> accessed 3 February 2014.

116 See *Commissioner of Police v Joseph Tobin* (n 109) 88-9.

117 [1987] 4 NWLR (Pt. 67) 797.

by ruling in favour of the locus standi of a private person to initiate prosecution, it soon retraced its step into its conservative shell when it circumscribed that right to the limits set by S. 342 of the Lagos State Criminal Procedure Law, which provides for perjury. Therefore, it is submitted that private persons ought to be empowered to embark on private prosecution or to have the locus to cause a writ of mandamus to issue against (an inefficient) AGF or any other authority to perform their duties. The presumption that the AGF would act in the public interest is too much of an assumption that must be overridden by a provision empowering private prosecution.

On the other hand, in civil cases (e.g., tort), the subject of nuisance usually generates controversies as to the locus standi of parties to sue. There are two types of nuisance: private nuisance and public nuisance. Whereas private nuisance is a condition that interferes with a person's enjoyment of property, public nuisance is an unreasonable interference with a right common to the general public, such as a condition dangerous to health, offensive to community moral standards, or unlawfully obstructing the public in the free use of public property.¹¹⁸ Apart from being a crime, corruption can be considered a civil wrong which may give rise to a claim predicated on private nuisance or public nuisance. In private nuisance, a contractor who lost out in a bid to secure a contract because of his competitor's bribing of some government officials can sue because he would be able to establish special or peculiar loss therein. Corruption can be treated as a public nuisance because it unlawfully interferes with the right of citizens to freely enjoy and dispose of their collective patrimony. Any damage or mischief arising therefrom is actionable at the instance of the AGF or, with his fiat, by a private individual.¹¹⁹ But outside the fiat of the AGF, a private person or litigant can have a right of action for public nuisance only if he can establish that he has sustained particular damage over and above the general inconvenience and injury suffered by the public.¹²⁰ Thus, in *Senator Abraham Adesanya v. President of the Federal Republic of Nigeria*,¹²¹ the Supreme Court held, *inter alia*, that the plaintiff/appellant lacked locus standi because the matter did not relate to his civil rights and obligations as a person. Consequently, only the AGF can claim against the tortfeasor, just as it is in criminal cases. Therefore, arguments or critique we advanced in respect of the prosecutorial powers of

118 Garner (n 29) 1097,1098.

119 See *Reynolds Construction Co. (Nigeria) Ltd v Mr. Edward Okwejinor* [2001] 15 NWLR (Pt 735) 787 CA.

120 *SPDC Ltd v Adamkue* [2003] 11 NWLR (Pt. 832) 533,597 CA.

121 (1981) 5 SC (Reprint) 69, 88.

the AGF equally applies, *mutatis mutandis*, to his absolute authority to sue in civil cases. Since corruption is a public matter, logic may have informed the vesting of the authority to sue in the AGF but in view of the exercise or non-exercise of such power contrary to public interest, fairness demands the liberalization of the rule on locus standi so that the AGF would cease to be the only centre of gravity on the issue of ventilating public grievance over massive plunder of national treasury.

6. CONCLUSION

This paper attempted a diagnosis of the persistence of high profile corruption despite the array of anti-corruption norms in Nigeria. Although the country's legal order formally prohibits corruption, it however accommodates contradictions, inconsistencies or deficiencies. Consequently, because it is unhealthy for a legal order to simultaneously blow hot and cold, the anti-corruption norms appear to be equivocal, ambiguous, inefficacious and unworkable. Therefore, in order to put the norms against corruption to work, we have suggested some reforms relating to the restructuring of anti-corruption agencies, location of illicit assets, character of probes, penalization and civil society participation in corruption control. It is our sincere hope that concerted legislative and administrative action be undertaken by relevant authorities and agencies so that every negative norm is eliminated from the normative legal order against corruption. It is believed that such measure would strengthen the norms of transparency and accountability and *ipso facto* drastically reduce if not eliminate high profile corruption from the land.