

THE RULE OF LAW AND ANTI-CORRUPTION CRUSADE IN NIGERIA

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Lecture delivered at the 9th Justice Idigbe Memorial Lecture, at the Akin Deko
Auditorium, University of Benin, Benin City, Nigeria on 6th August, 2008

INTRODUCTION

This paper will examine the rule of law in both its conservative and contemporary meaning. It is a concept which is not new to lawyers and any legal system. It has been examined and debated upon by lawyers and contemporary commentators over the years.¹ The concept has been so much in vogue that, at times, sounds like an aphorism or a cliché; although in the actual sense, its analysis is of practical utilitarian value to lawyers as it affects the rights of man in society. The concept of the rule of law has a generic connotation in the sense that it has no precise legal meaning. And what is more, with recent developments in contemporary law and politics, the concept has acquired a more pragmatic and purposeful meaning. We will examine the concept in some historical as well as contemporary context *anon*.

Anti-corruption statutes are legion in Nigeria. They are in a number of statute books. They are in some proliferation. Anti-corruption provisions are in the Criminal Code Act,² the Penal Code³ and in more recent times⁴ the Corrupt Practices and Other Related Offences Act,⁵ the Economic and Financial Crimes

¹ See generally, Dicey, Introduction to the Study of Law of the Constitution, Macmillan, (1959); Wade, Wade and Phillips Constitutional Law, Longmans, (1961) pp. 58-73; Jennings, The Law and the Constitution (5th ed.) Chap. II; Phillips, 'Constitutional Government and the Rule of Law', Journal of Comparative Legislation, 3rd series, Vol. XX, p.262; Ohonbamu, 'The Rule of Law in Nigeria'; Elias, T. O. (ed.) Law and Social Change in Nigeria, Evans Brothers (1972), pp 197-227; Adegbite, 'The Concept of the Rule of Law in African Society', Unpublished thesis, University of London (1966); 'Rule of Law in a Free Society', International Commission of Jurists (1959) African Conference on the Rule of Law (1961); Shyllon and Obasanjo, The Demise of the Rule of Law in Nigeria under the Military: Two points of view, Ibadan University Press (1980), pp. 1-4; Agbaje, F., "The Rule of Law and the Third Republic"; Owoboye, W. (ed.) Fundamental Legal Issues in Nigeria (1959), pp.275 to 291; Ayua, M. "The Rule of Law in Nigeria", Ayua I. A. (ed), Law, Justice and the Nigerian Society (1995), pp 69-90; Ayoola, E. O. "The Importance of the Rule of Law in Sustaining Democracy and Ensuring Good Governance", in Agbe, M. A. O. (ed) All Nigeria Judges Conference 2001 (2001) pp 47-61. See also the comments to the paper of Ayoola, E. O., by Tobi, N., *op. cit.*, pp 62-71.

² Cap. C.38, Laws of the Federation of Nigeria, 2004. See sections 98 to 98B.

³ Cap.89, Laws of Northern Nigeria, 1964. See sections 115 to 116.

⁴ Precisely from 2000 to date.

⁵ Cap. C.31, Laws of the Federation of Nigeria, 2004.

Commission (Establishment) Act, the Money Laundering (Prohibition) Act,⁶ 2004 and the Advance Fee Fraud and Other Fraud Related Offences Act, 2006.

The Criminal Code Act, a by-product of English Law, provides for the conservative offences.⁷ So too the Penal Code which originated essentially from Islamic jurisprudence.⁸ The Corrupt Practices and Other Related Offences Act, in addition to providing for the conservative offences, has moved further by expanding the frontiers of both the Criminal Code Act and the Penal Code.⁹ The Economic and Financial Crimes Commission (Establishment) Act is a brand new statute essentially modeled to capture economic crimes which are now rampant in Nigeria.¹⁰ So too the Money Laundering (Prohibition) Act, 2004 which, as the name implies, provides for offences of money laundering and the Advance Fee Fraud and Other Fraud Related Offences Act, 2006, which provides for fraud and fraud related offences.

RULE OF LAW

One of the earliest writers on the rule of law is Dicey. In his lectures delivered at the University of Oxford as a Vinerian Professor of English law, Dicey gave three meanings of the concept.¹¹ Dicey's first meaning recognized the absolute supremacy of the law but condemned arbitrary use of power.¹² He said:

“The rule of law means in the first place, the absolute supremacy or predominance of regular law as opposed

⁶ Cap. E.1, Laws of the Federation of Nigeria, 2004.

⁷ In the generic name of official corruption, they are public officials inviting bribes, person giving bribe on account of public official and person inviting bribes on account of actions of public official.

⁸ They are public servants taking gratification in respect of official act, and taking gratification by any person in order to influence public servant.

⁹ See sections 8 to 26 of the Act.

¹⁰ The EFCC Act defines economic crime as the non-violent criminal and illicit activity committed with the objectives of earning wealth illegally either individually or in a group or organized manner thereby violating existing regulation governing the economic activities of government and its administration and includes any form of fraud, narcotic drug trafficking, bribery, looting and any form of corrupt malpractices, illegal arm deal, smuggling, human trafficking and child labour, oil bunkering and illegal mining, tax evasion, foreign exchange malpractices including counterfeiting of currency, theft of intellectual property and piracy, open market abuse, dumping of toxic wastes and goods, etc. This is quite a mouthful.

¹¹ See Introduction to the Study of the Law of the Constitution.

¹² This is quite an ambitious one.

to the influence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government... a man may be punished for a breach of law, but he can be punished for nothing else.”¹³

In his second meaning of the concept, Dicey emphasized the principle of equality before the law. He said that every citizen, including the officials must be amenable to the jurisdiction of the ordinary courts of the land. He stated:

“The rule of law means equality before the law or the equal subjection of all classes to the ordinary law of the land administered by the ordinary law court.”¹⁴

Dicey’s third meaning, which was based on individual rights vis-à-vis constitutional provisions, is in these words:

“Finally, the rule of law of the Constitution, the rules which in foreign countries naturally form part of a constitutional code, are not the source but the consequence of the rights of individuals, as defined and enforced by the courts, that, in short, the principles of private law have with us been by the action of the Courts and Parliament so extended as to determine the position of the Crown and of its servants; thus the Constitution is the result of the ordinary law of the land.”¹⁵

The above all too familiar meanings of the rule of law, as given by Dicey, cannot fit into every legal system without qualifications; including the United Kingdom which Dicey used as a model. This is because they cannot fit into all the ramifications of the English Legal System and its jurisprudence.

In Nigeria, the position is not as simple as Dicey puts it. In his first meaning, Dicey talked about the predominance of regular law as opposed to the influence of arbitrary power. While it is difficult to determine what Dicey meant

¹³ Op. cit., p.202. On the interpretation of the meaning, see Wade, op. cit., p.60.

¹⁴ Op. cit. pp 22-203.

¹⁵ Op. cit., p.203.

by regular law,¹⁶ it is obvious that the meaning is certainly different in some other legal systems, including Nigeria.¹⁷ This apart, the expression “arbitrary power” is subjective and therefore gives a nebulous concept of the rule. It is known that the idea of arbitrariness arises when an exercise of executive power is not authorized by law. However, the point must be made that an executive action could be authorized by Dicey’s regular law of the State and yet go against the Constitution of the land.¹⁸ There are many examples of such laws in Nigeria in the military regime.

It is submitted that the arbitrariness of executive action cannot be determined *in vacuo* but in relation to a given case, considering the circumstances which lead to the exercise of the power. The consideration will ultimately depend upon the discretionary power of the Executive, if the enabling law gives such a power. While it is not always easy to draw a clean line between a discretionary power and an arbitrary one, (since they are both subjective) it is submitted that a discretionary power which is exercised *mala fide* or maliciously could be arbitrary.

Secondly, Dicey’s principles of equality of every person before the law is a mere farce. It is utopian to expect equality of every person before the law in a society where every other thing is not equal. And this reminds us of the African adage that not all the fingers created by God are equal. It is common in most legal systems to confer defined privileges and immunities on certain category of persons.¹⁹ Similarly, Dicey’s theory of subjecting every citizen to the ordinary courts of the land is not correct. There exists commissions, tribunals or quasi

¹⁶ Perhaps it could mean in Dicey’s England, the imperial status, the common law and the doctrines of equity.

¹⁷ In Nigeria, the regular law includes amongst other sources of law, the Constitution of the country.

¹⁸ See Sir William Holdsworth’s review of *Wade’s Introduction to Dicey*, 9th ed. 55 LGR 585.

¹⁹ See The Crown Proceedings Act, 1947 which confers certain privileges and immunities on the British Crown. The Constitution of the Federal Republic of Nigeria, 1999 also confers certain privileges and immunities on the President of the Federation. See also the Diplomatic Immunities and Privileges Act, 2004; Legislative Houses (Powers and Privileges) Act, 2004.

judicial bodies which do not qualify as courts of law in Dicey's context, and yet are involved in the enforcement of the law.²⁰

Finally, Dicey's third meaning may be true of the United Kingdom where the Constitution is unwritten, but it is certainly not true of countries operating written Constitutions, like Nigeria. For instance, in Nigeria the fundamental rights of the individual are entrenched in the Constitution²¹ of the land and not merely derived from pronouncements of the courts of law or Parliament. As opposed to the position in the United Kingdom, a citizen whose fundamental rights are infringed in Nigeria, seeks redress in a court of law,²² relying on the Constitution of the land²³ and not on the ordinary laws.²⁴

The French Revolution also gave rise to the emphasis on the rule of law. In the light of the experiences during the revolution, the supremacy of law over arbitrary actions and anarchy was included in *The Declaration of the Rights of Man and the Citizen*. This was promulgated into law by the French National Assembly in August, 1789. The following sacred rights of men and citizens were recognized in the famous declaration which was designed to put an end to despotism. They are:

“(vii) No man should be accused, arrested, or held in confinement, except in cases determined by the law, and according to the forms which it has prescribed. All who promote, solicit, execute, or cause to be executed, arbitrary orders, ought to be punished, and every citizen called upon, or

²⁰ See for example, The Robbery and firearms (Special Provisions) Decree No. 47, 1970; Public Complaints Commission Decree No. 31, 1975; Corrupt Practices Decree No. 38, 1975; Price Control Decree No. 1, 1977; Exchange Control (Anti-Sabotage) Decree No. 57, 1977 and the Land Use Decree No. 6, 1978, which operated during the Military regime.

²¹ On the historical development of fundamental right in Nigeria, see Odumosu, *The Nigerian Constitution*, Sweet and Maxwell (1963) pp 241-252; Grove, “The ‘sentinels’ of Liberty: The Nigerian Judiciary and Fundamental Rights” (1963 JAL Vol. 152, p.120; *The Minorities Commission Report*, Comnd. 505; Tobi, Human Rights in Nigeria, paper presented at the Hague Academy of International Law on completion of a course sponsored by the Academy at the University of Nairobi, Kenya between 26th January and 14th February, 1976, pp 1-9.

²² See s.46 of the 1999 Constitution.

²³ See Chapter IV of the 1999 Constitution.

²⁴ Cf. Wade, *op. cit.* p.69.

apprehended by virtue of the law, ought immediately to obey, and render himself culpable by resistance.

- (viii) The law ought to impose no other penalties but such as are absolutely and evidently necessary: and no one ought to be punished, but in virtue of a law promulgated before the offence, and legally applied...
- (xi) Every man is being presumed innocent till he has been convicted, whenever his detention becomes indispensable, all rigour to him, more than is necessary to secure his person, ought to be provided against by the law...
- (xvii) The right to property being inviolable and sacred, no one ought to be deprived of it, except in cases of evident public necessity, legally ascertained, and on condition of a previous just indemnity.”²⁵

In its Bill of Rights of 1791, the doctrine of the supremacy of the rule of law was written into the American Constitution, in what is now famously referred to as the Fifth Amendment of the Constitution. It provides that:

“No person shall... be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.”²⁶

The American Revolutionaries had earlier declared as follows:

“We hold these truths to be self-evident, that all men are created equal, that they are endowed by their creator with certain inalienable rights, that among these are love, liberty and the pursuit of happiness.”²⁷

²⁵ Merryn (ed), Revolutions, Harmondsworth (1971) pp 98-99.

²⁶ Merry, op. cit., p.77.

²⁷ Friedrich and McCloskey, From the Declaration of Independence to the Constitution (1954) p.3.

International organizations and bodies also make provisions for certain aspects of the rule of law. For example, in the preamble to the United Nations Charter, the Peoples of the United Nations reaffirm “faith in fundamental human rights in the dignity and worth of the human person, in the equal rights of men and women...” Similarly, Article 1(3) of the Charter provides as one of the purposes of the United Nations, the promotion and encouragement of respect “for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion.”²⁸

The provision of Article 1(3) is strengthened by Article 55(c.) which also enjoins the United Nations to promote “universal respect for, and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.” By Article 56, “all members pledge themselves to take joint and separate action in co-operation with the organization for the achievement of the purposes set forth in Article 55.” It does not appear that the Charter creates legal obligations on member States.²⁹

In 1959, the meaning of the rule of law was further examined by the International Congress of Jurists held in Delhi. In the Conference, which was made up of 53 countries represented by 185 judges and lawyers, the concept was given a broader meaning. At the end of the Conference, the rule of law was defined as:

“a dynamic concept for the expression and fulfillment of which jurists are primarily responsible and which should be employed not only to safeguard and advance the civil and political rights of the individual in a free society, but also to establish social, economic, educational and cultural conditions under which his legitimate aspirations and dignity may be realized.”³⁰

²⁸ See also Article 2 of the Charter of the Organisation of African Unity, as it was then called.

²⁹ See Kelsen, The Law of United Nations, 3-031; Drummond v. Wren (1945) OR 778; Fuji v. State of California, 242 Pac. 2d, 617; Oyama v. State of California (1948) 332 US 633-689. See also General Assembly Official Reports, 3rd Session, pt. 1 1948, Plenary Session, p.860.

³⁰ “Rule of Law in a Free Society” op. cit., pp 188-202.

The above definition is important in the sense that it did not stop at the traditional meaning of the concept in the context of civil and political rights but also included social, economic, educational and cultural rights. That is a contemporary meaning.

This re-enactment of the rule of law, which is more akin to the socialist philosophy, was materially entrenched in Chapter II of the 1979 Constitution as Fundamental Objectives and Directive Principles of State Policy.³¹ It is remarkable that for the first time in the constitutional history of Nigeria, the economic and social duties of Government were clearly entrenched in the Constitution.³² It is also provided for in Chapter II of the 1999 Constitution. However, the non-justiciability of the provisions of the Chapter will certainly reduce their practical impact on the economic and social well-being of the people.³³

An African Conference on the rule of law was held in Lagos in January, 1961. In his Address to the plenary session, the former Chief Justice of the Federation, Sir Adetokunbo Ademola, while disagreeing that the concept of the rule of law was mainly Anglo-American, said:

“It has been said that the rule of law is mainly an Anglo-American institution, that the concept of ‘government under law’ and such phrases as the ‘supremacy of law’ or ‘the rule of law’ are all purely western inventions... The African, it was suggested, might find a third legal system which is neither ‘the rule of law’ nor socialist legality propounded by the communists. But the rule of law is not a western idea, nor is it linked up with any economic or social system.

³¹ On the provisions of the chapter, see Ofonagoro, Ojo and Jinadu (ed.) The Great Debate, Daily Times Publication (1978) Chapter II; Proceedings of the Workshop on the Draft Constitution for Nigeria held at the University of Nigeria, Nsukka, under the auspices of the Department of Political Science between 20th and 21st January, 1977, pp 50-56; Proceedings of the Workshop on the Draft Constitution held at the University of Maiduguri under the auspices of the Department of Law between 23rd and 27th May, 1977, pp 24-47.

³² Whether the ambitious provisions of Chapter II will be attained is a different matter.

³³ See s. 6(6)(c) of the Constitution. The Supreme Court gave a very illuminating interpretation to the provisions of the Chapter in the 1999 Constitution in the case of Attorney-General of Ondo State v. Attorney-General of the Federation (2002) 9 NWLR (Pt.772) 227.

As soon as you accept *Man is governed by law and not by whims of man, it is the rule of law.*³⁴ It may be under different forms from country to country but it is based on principles; it is not an abstract notion.”³⁵

The concept of the rule of law has changed over the years and in modern times, it is identified with the rights of man in society.³⁶ It is in this context that most international documents use the concept. In Nigeria, this modern concept of the rule of law was entrenched³⁷ in Chapter III of the 1960 and 1963 Constitutions as fundamental rights of the individual citizen and Chapter IV of the 1979 Constitution. The provisions are repeated in Chapter IV of the 1999 Constitution.

It is important to point out in addition to the above that the 1979 Constitution introduced an innovation in section 17, which in effect, provided for the concept of the rule of law in its generally accepted sense. The section provided in part:

- “(1) The State social order is founded on ideals of Freedom, Equality and Justice.
- (2) In furtherance of the social order:
 - (a) every citizen shall have equality of rights, obligations and opportunities before the law;³⁸
 - (b) the sanctity of the human person shall be recognized and human dignity shall be maintained and enhanced;
 - (c) governmental actions shall be humane;
 - (d) exploitation of human and natural resources in any form whatsoever for reasons other than the good of the community shall be prevented; and

³⁴ Italics for emphasis only.

³⁵ African Conference on the Rule of Law (1961) p.86.

³⁶ Wade, op. cit. p.70.

³⁷ See for example the UNO, AU, OAS Charters; the Universal Declaration of Human Rights and the European Convention on Human Rights.

³⁸ S.17(2), ibid.

- (e) the independence, impartiality and integrity of courts of law, and easy accessibility thereto shall be secured and maintained.”³⁹

Similar provision is contained in section 17 of the Constitution of the Federal Republic of Nigeria, 1999. Although the side note to section 17 is worded “social objectives”, it is submitted that the section, in effect, provides for the rule of law. While some of the provisions of section 17(2) are nebulous, vague and therefore not capable of any precise legal meaning,⁴⁰ the totality of the provisions, in so far as they are declarations of governmental policy, may have a psychological impact on the entire administration of justice.

The rule of law entails: (a) The supremacy of law over arbitrary power. (b) Every person is subject to the ordinary law of the land and therefore must obey the law and that disobedience of the law will be on pain of sanction or punishment. (c) Every person should be equal before the law. This is because the law is no respecter of any person or group of persons. The law is a leveler. This means that normally, every citizen is subject to the jurisdiction of the courts of the land. (d) The fundamental rights of the individual, which are inalienable, should not be denied him, unless as provided in the Constitution. In other words, every individual has the right to due process of the law. We must add that there are exceptions here and there on the above, some of which are in our Constitution.

LEGISLATIVE POWERS ON ANTI-CORRUPTION STATUTES

There is a vibrant argument in respect of the Legislature that has the competence to legislate on anti-corruption statutes. It is the argument in some quarters that the National Assembly is not competent to legislate on anti-corruption and that only the State Houses of Assembly are competent to do so in the light of the federal nature of the Constitution. The general legislative powers

³⁹ See also s. 17(3), *ibid*.

⁴⁰ Quaere, what will be the criteria for determining s.17(2)(b) and (c)?

of the National Assembly are contained in section 4 of the Constitution of the Federal Republic of Nigeria, 1999. By the section, the legislative powers of the Federal Republic of Nigeria shall be vested in the National Assembly which consists of the Senate and the House of Representatives.⁴¹

The National Assembly shall have power to make laws for the peace, order and good government of the Federation or any part thereof with respect to any matter included in the Exclusive Legislative List set out in Part 1 of the Second Schedule to the Constitution.⁴² The power of the National Assembly to make laws for the peace, order and good government of the Federation with respect to any matter included in the Exclusive Legislative List shall, save as otherwise provided in the Constitution, be to the exclusion of the Houses of Assembly of States.⁴³ The Constitution does not provide for the sharing of legislative powers between the National Assembly and the Houses of Assembly of States in respect of matters in the Exclusive Legislative List.

In addition and without prejudice to the powers conferred by section 4(2), the National Assembly shall have power to make laws with respect to the following matters, and that is to say: (a) any matter in the Concurrent Legislative List set out in the first column of Part II of the Second Schedule to the Constitution to the extent prescribed in the second column opposite thereto; and (b) any other matter with respect to which it is empowered to make laws in accordance with the provisions of the Constitution.

Section 4(6) of the Constitution provides that the legislative powers of a State of the Federation shall be vested in the House of Assembly of the State. The House of Assembly of a State shall have power to make laws for the peace, order and good government of a State or any part thereof with respect to the following matters, that is to say: (a) any matter not included in the Exclusive Legislative List set out in Part I of the Second Schedule to the Constitution; (b) any matter

⁴¹ Section 4(1) of the 1999 Constitution.

⁴² Section 4(2), *ibid.*

⁴³ Section 4(3), *ibid.*

included in the Concurrent Legislative List set out in the first column of Part II to the Second Schedule to the extent prescribed with respect to which it is empowered to make laws in accordance with the provisions of the Constitution.⁴⁴

The Supreme Court dealt with whether the National Assembly has the constitutional power to legislate on corruption, in the light of the federal arrangement in the 1999 Constitution. The issue before the court was the constitutionality of the Corrupt Practices and Other Related Offences Act 2000 in the case of Attorney-General of Ondo State v. Attorney-General of the Federation.⁴⁵ The case will be dealt with in so much detail because of the misconception of the decision by some writers. By an originating summons filed in the Supreme Court on 16th July, 2001 for adjudication in its original jurisdiction under section 232(1) of the 1999 Constitution, the plaintiff sued the 1st defendant (i.e. Attorney-General of the Federation), and joined the 2nd-36th defendants as parties whose rights may be affected by the action, and asked for the following six 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 every State of the Federal Republic of Nigeria (including Ondo State).
2. A determination of the question whether or not the Attorney-General of the Federation (1st defendant) or any person authorized by him can lawfully initiate legal proceedings in any court of law in Ondo State in respect of any of the criminal offences created by any of the provisions of the said Corrupt Practices and Other Related Offences Act, 2000.
3. A declaration that the Corrupt Practices and Other Related Offences Act, 2000, is not in force as law in Ondo State.

⁴⁴ Section 4(7), *ibid.*

⁴⁵ [2002] 9 NWLR (Pt. 772) 222.

4. A declaration that it is not lawful for the Attorney-General of the Federation (1st defendant) or any person authorized by him to initiate legal proceedings in any court of law in Ondo State in respect of the criminal offences purported to be created by the provisions of the Corrupt Practices and Other Related Offences Act, 2000.
5. An order of perpetual injunction restraining the Federal Government, its functionaries or agencies whomsoever (including the Independent Corrupt Practices Commission) or howsoever from executing or applying or enforcing the provisions of the Corrupt Practices and Other Related Offences Act, 2000 in Ondo State whether by interfering with the activities of any person in Ondo State (including any public officer or functionary or officer or servant of the Government of Ondo State) in exercise of powers purported to be conferred by or under the provisions of the said Act or otherwise howsoever.
6. An order of perpetual injunction restraining the Attorney-General of the Federation including his officers, servants and agents whosoever or howsoever from exercising any of the powers vested in him by the Constitution of the Federal Republic of Nigeria, 1999 or by any other law in respect of any of the criminal offences created by any of the provisions contained in the Corrupt Practices and Other Related Offences Act, 2000.”

On 22nd January, 2002, the parties were directed by the Supreme Court to file briefs of argument within a given time. The plaintiff and the 1st defendant complied. Of the 2nd-36th defendants, only the 2nd, 4th, 7th, 8th, 11th, 12th, 14th, 17th, 19th, 23rd, 25th, 27th, 28th, 30th, 31st and 32nd defendants filed briefs of argument.

The court also invited three Senior Advocates of Nigeria, Professor B. O. Nwabueze, Chief Afe Babalola and Olisa Agbakoba as *amici curiae* and they each filed briefs of argument.

The contention of the plaintiff can be summed up as follows:

1. The Act is not in respect of a matter or matters either in the Exclusive Legislative List or the Concurrent Legislative List and therefore unconstitutional.
2. The National Assembly has no power to make laws with respect to the criminal offences contained in the Act.
3. The Attorney-General of the Federation or any person authorized by the ICPC can only initiate or authorize the initiation of criminal proceedings in any court of law in Ondo State in respect of any of the criminal offences created by the Act only if that enactment is valid.
4. Sections 26(3) and 35 of the Act constitute a usurpation of judicial functions, as well as section 35 being an abuse of legislative power, by the National Assembly and are therefore unconstitutional and void.
5. Sections 28 and 29 of the Act confer on the ICPC powers exercisable over any person whether or not such person is performing governmental functions and are accordingly void.
6. Section 37 of the Act is unconstitutional and void because it is ancillary to the creation of offences which the National Assembly has no power to create.
7. Section 6(b) of the Act constitutes a possible intrusion into the functions of States and their public bodies.

In resolving the conflict, the Supreme Court referred to and construed relevant provisions of the 1999 Constitution, the Corrupt Practices and Other Related Offences Act, 2000 and the Interpretation Act, 1964, Cap. 192, Laws of the Federation of Nigeria, 1990. The Court held *inter alia* as follows:

1. Having regard to the principles enunciated above with regard to the interpretation of a Constitution, it is necessary to observe that what has to be construed is the constitutional document wherein all the provisions for the governance of the nation, Nigeria have been set out. In other words, it is the Constitution of Nigeria, 1999, that is

under scrutiny in this matter. It is certainly not the Constitution of any other country, no matter how desirable and perfect that Constitution may be. We, as Nigerians, have to live and abide with all the provisions of the Constitution which have been fashioned for us by those whose fate was ordained to fashion the Constitution for the governance of the people.

2. Where an enactment is in relation to a matter within the enumerated classes of subjects expressly assigned to the National Assembly by section 15(5) and Item 60(a) on the Exclusive Legislative List of the 1999 Constitution, the National Assembly may by that enactment provide for matters which, although within the legislative, or even executive, competence of the States, are necessarily incidental or ancillary to effective legislation by the National Assembly in relation to that enumerated matter.
3. It is not open to the Federal Republic of Nigeria to take steps, or enact any legislation, deliberately or by necessary consequence, that will undermine the legislative powers and authority of the States if it cannot be ascertained from the Constitution that the action of the Federal Republic was inevitable in the overall interest of the nation, and was constitutional.
4. It is the construction of the constitutional provisions under which powers are allocated to the different governments that determines whether an Act of the Federal or National Government has gone beyond limits to interfere with the affairs of a State in matters reserved to it under the Constitution. It is a wrong approach to the interpretation of constitutional provisions to project the doctrines of “implied prohibition” and “mutual non-interference” as a way of determining the limits of those powers. However, those doctrines may be kept at the back of the mind and recognized as a healthy

political theory which in some circumstances, as appropriate, may be applied to analyze what the court has interpreted. In other circumstances, they may help to justify the reason for the autonomy granted to the States under the Constitution within the Federation.

5. Corruption is not a disease which afflicts public officers alone but society as a whole. If it is therefore to be eradicated effectively, the solution to it must be pervasive to cover every segment of the society.
6. Going by the definitions of “State” and “Government” in section 318(1) of the 1999 Constitution, the directive under section 15(5) of the Constitution that “the State shall abolish all corrupt practices and abuse of government” applies to all the three tiers of government. In that case, the power to legislate in order to prohibit corrupt practices and abuse of power is concurrent and can be exercised by the Federal and State Governments by virtue of section 49(2), 4(4)(b) and 4(7)(c) of the Constitution. However, it is doubtful if the Local Governments can legislate on the subject since there is no provision under section 7 and the Fourth Schedule to the Constitution that empowers them to do so.
7. Although the power to legislate on the subject of corruption and abuse of office is given to the National Assembly and State House of Assembly, when both exercise the power, the legislation by the National Assembly will prevail by virtue of section 4(5) of the Constitution.
8. The Federal Government has power to punish for corruption and fraud in relation not only to property but also to all matters within its legislative competence.
9. The provision of section 2(a) of Part III of the Second Schedule to the 1999 Constitution was enacted in order to expound the effect and

the extent of the provision of Item 68 of Part I of the Second Schedule. It is by virtue of that provision that offences may be enacted by the National Assembly if it is shown that such offences as may be created are incidental and supplementary to matters on which the National Assembly is vested with power to enact laws.

10. Since by virtue of section 4(2) of the 1999 Constitution the National Assembly has the power to make laws for the peace, order and good government of the Federation with respect to any matter included in the Exclusive Legislative List, it follows that the National Assembly is empowered to legislate under Item 60(a) of the Exclusive Legislative List for the power to make laws with respect to “any other matter with respect to which it is empowered to make laws in accordance with the provisions of this Constitution.” The issue of corruption and abuse of power has become international. It is a declared State Policy in Nigeria to combat it and so it has assumed a national issue of high priority which is considered best suited for the National Assembly to be addressed through a federal agency like the ICPC.
11. Reading these provisions of the 1999 Constitution together and construed liberally and broadly, it can easily be seen that the National Assembly possesses the power both “incidental” and “implied” to promulgate the Corrupt Practices and Other Related Offences Act, 2000, to enable the State, which for this purpose means the Federal Republic of Nigeria, to implement provisions of Item 68 read together with section 15(5) of the Constitution which confers power on the National Assembly to enact the Act.
12. Section 6(a) of the Corrupt Practices and Other Related Offences Act, 2000 that imposes on the Independent Corrupt Practices Commission the power to receive, investigate and prosecute any

person for offences under the Act is not unconstitutional and the power is exercisable in any State of the Federation (in this case, Ondo State) by virtue of section 4(2) and 4(3) of the 1999 Constitution.

13. Section 28 of the Corrupt Practices and Other Related Offences Act, 2000 gives the Independent Corrupt Practices Commission wide powers when investigating the commission of an offence to summon any person, order him to produce any book or document or require him to make written statement under oath or affirmation, etc. Those powers are co-extensive with those of the police under the Police Act, Cap. 359, Laws of the Federation, 1990 and do not usurp the police power under section 214 of the 1999 Constitution. The power is exercisable on a person not exercising government function. The National Assembly has the power to so enact.
14. The power conferred by section 29 of the Corrupt Practices and Other Related Offences Act, 2000 on the Independent Corrupt Practices Commission to issue summons to person complained against for the purpose of being examined is not unconstitutional by reason of its being exercisable on persons not exercising government function. The National Assembly has the power to so enact.
15. The power given by section 35 of the Corrupt Practices and Other Related Offences Act, 2000 to the Independent Corrupt Practices Commission to arrest and detain a person indefinitely, that is until the person complies with the summons, violates the provision of section 35 of the 1999 Constitution which guarantees the fundamental right to personal liberty. The provision is therefore unconstitutional, null and void.
16. The power given to the Independent Corrupt Practices Commission by section 37 of the Corrupt Practices and Other Related Offences

Act, 2000 to seize any movable or immovable property on suspicion that the property is the subject-matter of an offence or evidence relating to the offence is constitutional. The National Assembly has the right to create the offence. As always, if there is an improper seizure or taking of custody of any such property that may be a matter for contention, as appropriate, to be decided by judicial process.

The Supreme Court also considered the same issue in Chief Olafisoye v. Federal Republic of Nigeria.⁴⁶ For the same reasons as in Attorney-General of Ondo State, the case will be examined in so much detail. The appellant was arraigned along with three other persons before the High Court of the Federal Capital Territory on two counts charge under the Corrupt Practices and Other Related Offences Act, 2000. He was the 2nd accused. The charge was in respect of an alleged contravention of some offences under the Act. Count 1 charged for conspiracy to give gratification of N3,500,000.00, an offence under section 26(1)(c) and punishable under section 9(1) of the Act.

The appellant objected to the jurisdiction of the High Court to try him on the ground that the Corrupt Practices and Other Related Offences Act, 2000 is unconstitutional and invalid. The objection was overruled by the High Court. Dissatisfied, the appellant appealed to the Court of Appeal, and requested for a reference to the Supreme Court. Accordingly the following two questions were referred to the Supreme Court:

- “(i) Whether the combined effect of the provisions of sections 4(2), 15(5), Items 60(a), 67 and 68 in Part I of the Second Schedule and section 2(a) of Part III of the Second Schedule of the Constitution of the Federal Republic of Nigeria, 1999, confer powers on the National Assembly to make laws for the peace, order and good government of the Federal Republic of Nigeria

⁴⁶ [2004] 4 NWLR (Pt. 864) 580.

with respect to offences arising from, connected with or pertaining to corrupt practices and abuse of power.

- (ii) In the light of the answer to question (i), whether the National Assembly has power to enact sections 9(1)(a), 9(1), 26(1)(c) and 26(3) of the Corrupt Practices and Related Offences Act, 2000.”

The Court of Appeal accordingly referred the two questions to the Supreme Court by way of case stated in accordance with section 295(3) of the 1999 Constitution.

Meanwhile, before the questions were determined, the Supreme Court had delivered judgment in the case of A-G Ondo State v. A-G, Federation (2002) 9 NWLR (Pt. 772) 222, which dealt substantially with the same matter. In resolving the appeal, the Supreme Court considered the relevant provisions of the Constitution of the Federal Republic of Nigeria, 1999 and held as follows:

1. A federal government will mean what the Constitution writers say it means. And this can be procured within the four walls of the Constitution. Therefore, a general definition of federalism or federal government may not be the answer to the peculiar provisions of a nation’s Constitution which is the *fons et origo* of its legal system. Thus, the word federalism conveys different meanings in different Constitutions as the constitutional arrangements show particularly in the legislative lists.
2. There are ideals of Federalism propounded and developed by constitutional law scholars and political scientists the world over. These ideals and ideas are goals set out to achieve true federalism. No Constitution can really achieve such goals which are largely utopia. Such goals are ideals but by and large, and at the end of the

day, Judges must interpret the provisions of the Constitution and not the ideals.

3. The concept of State autonomy must be examined in the context of the Constitution of the Federal Republic of Nigeria, 1999. This is because it will not be a useful exercise to take the concept outside the constitutional arrangement and therefore in a vacuum or in *vacuo*. There could be an incursion or erosion into the concept of State autonomy by a particular Constitution, particularly in respect of the doctrine of covering the field; also sometimes called doctrine of inconsistency. Thus, the concept of State autonomy is not sacrosanct. The concept will, in appropriate situations, bow to the overall sovereignty of the federal government, a sovereignty which presents its head clearly in section 4(1), (2), (3), (4) and (5) of the 1999 Constitution in the major area of legislation.
4. While the legislative powers of the government of the Federation are vested in the National Assembly, the legislative powers of a State Government are vested in the House of Assembly of a State. It is in section 4. Section 4(1)-(4) provides for the legislative powers of the National Assembly while section 4(6) and (7) provides for the legislative powers of the House of Assembly of a State. Section 4(5) seems to be hybrid provision as it provides for the legislative powers of both the National Assembly and the House of Assembly of a State. That is the subsection which provides for the doctrine of covering the field.
5. By virtue of subsection (3) of section 4 of the 1999 Constitution, all the legislative powers for the peace, order and good government of the Federation in respect of any matter included in the Exclusive Legislative List are vested in the National Assembly. By subsection (4) of section 4, any matter in the Concurrent Legislative List set out

in the First Column of Part II of the Second Schedule to the extent prescribed in the Second Column opposite thereto, is vested in the National Assembly.

6. By section 4(7) of the 1999 Constitution, the House of Assembly of a State has power to make laws for the peace, order and good government of the State with respect to:

(a) any matter not included in the Exclusive Legislative List set out in Part I of the Second Schedule to the Constitution;

(b) any matter included in the Concurrent Legislative List set out in the first column of Part II of the Second Schedule to the Constitution to the extent prescribed in the second column thereto.

7. Under section 318 of the 1999 Constitution, “authority” is defined to include government. And from the provision of section 3 of the Corrupt Practices and Other Related Offences Commission Act, 2000 which establishes the Independent Corrupt Practices Commission (ICPC), it is clear that the National Assembly has the legislative power to enact the Act under Item 60(a) of the Exclusive Legislative List as the item relates to section 15(5) of the 1999 Constitution. This is because the ICPC qualifies as an authority within the meaning of Item 60(a). Moreover, a joint reading of the power of the National Assembly under section 4 and Items 67 and 68 of the Exclusive Legislative List, vests in the National Assembly the power to make laws for the peace, order and good government of the Federation with respect to matters the National Assembly is vested with such law making powers, including any matter incidental or supplementary thereto.

8. An act is *ultra vires* the National Assembly when it is enacted outside the legislative powers of the National Assembly. Where the enactment of an Act is within the legislative powers or competence of the National Assembly such an Act is *intra vires* the National Assembly. In the instant case, the Corrupt Practices and Other Related Offences Act, 2000 was validly enacted within the powers conferred by the Constitution on the National Assembly.
9. The word “State” conveys different meanings in different circumstances. In international law, it means a nation with full status of statehood, as a sovereign entity. In this context, it is regarded as a person in international law with power to sue and be used in the State name. It must go beyond *status nascendi*. In municipal law, it also conveys the same meaning. But it could also mean component parts of the nation. That is one meaning of the expression in section 4(6) of the 1999 Constitution.
10. By virtue of section 14(1) of the 1999 Constitution which provides that the Federal Republic of Nigeria shall be a State based on the principles of democracy and social justice, it is plain that it is the Federal Republic of Nigeria, as a State, that is looked upon under the Constitution to take steps, or perhaps to spearhead the policy, to abolish all corrupt practices and abuse of power.
11. Although Nigerian courts can consider foreign Constitutions in interpreting the Nigerian Constitution, nevertheless the ultimate end will be the Nigerian Constitution itself. What has to be construed is the constitutional document wherein all the provisions for the governance of the nation, Nigeria, have

been set out. In other words, it is the Constitution of Nigeria that is under scrutiny and not the Constitution of any other country, no matter how desirable and perfect that other Constitution may be.

Responding to the arguments of learned Senior Advocate for the appellant, I said, and I quote what I said in some detail because of the criticism of the judgment by Professor Sagay:

“Learned Senior Advocate cited some Australian authorities on federalism and the doctrine of State autonomy. He urged the court to follow the decisions which were given on the Australian Constitution. The Australian Constitution was enacted under different economic, political, social and cultural background and circumstances. The Nigerian Constitution was enacted under different economic, political, social and cultural background and circumstances.

The above apart, the Australian Constitution is not the best example in terms of exactness or nearness to the Nigerian Constitution. I would like to think that although Australia operates a federal Constitution, it should be one of the last places that counsel should rely on the decisions of that country’s High Court, which is equivalent of Nigeria’s Supreme Court. The interpretation of the federal system of government in Australia cannot be basis for the interpretation of the Nigerian Constitution for the following reasons. Firstly, the constitutional arrangement in Australia is quite different from ours. There are State Constitutions in Australia as provided in sections 106 and 121 of the Constitution. The constitutional implication of State autonomy is clearer than a Federal Constitution such as ours, which has no provision for State Constitutions.

Secondly, Australia operates a parliamentary system of government while Nigeria operates a presidential system of government. Putting it in another language, while the Australian Constitution is closer to the Constitution of the Federal Republic of Nigeria, 1963, the Presidential Constitution of 1999 is closer to the Constitution of the United States. I should not be understood as making the point that the

Constitution of the United States is the same as that of Nigeria. I am not saying that because it is wrong to say that. Considering the fact that the 1963 Parliamentary Constitution is very different from 1999 Presidential Constitution, the reference to the principles of federal government or federalism in the Australian Constitution is not helpful to the appellant. Thirdly, the Australian Constitution does not contain fundamental objectives and directive principles of state policy, and therefore has not the provision of section 15, Items 60, 67 and 68 of the Exclusive Legislative List that have been interpreted in this reference. And this is most material.

Fourthly, the Australian Constitution, which provides for powers of Parliament contains 39 matters in the Legislative List under section 51. The implication of this from the viewpoint of federalism is that it contains less items for the Federal government. And this is the basic criticism of most Nigerians on the Constitution. A court of law cannot follow the bandwagon and interpret the Constitution to suit popular ideas. Rather a court of law must interpret the provisions of the Constitution and nothing more and nothing less.

What this court must interpret is the Constitution of the Federal Republic of Nigeria, 1999. While I agree that this court can take advantage of interpretations of similar provisions by courts of other jurisdictions in more advanced legal systems, by and large, the end of the journey will be the Nigerian Constitution. In Rabiu v. The State (1981) 2 NCLR 293, Udo Udoma, JSC, emphasized the indigenous nature of the 1979 Constitution and the need to interpret the provisions of the Constitution in its autochthonous content. He said at page 326:

‘My Lords, in my opinion, it is the duty of this court to bear constantly in mind the fact that the present Constitution has been proclaimed the Supreme law of the land, that it is written, organic instrument meant to serve not only the present generation, but also several generations yet unborn, that it is made, enacted and given to the people of the Federal Republic of Nigeria in Constituent Assembly assembled...’

In the case of Attorney-General of Ondo State v. Attorney-General of the Federation (supra), Ejiwunmi, JSC, did not

mince words when he talked about the need to abide by the Nigerian Constitution. He said at page 462:

‘Now, having regard to the principles enunciated above with regard to the interpretation of a Constitution, it is necessary to observe that what has to be construed is the constitutional document wherein all the provisions for the governance of the nation, Nigeria have been set out. In other words it is the Constitution of Nigeria, 1999 that is under scrutiny in this matter. It is certainly not the Constitution of any other country, no matter how desirable and perfect that Constitution may be. We as Nigerians have to live and abide with all the provisions of the Constitution which have been fashioned for us by those whose fate was ordained to fashion the Constitution for the governance of the people of Nigeria.’

No two countries operating federal Constitution practice federalism exactly in the same way. I am yet to see two countries operating federal Constitution providing for exactly the same federal content in the Constitutions. All countries, including those operating federal Constitutions, have their peculiar provisions, which they rightly call theirs.

As our country is sovereign, so too our Constitution and this court will always bow or kowtow to the sovereign nature of our Constitution, a sovereignty which gives rise to its supremacy over all laws of the land, including decisions by foreign courts. Gone are the days when all things from older common law jurisdictions were preferred to everything from the younger common law jurisdictions. Gone are also the days when differences between judgments of this court and foreign judgments, implied that the judgments of this court could be wrong. Let those days not come back and they will not come back. In Adigun v. The Attorney-General of Oyo State (No. 2) (1987) 2 NWLR (Pt. 56) 197, Karibi-Whyte, JSC, correctly made the point at page 230:

‘This court has reached the stage where it does not regard differences from the highest English or other Commonwealth court or other courts of common law jurisdiction as necessarily suggesting that it is wrong.’

Decisions of foreign countries are merely of persuasive authority. This court will certainly allow itself to be persuaded in appropriate cases but this court will not stray away from its course of interpreting the Nigerian Constitution by resorting to foreign decisions which were decided strictly in the context of their Constitutions and which are not similar to ours. In Okon v. The State (1988) 1 NWLR (Pt. 69) 172, Nnaemeka-Agu, JSC, said at page 180:

‘It is well to remember not only that a foreign decision should at best be persuasive authority in a Nigerian court but also that before it can even qualify as such, the legislation, substantive or adjectival, upon which it was based must be in *pari materia* with our own. It is dangerous to follow a foreign decision simply because its wording approximates to our own. Nigerian courts are obliged to give Nigerian legislation its natural and ordinary meaning, taking into account our own sociological circumstances as well as other factors which form the background of our local legislation in question. A ‘copy cart’ transposition of an English decision may in some circumstances turn out to be inimical to justice in our own courts.’

When this matter was adjourned for judgment, learned Senior Advocate for the appellant, Chief Williams, sent to us a letter No. 2A/1/1/24(1) dated 31st October, 2003. He called the court’s attention to the case of Peenok Investment Ltd. v. Hotel Presidential Ltd. (1983) 4 NCLR 122, (1982) 12 NSCC at 477 on joinder of necessary parties. With the greatest respect, I do not find the authority relevant in the determination of the live issues in the reference. The respondent’s brief did not raise the issue of joinder. I therefore discountenance the authority.”

Professor Sagay, SAN, in the 8th Justice Idigbe Memorial Lecture on the title “Nigeria: The Unfinished Federal Project” criticized the above decision, saying that I was wrong in what I said about federalism. He quoted a passage in the judgment. I will quote the passage which received the castigation of the learned Professor and Senior Advocate. And I will do so by taking the quotations a bit earlier and a bit down to really appreciate the point I made, and I will do so in *extenso*:

“The impression is given in the appellant’s brief that federalism in law has a single or exact concept or meaning, which the courts must interpret in respect of cases that come before them. The brief contains the following statement at pages 8 and 12:

‘The doctrine rests upon necessary implication from the establishment by the Constitution of the Federal and State governments as separate and autonomous governments, and the necessity for the maintenance of their capacity to continue to exercise their respective constitutional functions such as governments... The principle of autonomy in a federal system implies, further, that neither the central government nor its regional ones can confer functions or impose duties, obligations, restrictions and liabilities on the functionaries of the other.’

The above is a dogmatic statement meant to be applied in all Federal Constitutions. That is the position of learned Senior Advocate. But is that the situation? Should that be the correct position? Do all Federal Constitutions have the same nature and characteristics?

In my humble view, there is not much in a name, but there is so much in a name by way of definitions, amplifications, restrictions and all that. Constitutions are named as federal, unitary and confederal, to mention the major ones. A federal government will mean what the Constitution writers say it means. And this can be procured within the four walls of the Constitution and the four walls only. Therefore a general definition of federalism or federal government may not be the answer to the peculiar provisions of a nation’s Constitution which is the *fons et origo* of its legal system.

Ideal federalism or true federalism is different from specific or individual Federal Constitutions of nations, which may not be able to achieve the utopia of that ideal federalism or true federalism but which in their own sphere are called Federal Constitution. I think Nigeria falls into the latter category or group. It will therefore be wrong to propagate theories based on ideal or true federalism in a nation’s Constitution which does not admit such utopia. I will return to this later.

The point I am struggling to make is that there is no universal agreement as to what is a federalism or a federal government. Definitions of words, including ‘federalism’ or ‘federal government’, by their nature, concept or content, are never fully accurate all the time, like a mathematical solution to a problem. Definitions are definitions because they reflect the idiosyncrasies, inclinations, prejudices, slants and emotions of the person offering them. While a definer of a word may pretend to be impartial and unbiased, the final product of his definition will, in a number of situations, be a victim of partiality and bias. I seem to see the definitions given in the appellant’s brief in the light of the above analyses.

Let me illustrate the diversity and non-universality of what federalism or federal government means. Defining what he meant by federal principle as the method of dividing powers so that the general and regional governments are each within a sphere, co-ordinate and independent, that great Professor of Government and Public Administration in the University of Oxford, K. C. Wheare, said at page 10 in his well-written book on Federal Government:

‘This restriction of the word ‘federal’ to the sense just defined may be objected to by some students on historical grounds. They will point out, quite correctly, that the authors of *the federalism*, for example, use the word ‘federal’ or describe both the system set up by the Articles of Confederation of 1777 and that proposed by the Constitution of 1787.’

Professor Wheare continued at page 11:

‘It is proper to add that this definition of the federal principle is not accepted as valid by all students of the subject. Some authorities find the essence of federalism in some different principle. There are those, for example, who hold that the federal principle consists in the division of power in such a way that the powers to be exercised by the general government are specified and the residue is left to the regional governments. It is not enough that

general and regional governments should each be independent in its own sphere. That sphere must be marked out in a particular way. The residuary powers, as they are called, must lie with the regional governments. On this view a government is not federal if the powers of the regional governments are not specified and the residue is left to the general government.'

A. H. Birch in his article titled "Approaches to the Study of Federalism: 14 Pol. Studies 15 (1966), recognizing the diversity of views on the meaning of federalism, said:

'Its meaning in any particular study is defined by the student in a manner which is determined by the approach which he wishes to make to his material.'

And finally, Professor Nwabueze, in his book Federalism in Nigeria (1983) correctly said at page 34:

'The application of the Federal System in Nigeria and in many later federations has shown that a federation could be formed by a state hitherto under a unitary government, devolving part of its powers to two or more independent State governments.'

By the above statement, Professor Nwabueze rightly recognizes that a federation can take its branches from the tree of a unitary government. In such a situation, the historical ties may make it impossible for the federal Constitution to entirely and totally strip off its relationship with unitarism. That could be the Nigerian experience for now.

It is clear from the above that it is wrong to sound dogmatic and final when dealing with the meaning, concept or constituents of federalism or federal government, as there is in law no finality in the meaning, concept or constituents in the sense of total agreement of theorists on the word. Although the word 'federalism' may be knit on theories of political science, it conveys different meanings in different Constitutions, as the constitutional arrangements show particularly in the legislative lists."

In his criticism, Professor Sagay said at pages 19 and 20 of the Lecture:

“With due respect, his Lordship was wrong. I agree entirely with Professor Nwabueze’s response to the above statement that his Lordship’s rationalization simply reduces “Federalism” or “federal government” to a concept without a specific meaning; it empties it of all content, for it would mean that whatever a particular Constitution, by its provisions, say it is. That would be absurd. Federalism like any other concept must have some core or basic principle which defines its essence or it does not exist as a constitutional or political concept.”

Later at page 20 and moving to page 21 of the Lecture, Professor Sagay made some attempt to give me some little credit, but in another case. The learned Professor and Senior Advocate said:

“To be fair to Justice Niki Tobi, he made amends (to use the words of Nwabueze) in a later case, *A.G Abia State and others v. A.G. of the Federation and others* when dealing with a case in which the attempt by the Federal Government to take over the allocation of funds and supervision of local government finances from State Governments was challenged, Niki Tobi, JSC, in his leading judgment, unequivocally acknowledged an essential of the Nigerian federal system, the autonomy of such government which presupposes its separate existence and independence from the Federal Government. The learned Justice of the Supreme Court went further to state that, the Act which enjoins each State Government to establish a State Joint Local Government Account Allocation Committee is ‘clearly against the Federal arrangement in the Constitution’ and that it has traits of unitarism’. The Learned Justice held further that the word ‘monitoring’ used in the Act ‘conveys some element of policing the State Governments.’ In his view, the word means ‘to watch, to check.’ In terms of showing the strength of the Federal Government, ‘it is a very arrogant word that spells some doom in a federal structure.’”

The learned professor had not finished with my views on federalism. He continued his quarrel at page 23 of the lecture when he picked me up after relying on Wheare on Federal Government. He said:

“This provides answer to JUSTICE Niki Tobi’s views, supra on federalism. Indeed as Uwaifo, JSC, observed in A.G. of Lagos State v. A.G. of the Federation (2003) 12 NWLR (Pt. 833) 1, ‘it is a non-controversial political philosophy of Federalism that the Federal Government does not exercise supervisory authority over State Governments.’”

One is in sympathy with the criticisms of Professor Nwabueze in his recent book entitled How President Obasanjo Subverted Nigeria’s Federal System (2007); a book I have not read. His criticisms are merely arguments of Chief F. R. A. Williams in Olafisoye v. Federal Republic of Nigeria; a matter Professor Nwabueze also appeared with Chief Williams and made major inputs. Both Chief Williams and Professor Nwabueze placed before the court the knowledge of their research and their knowledge of federalism. They cited Nwabueze’s book on Federalism in Nigeria (1983); Sir Robert Garran’s Article on “Development of the Australian Constitution (1924) 40 LQR 202 at 215 and a number of cases including McCulloch v. Maryland;⁴⁷ D’Emden v. Peddler;⁴⁸ West v. Commissioner of Taxation;⁴⁹ Commonwealth Court of Conciliation and Arbitration, Ex parte Victoria;⁵⁰ Melbourne Corporation v. Commonwealth;⁵¹ Madras v. Champalan.⁵²

After carefully listening to the scholarly arguments, the Supreme Court followed its earlier decision in Attorney-General of Ondo State v. Attorney-General of the Federation.⁵³ The court held that the National Assembly has the

⁴⁷ 4 Wheat 31 (1891).

⁴⁸ (1904) 1 CLR 91 at 111.

⁴⁹ (1937) 56 CLR 657 at 681.

⁵⁰ (1942) 66 CLR 488.

⁵¹ (1947) 74 CLR 31 at 82-83.

⁵² (1951) SCR 252.

⁵³ Supra.

power to enact sections 9(1)(a) and 26(1)(c) of the Corrupt Practices and Other Related Offences Act, 2000 and that section 26(3) of the Act is unconstitutional.

Although Professor Sagay agrees with Professor Nwabueze that I was wrong in my decision on the definition of federalism in Olafisoye, it is submitted with all respect to the learned professors that I was not wrong. It is still my view that “a general definition of federalism or federal government may not be the answer to the peculiar provisions of a nation’s Constitution which is the *fons et origo* of its legal system. Ideal federalism or true federalism is different from specific or individual federal Constitutions of nations which may not be able to achieve the utopia of that ideal federalism or true federalism but which in their own sphere are called federal Constitutions.”

The Supreme Court has said several times that the duty of courts in Nigeria is to interpret the Constitution of Nigeria. In the celebrated and often cited case of Rabiu v. The State,⁵⁴ Udo Udoma, JSC, said at page 327:

“I might add that in my opinion, it is not correct approach to the proper interpretation of our present Constitution to begin by looking at the meaning or interpretation of a statutory provision or Constitution of other countries with different wordings. But of course, foreign Constitutions or statute with identical provisions accepted as in *pari materia* with the relevant provisions of our Constitution will naturally carry some weight in their persuasive influence, bearing in mind always, that even in such cases, circumstances may be at variance.”

Ejiwunmi, JSC, made similar statement in Attorney-General Ondo State v. Attorney-General of the Federation.⁵⁵ After making reference to Rabiu and the case of Ekpankhio v. Egbadan,⁵⁶ the learned Justice said at page 462:

“Now, having regard to the principles enunciated above with regard to the interpretation of a Constitution, it is necessary to observe that what has to be construed is the constitutional document wherein all the provisions for the governing of the

⁵⁴ [1981] 2 NCLR 293.

⁵⁵ *Supra*.

⁵⁶ [1993] 7 NWLR (Pt. 308) 717.

nation, Nigeria have been set out. In other words, it is the Constitution of Nigeria, 1999, that is under scrutiny in this matter. It is certainly not the Constitution of any other country, no matter how desirable and perfect that Constitution may be. We as Nigerians have to live and abide with all the provisions of the Constitution which have been fashioned for us by those whose fate was ordained to fashion the Constitution for the government of the people of Nigeria.”

In Attorney-General of Abia State v. Attorney-General of the Federation,⁵⁷

I said that “as a Judge, I am hired to interpret the laws of this country which include the Constitution and statutes.⁵⁸ And that is the role or function of any Nigerian Judge. He cannot go out of the Nigerian Constitution and fish for definitions of federalism in other Constitutions even in their best legal phraseology which are not provided for in the Nigerian Constitution. And that was the point made in Olafisoye. Courts of Nigeria are bound by the provisions on federalism in the Nigerian Constitution, as they have no jurisdiction to shop for any other definitions in other countries, whatever may be the level of sophistication or civilization they have attained. If by that, Professors Nwabueze and Sagay hold the view that it reduces federalism or federal government to a concept “without a specific meaning and it empties it of all content”; let it be. I do not however think so. The expression “federalism”, or “federal government” has a specific meaning in the 1999 Constitution and that is the meaning that the Constitution has bestowed on it. It is therefore not correct to say that “it empties it of all content.” There is content in it and it is the one bestowed on it by the Constitution. Professors Nwabueze and Sagay may not like the content in the Constitution but that is all about it. There is nothing they can do as they have to wait for the National Assembly and the Houses of Assembly of the States to rewrite the Constitution. Unfortunately, the Supreme Court cannot wait for that. With respect, I do not see anything absurd in the point I made in Olafisoye. Professor

⁵⁷ [2006] 16 NWLR (Pt. 1005) 265.

⁵⁸ Ibid.

Sagay, in his effort to say that I was wrong in the decision, referred me to what Wheare said about a federal system. He forgot to look at the reference I made to the same author at page 648 of the judgment. The statement made by Wheare completely destroys the argument of Professor Sagay, and I so submit.

While I entirely agree with Professors Nwabueze and Sagay that federalism like any other concept “must have some core or basic principle which defines its essence”, I am firmly of the view that the core or basic principle must be in the Constitution to enable courts of law to interpret it accordingly. If it is not in the Constitution, courts of law are handicapped as they cannot go outside the Constitution to procure the “core or basic principle.”

The criticism, with all respect, is a most unnecessary and uncalled for scholarship which has no place in the constitutional role of the Nigerian Judge in the interpretation or construction of the Nigerian Constitution. It will be a very sad day for courts in Nigeria to import into the Nigerian Constitution provisions of other Constitutions, like the United States of America, Canada and Australia,⁵⁹ not contained in the Nigerian Constitution. Of course, the Supreme Court is free to make use of any provision in any of the countries mentioned above and beyond, which are similar to the Nigerian Constitution. The Supreme Court cannot go beyond that. It is hoped that that day will not dawn on the Supreme Court.

Professor Sagay cited the case of Attorney-General Abia State v. Attorney-General of the Federation,⁶⁰ with the sole purpose to say that I took a contrary position in that case. He credited a statement to Professor Nwabueze that I made amends in Attorney-General of Abia State. I did not make any amends. The facts of the two cases were quite different and so the decisions were different. It is elementary law that decisions are given by courts in the light of the facts of the case. While Olafisoye involved the interpretation of the Corrupt Practices and Other Related Offences Act, 2000, Attorney-General of Abia State involved the

⁵⁹ The usual ones referred to the Supreme Court in recent times.

⁶⁰ Supra.

interpretation of the Monitoring of Revenue Allocation to Local Government Act, 2005, in relation to specific provisions of the Constitution which are different. In the circumstances, it is unfortunate for the learned professors and Senior Advocates to say that I made amends in Attorney-General of Abia State, *supra*. It is necessary to recall that Professor Sagay said that I “unequivocally acknowledged as an essential of the Nigerian federal system the autonomy of each government.” This justifies my position in Olafisoye that Nigerian Judges are bound by the Nigerian Constitution which provides for the “Nigerian federal system”, to use the three words of Professor Sagay.

Courts of law are most serious legal institutions which do not deal with academic matters, theories or hypothesis. On the contrary, they deal with live issues arising from the litigation by way of reliefs. They do not theorise. They do not go outside the reliefs sought. They do not go outside the enabling law. They do not go on a voyage outside the shores of Nigeria to search for provisions of Constitutions which are not similar to ours. While academics can do so for purposes of developing a corpus of jurisprudence on comparative law, courts cannot.

It should be said finally that criticisms of judgments of courts is a very serious academic exercise which must be taken seriously in the interest of the development of the country’s Legal System and jurisprudence. Lawyers, as ministers in the temple of justice, must be very sure before they say that our decisions are wrong. As the Supreme Court and other courts are very willing to change their position in decisions which are wrong, critics should not jump quickly at criticizing decisions of the court unless they are really wrong. The criticism of Olafisoye is not correct.

Professor Sagay in his lecture dealt with what he called defects and anomalies of Nigerian Federalism at pages 40 to 46. He examined what he called true federalism and subversion of federalism. The learned professor knows that it is not the function of the courts to correct any anomalies but to interpret the

Constitution. It was his wrong expectations of the Supreme Court to correct “his anomalies” that made him miss the point completely.

DUPLICATION OF OFFENCES

Offences are duplicated in the anti-corruption statutes. The Criminal Code Act and the Penal Code provide for official corruption of public officers⁶¹ and public officers taking gratification.⁶² The Corrupt Practices and Other Related Offence Act, 2004 also provides for accepting gratification,⁶³ corrupt offers to public officers,⁶⁴ and corrupt demands by persons.⁶⁵ Although the EFCC Act does not specifically provide for the sections 98A and 98B Criminal Code Act Offences and the sections 115 and 116 Penal Code Offences, the definition of economic and financial crime in section 46 of the Act, which includes embezzlement, bribery and any other form of corrupt practice vindicate the offences in both the Criminal Code Act and the Penal Code.

In order to fully appreciate the point made, it is necessary to produce the *ipsissima verba* of the section:

“Economic and financial crimes mean the non-violent criminal and illicit activity committed with the objectives of earning wealth illegally either individually or in a group or organized manner thereby violating existing legislation governing the economic activities of government and its administration and includes any form of fraud, narcotic drug trafficking, money laundering, embezzlement, bribery, looting and any form of corrupt practices, illegal arms deal, smuggling, human trafficking and child labour, illegal oil bunkering and illegal mining, tax evasion, foreign exchange malpractices including counterfeiting of currency, theft of intellectual property and piracy, open market abuse, dumping of toxic waste and prohibited goods, etc.”

⁶¹ Section 98A and 98B, *ibid.*

⁶² Section 115 and 115, *ibid.*

⁶³ Section 8, *ibid.* See also section 17, *ibid.*

⁶⁴ Section 9, *ibid.*

⁶⁵ Section 10, *ibid.*

This most ambitious definition covers not only offences in the Criminal Code Act and the Penal Code, but also other statutes. Two most current examples are the Money Laundering (Prohibition) Act, 2004 and the Advance Fee Fraud and other Fraud Related Offences Act, 2006. The direct implication of the duplication of offences arises when a person is tried on the same offence in two or more of the statutes. That is where the rule of law comes in with some vexation, or annoyance, as the subsequent trial will violate section 36(9) of the Constitution of the Federal Republic of Nigeria, which provides as follows:

“No person who shows that he has been tried by any court of competent jurisdiction or tribunal for a criminal offence and either convicted or acquitted shall again be tried for that offence or for a criminal offence having the same ingredients as that offence save upon the order of a superior court.”

Section 36(9) is against the wrong application or use of due process. It provides for the common law rule of *autrofois acquit* and *autrofois convict*, which literally means formerly acquitted and formerly convicted respectively. While the first rule means that an accused person should not be vexed twice by prosecution or an accused who has been acquitted of the same offence should not be prosecuted the second time, the second one means that a party should not be brought twice into danger of his life for the same offence. There is obvious need to streamline the offences in the anti-corruption statutes in order to avoid the situation provided in section 36(9) of the Constitution. That will certainly vindicate the rule of law.

INVESTIGATION OF OFFENCES AND INTERROGATION OF OFFENDERS

Sections 27, 28 and 29 of the Corrupt Practices and Other Related Offences Act, 2004 provide for power to investigate reports and enquire into information, power to examine persons and power to summon persons for examination

respectively. The three sections provide for power of investigation and interrogation.

Where an officer of the Commission has reasons to suspect the commission of an offence under the Act following a report or information received by him, he will cause investigation to be made. For such purpose the officer may exercise all the powers of investigation provided for under the Act or any other law.⁶⁶ Section 28 of the Act specifically empowers an officer to give three orders⁶⁷ which the person investigated must comply with.⁶⁸

Subject to the provisions of section 29 to 34⁶⁹ of the Act, the Commission has the power to issue summons directed to a person complained against or any other person to attend before the Commission for the purpose of being examined in relation to the complaint or in relation to any other matter which may and or facilitate the investigation of the complaint. A summons so issued must state the substance of the complaint and the time and place at which the inquiry is to be held.⁷⁰

Section 6 of the EFCC Act, 2004 provides for power of investigation by the Commission. The Commission has the power to cause investigations to be conducted as to whether any person, corporate body or organization has committed an offence under the Act or other law relating to economic and financial crimes.⁷¹ The Commission has also the power to cause investigations to be conducted into the properties of any person if it appears to it that the person's life style and extent of the properties are not justified by his source of income.⁷²

⁶⁶ Section 27(3), *ibid.*

⁶⁷ Section 28(1)(a), (b) and (c), *ibid.*

⁶⁸ Section 28(3) to (9). Section 28(10) provides penalty of three months imprisonment for non-compliance with the section.

⁶⁹ Section 29 provides for summons against suspects. Section 30 provides for forms and service of summons. Section 31 provides for mode of service. Section 32 provides for substituted service. Section 33 provides for acknowledgment of service. Section 34 provides for detention of person refusing to acknowledge service.

⁷⁰ Section 29, *ibid.*

⁷¹ Section 6(1)(a), *ibid.*

⁷² Section 6(1)(b), *ibid.*

As both Acts do not provide for the *modus operandi* of investigation and interrogation, officers of the anti-corruption bodies are expected, in the interest of the rule of law, to comply with the Criminal Procedure Act⁷³ and the Criminal Procedure Code⁷⁴ in their investigation and interrogation. While the Criminal Procedure Act applies to the Southern States, the Criminal Procedure Code applies to the Northern States. More importantly, officers must comply with the Judges Rules of England, 1964⁷⁵ and the Criminal Procedure (Statement to Police Officers) Rules, 1960.⁷⁶ That is the only way to check police brutality in the interrogation room, a place which is inherently frightful and brutal.⁷⁷ As police brutality in the interrogation room is totally against the tenets of the rule of law, it must be avoided in the interest of due process.

ARREST, SEARCH, SEIZURE AND FORFEITURE

The ICPC Act does not specifically provide for the arrest of a person who is served with summons to appear before the Commission. It merely provides that a person who has been served with a summons and refuses to appear before the Commission will be arrested and detained.⁷⁸ The Supreme Court declared the provision (section 35) unconstitutional in Attorney-General of Ondo State v. Attorney-General of the Federation. The EFCC Act specifically provides for the arrest and apprehension of economic and financial crime perpetrators.⁷⁹

Section 36 of the ICPC Act empowers the Commission to obtain search warrant from a Judge or Magistrate to conduct a search in any place there is evidence of the commission of any offence under the Act.⁸⁰ Only a person who is

⁷³ Cap. C.41, Laws of the Federation of Nigeria, 2004.

⁷⁴ 1960.

⁷⁵ Applicable to the Southern States.

⁷⁶ Applicable to the Northern States.

⁷⁷ See Tobi, N., "The Admissibility of Confessions: The Dilemma of the Accused", (1980) 1 Maid. LJ, 19-22.

⁷⁸ Section 35, ibid.

⁷⁹ Section 12(1)(b), ibid.

⁸⁰ Section 36(1) and (2), ibid.

of the same gender as the person searched will conduct the search⁸¹. It does not appear that the EFCC Act specifically provides for search of a place. It is submitted that the Commission can perform such function by section 12 of the Act which provides for special duties of the Units.⁸²

By section 37 of the ICPC Act, an officer of the Commission, in the course of his investigation, may seize property, which he has reasonable grounds to suspect is related to an offence.⁸³ Section 38 provides for the custody of seized property. Section 25 of the EFCC Act provides for seizure of property. Any property subject to forfeiture under the Act may be seized by the Commission in the following circumstances: (a) the seizure incidental to an arrest or search; (b) in the case of property liable to forfeiture upon process issued by the court following an application made by the Commission in accordance with the prescribed rules.⁸⁴ Whenever property is seized under any provision of the Act, the Commission may: (a) place the property under seal; or (b) remove the property to a place designated by the Commission.⁸⁵ Properties taken or detained under the section will be deemed to be in the custody of the Commission, subject only to an order of court.⁸⁶

Sections 47 and 48 of the ICPC Act provide for the forfeiture of property. While section 47 provides for the forfeiture of property upon prosecution for an offence, section 48 provides for forfeiture of property where there is no prosecution. In the section 48 situation, the Chairman of the Commission is enjoined to apply to a Judge of the High Court for an order of forfeiture of the property before the expiration of twelve months from the date of the seizure.

Sections 19, 20, 21, 22, 23 and 24 of the EFCC Act provide for forfeiture of properties. Section 19 provides for forfeiture after conviction in certain cases.

⁸¹ Section 36(3), *ibid.*

⁸² The function can be carried out by the provision of section 12(1)(a) in which the Unit is charged with responsibility for the prevention and detection of offences in violation of the provisions of the Act.

⁸³ Section 37(1), *ibid.*

⁸⁴ Section 25(1), *ibid.*

⁸⁵ Section 25(2), *ibid.*

⁸⁶ Section 25(3), *ibid.*

Section 20 provides for properties that will be forfeited by the Federal Government. Section 21 provides for the forfeiture of foreign assets. Section 22 provides for forfeiture of passport. Section 23 provides for consequence of forfeiture of property. Section 24 makes further general provision on forfeiture.

An examination of the provisions of the Acts on arrest, search, seizure and forfeiture, show that the Acts substantially comply with the rule of law. The courts are involved in almost all the processes and that is the essence of the rule of law. It is good that a suspect or accused is invited by summons under section 29 of the ICPC Act. This process is certainly more civil than an outright arrest and therefore more akin to the rule of law.

THE DECISION TO PROSECUTE

The decision to prosecute in Nigeria is a very crucial one in the enforcement of the criminal process. It is a decision which must be exercised judicially and judiciously and with utmost caution. The decision in most cases is taken by the prosecution.⁸⁷ It is not in the interest of the administration of justice for the prosecution to invoke the decision merely as a weapon to apprehend a person. It cannot and should not be invoked as a vendetta against uncooperative accused person. On the contrary, the decision should be exercised only when it is designed to bring to justice an accused person who has committed an offence. Where the decision is malicious, an aggrieved person has a right of action in a competent court of law.⁸⁸

The decision to prosecute in Nigeria is taken at different stages by different sets of law enforcement agencies. Thus, the Police⁸⁹ and the Director of Public Prosecutions, in the exercise of the constitutional functions of the Attorney-General can take the prosecution decision.⁹⁰ The Attorney-General himself can

⁸⁷ The individual can also take the decision if he intends to institute private prosecution.

⁸⁸ See Okonkwo, C. O., *The Police and the Public*, Sweet and Maxwell (1966) 67-68.

⁸⁹ See section 23 of the Police Act, Cap. P19, Laws of the Federal Republic of Nigeria, 2004.

⁹⁰ Sections 174 and 211 of the Constitution of the Federal Republic of Nigeria, 1999.

also institute criminal proceedings by virtue of the constitutional provisions.⁹¹ Prosecution of offences in either the Criminal Code Act or the Penal Code is undertaken by the Director of Public Prosecutions on behalf of the Attorney-General or the Police.

Section 61 of the Corrupt Practices and Other Related Offences Act, 2004 provides for the prosecution of offences. Every prosecution for an offence under the Act or any other law prohibiting bribery, corruption and other related offences will be deemed to be done with the consent of the Attorney-General.⁹² Without prejudice to any other law prohibiting bribery, corruption, fraud or any other related offences by public officers or other persons, a public officer or any other person may be prosecuted by the appropriate authority for an offence of bribery, corruption, fraud, or any other related offences committed by such public officer or other person contrary to any law in force before or after the coming into effect of the Act and nothing in the Act will be construed to derogate from or undermine the right or authority of any person or authority to prosecute offenders under such other laws.⁹³

By section 61(1) of the Act, prosecution of offences need not be by the Attorney-General. That is the meaning of the word, “deem” in the subsection, which connotes “treat as if or construe”. Section 61(2) of the Act vests in the appropriate authority the power to prosecute offences. The appropriate authority is not defined in the Act. In order to achieve the possible meaning of the draftsman of section 61, there should be a community reading of the two subsections. In such an exercise, the expression “the appropriate authority” in subsection (2) should be construed along with subsection (1) of the section. The meaning of such a community reading is that the appropriate authority in

⁹¹ Apart from the above main public functionaries, the law vests statutory powers in other bodies to institute criminal proceedings. One of such bodies is the Posts and Telecommunications Department by virtue of the Posts and Telecommunications Proceedings Act, No. 30 of 1967. In addition, the law vests in private individuals the power to institute prosecution by obtaining fiat from the Attorney-General.

⁹² Section 61(1) of the Act.

⁹³ Section 61(2), *ibid*.

subsection (2) is not the Attorney-General. Who then is he? That is a million naira question. The appropriate authority could be the Director of Public Prosecutions of the Federation and his staff. Can this expression cover private persons? It will be dangerous to extend the expression in that way. That will be a violation of section 174 of the Constitution which vests public prosecution on the Attorney-General.

Section 12 of the EFCC Act provides for special duties of the Units of the Commission.⁹⁴ Of relevance to us is section 12(2) which provides as follows:

“The Legal and Prosecution Unit shall be charged with responsibility for

- (a) prosecuting offenders under the Act;
- (b) supporting the General and Assets Investigation Unit by providing the Unit with legal advice and assistance whenever it is required;
- (c) conducting such proceedings as may be necessary towards the recovering of any assets or property forfeited under the Act; and
- (d) performing such other legal duties as the Commission may refer to it from time to time.”

Section 12 of the EFCC Act is straightforward. It is not as complicated as section 61 of the Corrupt Practices and Other Related Offences Act. By section 12, prosecution of EFCC offences will be undertaken by the Legal and Prosecution Unit. It would appear that the prosecution will be undertaken by the staff of the Commission or by other persons recruited by the Commission or by both.

The above is on the personnel involved in the prosecution decision and the prosecution of the offences. We should take briefly here the allegation of some

⁹⁴ The Units are spelt out in section 11 of the Act. They are the General and Assets Investigation Unit, the Legal and Prosecution Unit, the Research Unit, the Administrative Unit and the Training Unit.

Nigerians that the prosecution of offences has political bias and so highly selective against some persons and in favour of others. The allegation is more on EFCC. In his article, “Crisis of Constitutional Impeachments: Governor Fayose as a Case Study,”⁹⁵ Taiwo Kupolati, under the sub-title: “Is EFCC an Ethical Sanitizer or Selective Inquisitor?” credited the following statement to Professor Tam David-West:

“A situation, contrariwise, where all President Obasanjo’s enthusiasts, supporters, lackeys, praise-singers, sycophants are necessarily immuned against the all-ranging EFCC virus; saints all, not only insults our collective intelligence but wreaks havoc, monstrous havoc on our un-corruptive conscience, condemns us as a mad iniquitous people. It should be embarrassing to President Obasanjo. Because the ‘third term dividend’ has increased the number of people under EFCC beam light. Not without custom-made (teleguided?) negative verdict. Working from ‘answer’ to question? Shame. This situation where all Obasanjo’s supporters are saints, all his non-supporters are villains necessarily swims against the tide of normalcy of even commonsense. But in Nigeria the abnormal often pass on, nay celebrated as normal. As when candidates (politicians) poll more votes than registered voters at elections. President Obasanjo himself, indeed, ‘state of nature’ pure and unsoiled, believed that Nigeria is the country of anything goes.”⁹⁶

One is not in a position to know the authenticity or veracity of the above statement by Professor David-West, a fine Nigerian scholar. Assuming that it is correct, then one can say without equivocation that it is against the rule of law, which sings the song of equality of every person under or before the law.

Section 26 of the ICPC Act provides that a prosecution for an offence shall be conducted and judgment delivered within ninety working days of its commencement save the judgment of the court to continue to hear and determine the case shall not be affected where good grounds exist for the delay. The

⁹⁵ See Olatunbosun, I. A. (ed) Legal Issues for Contemporary Justice in Nigeria, Department of Jurisprudence and Private Law, Obafemi Awolowo University, Ile-Ife (2007).

⁹⁶ Pages 76 and 77, op. cit.

Supreme Court held in Olafisoye v. Federal Republic of Nigeria, *supra*, that the subsection is unconstitutional as it is *ultra vires* the law making powers of the National Assembly.

THE BAIL DECISION

Trial bail decision is taken by the trial court. Bail is a contract whereby an accused person is delivered to his surety. It is also the contract of the surety himself. The effect of granting bail is not to set the accused free but to release him from the custody of the law and entrust him to a surety to appear at his trial at a specific time and place. Offences are divided into two for purposes of bail. And so we have non-bailable offences⁹⁷ and bailable offences.⁹⁸

Bail is a constitutional right of the accused person and should not be denied him in cases which involve bailable offences.⁹⁹ The most important criterion of bail at the pre-trial, trial and post-trial or appellate levels is the availability of the accused to stand trial. All other criteria take their queue from the above basic criterion. If the court is satisfied that the accused will return to his trial and will not jump bail, bail should be granted.

Money bail is one very hard and sensitive aspect of pre-trial freedom. It is generally believed that an accused person will not return to take his trial unless there are enough compelling circumstances for him to do so. One such compelling circumstance, it is believed, is money bail. In the determination of the amount of bail, the courts take into consideration a number of factors. These include the nature of the accused, his previous criminal record, and the weight of the evidence held by the prosecution.¹⁰⁰

⁹⁷ See section 118(1) of the Criminal Procedure Act and section 341(1) of the Criminal Procedure Code.

⁹⁸ See sections 118(2) and (3) of the Criminal Procedure Act and section 341(3) of the Criminal Procedure Code. Section 341(2) of the Criminal Procedure Code seems to provide for a hybrid situation.

⁹⁹ Section 35(4)(b) of the Constitution of the Federal Republic of Nigeria, 1999.

¹⁰⁰ The courts do not generally invoke all the above criteria in any particular case. The criteria invoked will depend on the circumstances of the particular case before the court.

The Constitution of the Federal Republic of Nigeria, 1999, does not, unlike that of the United States,¹⁰¹ specifically and unequivocally provide for money bail. The Constitution provides that a person arrested or detained shall “be released unconditionally or upon such conditions as are reasonably necessary to ensure that he appears for trial at a later date.” The provision, though not unequivocal on money bail, nebulously anticipates money bail. However, the Criminal Procedure Act¹⁰² and the Criminal Procedure Code¹⁰³ make clear provisions on money bail.

The very disturbing, if not most disturbing area of the bail decision in recent times, is the attitude of the trial courts in respect of the conditions given for granting bail. It has become a style in vogue in most trial courts of accused persons facing corruption charges to give most stringent and difficult conditions for granting bail. Some Judges go out of their discretionary power to ask for a specific person of standing in the society and property owners in specific or particular locations to stand as sureties, as conditions for granting bail. Such Judges find useful in the bargain, Senators, traditional rulers, permanent secretaries, to mention a few. They require landed property in Maitama and Asokoro in Abuja and in other choice areas in other cities. Because such conditions are stringent, accused persons, in most cases, do not meet them and therefore languish in pre-trial custody, although the offences they are alleged to have committed are bailable; in line with section 42 of the ICPC Act.¹⁰⁴ This is a serious constraint as the accused person is denied pre-trial freedom to assemble

¹⁰¹ See The Eighth Amendments.

¹⁰² Section 120 of the Criminal Procedure Act gives the court a discretion to determine the amount of bail in each case, taking into consideration the circumstances of the case. The section also provides that the amount of bail should not be excessive.

¹⁰³ Sections 347 and 349 of the Criminal Procedure Code provide for money bail. By section 347, a court or police officer may allow an accused person to deposit a sum of money in lieu of the execution of a bond. Section 349(1) is more specific and it provides that “the amount of every bond shall be fixed with due regard to the circumstances of the case.

¹⁰⁴ The section provides in part:

- (1) “Every offence under this Act shall be a bailable offence for the purposes of the Criminal Procedure Act or Code.
- (2) Every person arrested under subsection (1) of this section may be released from custody on his executing a bond with sureties, as an officer of the Commission may require.”

evidence for his counsel in his defence. The rule of law is the final victim. The exculpatory argument that the stringent bail conditions are necessary to fight corruption is, with respect, neither here nor there, as it has no place in the Law of Bail. It is mere sentiment and law is not based on sentiment.

LAW OF PROCEDURE AND EVIDENCE

The law of bail is an area of procedure. It is taken separately because of its particular or special significance in the paper. There are some provisions in both the Corrupt Practices and Other Related Offences Act and the EFCC Act which can be regarded as against the rule of law. Sections 55, 56 and 60 of the Corrupt Practices and Other Related Offences Act do not seem to be consistent with the law of procedure and evidence. Section 55 provides for evidence of accomplice and agent provocateur. Section 56 provides for admissibility of statement by accused persons. Section 60 provides that evidence of custom or convention in respect of gratification is inadmissible.

An accomplice is a person who might on the evidence before the court be convicted of the offence with which the accused is charged.¹⁰⁵ An accomplice includes: (1) *participes criminis*, that is participant in the actual crime charged, including accessories before and after the fact; (2) receivers of the property which the accused is charged with stealing; (3) participants in other crimes alleged to have been committed by the accused where evidence of such other crimes is admissible to prove system or intent or to negate accident.¹⁰⁶ It is clear from the provision of section 55 that a witness who comes under section 55(a) is an accomplice and therefore ought to be treated within the proviso to section 178(1) of the Evidence Act, 2004. That is not the position in the Act. Why is it so?

¹⁰⁵ See Idahosa v. R. [1965] NMLR 85.

¹⁰⁶ See Ezechi v. The Queen [1962] 1 All NLR 113. See also Akinlenubola v. Commissioner of Police (1976) 6 SC 205; Enahoro v. The Queen [1965] 1 All NLR 125.

An agent provocateur, in general parlance, is a spy, a secret agent hired to penetrate an organization to gather evidence against its members or to incite trouble.¹⁰⁷ An agent provocateur is an undercover agent who investigates or participates in a crime, often by infiltrating a group involved in suspected illegal conduct. He is also a person who entraps or entices another to break the law and then inform against the other as a lawbreaker. In short, an agent provocateur is a bad man, a die-hard criminal whose evidence section 55(b) and (c) treats with soft glove. Again, why is it so?

Section 56 bars the application of any written law or rule of law from the admissibility of statement of accused persons within the section. So much is loaded into the section. Some of the loads cannot be carried by the Evidence Act or the Criminal Procedure Act and the Criminal Procedure Code. The accused person, as long as he remains accused, needs equal protection as the victim of his crime. Section 56 does not appear to give such protection. Again, why is it so?

Section 60 provides that in any proceedings under the Act, evidence shall not be admissible to show that any such gratification mentioned in the Act is customary in any profession, trade, vocation or calling or on a social occasion. This provision is completely out of line, like or taste with the practical realities in society. Rule 3(F)(2) of the Code of Conduct for Judicial Officers of the Federal Republic of Nigeria permits personal gifts or benefits from relatives or personal friends to such extent and to such occasions as are recognized by custom. Section 60 is taking the matter too far. Again, why is it so?

That takes us to the EFCC Act. We will take sections 15, 26, 27 and 32 of the Act. Section 15 provides for proof by a public officer. Section 26 provides for investigation of assets under properties of a person arrested under the Act. Section 27 provides for disclosure of assets and properties by an arrested person. Section 32 provides for the consequences of an acquittal in respect of assets and properties.

¹⁰⁷ Blacks Law Dictionary, 6th edition, page 64.

Section 15(1) provides that any public officer who, in the discharge of his duty under the Act, presents to another public officer who is to take a decision thereon or do any other act in relation thereto gives information which is false in any material particular, commits an offence under the Act. The onus shall be on him to prove that such information was supplied to him by another person and that he exercised all diligence to prevent the commission of the offence having regard to the nature of his function in that capacity and in all circumstances. Section 15(3) provides a penalty not exceeding 25 years. Section 15 violates section 36(5) of the Constitution which presumes the accused person innocent until he is proved guilty. The burden is on the prosecution to prove the guilt of an accused beyond reasonable doubt.

The same cannot be said of section 3(2) and (3) of the Money Laundering (Prohibition) Act, 2004 which provides as follows:

- “(2) An individual shall be required to provide proof of his
- (a) identity by presenting to the financial institution a valid original copy of an official document bearing his names and photograph; and
 - (b) address, by presenting to the financial institution the originals of receipts issued within the previous three months by public utilities.
- (3) A body corporate shall be required to provide proof of its identity by presenting its certificate of incorporation and other valid official documents attesting to the existence of the body corporate.”

The above provision is consistent with section 139 of the Evidence Act which provides that the burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence.

By section 26, the Commission is empowered to trace and attach all assets and properties of an arrested person and thereafter cause to be obtained an interim attachment order by the court. Why the seizure before an interim attachment

order? Why not the other way round, which is consistent with the rule of law? Section 26 creates a state of helplessness or hopelessness to the court, in respect of the accused. That is bad. The argument that the arrested person will hide the assets and properties, is neither here nor there.

Section 27(1) provides that where a person is arrested for committing an offence under the Act, it shall be obligatory for such person to make full disclosure of all his assets and properties by completing the Declaration of Assets Form as specified in Form A of the Schedule to the Act. Section 37(3) provides penalty for making a false declaration, failure to answer questions or neglect or refusal to make a declaration or furnish any information. Section 27 violates the constitutional right of the accused to remain silent or avoid answering any question until after consultation with a legal practitioner or any other person of his own choice. That is the essence of section 35(2) of the 1999 Constitution.

By section 32, the Commission is empowered to attach the property of a discharged and acquitted person if the discharge is merely given on technical grounds. Why should the court confirm an interim order of attachment of the property of a person who is discharged and acquitted? Is that justice? Section 32(3) meets the justice of a person who has been discharged and acquitted. The element of confirmation in section 32(1) is not fair to the person who is discharged and acquitted.

JURISDICTION OF COURTS

Offences in the Criminal Code Act and the Penal Code including corruption are usually tried in the High Court. Section 61(3) of the Corrupt Practices and Other Related Offences Act vests in the Chief Judge of a State or of the High Court of the Federal Capital Territory, Abuja, power to designate a court or judge or such number of courts or judges as he will deem appropriate to hear and determine all cases of bribery, corruption, fraud, or other related offences arising under the Act or any other laws prohibiting fraud, bribery, or corruption. A court or judge so designated will not while being so designated, hear or determine any

other case provided that all cases of fraud, bribery, or corruption pending in any court before the coming into effect of the Act will continue to be heard and determined within any length of time. Section 18 of the EFCC Act provides that the Federal High Court or High Court of a State has jurisdiction to try offenders under the Act.¹⁰⁸

Section 19(1) of the Money Laundering (Prohibition) Act, 2004 provides that the Federal High Court shall have exclusive jurisdiction to try offences under the Act. Section 14 of the Advance Fee Fraud and Other Fraud Related Offences Act, 2006 provides that the Federal High Court or the High Court of the Federal Capital Territory and the High Court of the States shall have jurisdiction to try offences and impose penalties under the Act.

As it is, ICPC Act vests jurisdiction in the State High Court or the High Court of the Federal Capital Territory. The EFCC Act vests jurisdiction in the Federal High Court or High Court of a State. The Money Laundering (Prohibition) Act vests in the Federal High Court exclusive jurisdiction. And finally the Advance Fee Fraud and Other Fraud Related Offences Act vests jurisdiction in the Federal High Court, or the High Court of the Federal Capital Territory or the High Court of a State.

All the Acts, other than the ICPC Act, share in common in terms of jurisdiction the Federal High Court. They seem to find in that court, a darling; but not the ICPC Act. As a matter of law, section 19(1) of the Money Laundering (Prohibition) Act, 2004 vests exclusive jurisdiction in that court. Both the ICPC Act and the Advance Fee Fraud and Other Fraud Related Offences Act share in common in terms of jurisdiction, the High Court of the Federal Capital Territory and the High Court of a State. The EFCC Act also shares with the ICPC Act and the Advance Fee Fraud and Other Fraud Related Offences Act in terms of jurisdiction, the High Court of a State.

¹⁰⁸ Section 18(1), ibid.

While the ICPC Act, and the EFCC Act vest jurisdiction in two courts, the Advance Fee Fraud and Other Fraud Related Offences Act vests jurisdiction in three courts. The Money Laundering (Prohibition) Act vests jurisdiction in only the Federal High Court; a jurisdiction which is exclusive to that court.

There is no constitutional problem vesting the jurisdiction in the three courts as the Constitution generically covers the offences in the anti-corruption statutes.¹⁰⁹ The only problem is in respect of the venue, which is not provided for in either the Constitution or the Acts. The Criminal Procedure Act and the Criminal Procedure Code provide for venue.

By section 64 of the Criminal Procedure Act, an offence shall be tried or inquired into by a court having jurisdiction in the division or district where the offence was committed.¹¹⁰ Where a person is accused of the commission of any offence by reason of anything which has been done, or of anything which has been committed to be done, any of the consequences which has ensued such offence may be tried or inquired into by a court having jurisdiction in the division or district in which any such thing has been done or committed to be done or any such consequences has ensued.¹¹¹

Section 134 of the Criminal Procedure Code provides that every offence shall ordinarily be inquired into and tried by a court within the local limits of whose jurisdiction: (a) the offence was wholly or in part committed, or some act forming part of the offence was done; (b) some consequence of the offence has ensued; or (c) some offence was committed by reference to which the offence is defined; or (d) some person against whom; or property in respect of which, the offence was committed is found, having been transported either by the offender or by some person knowing of the offence.

¹⁰⁹ Sections 251(1), 257(1) and 272(1) of the Constitution of the Federal Republic of Nigeria, which provide for the jurisdiction of the Federal High Court, High Court of the Federal Capital Territory, Abuja and High Court of a State, respectively.

¹¹⁰ Section 64(a), ibid.

¹¹¹ Section 64(b), ibid.

CONCLUSION

In the light of the above, the following suggestions are made as a way forward to the successful prosecution of the anti-corruption offences in the interest of the rule of law.

1. The duplication of offences is a constraint in the successful prosecution of the anti-corruption offences. As the ingredients of the offences in the different statutes are not the same, a situation arises where an accused finds himself battling with seemingly the same offence conveying different ingredients. Although the Criminal Code Act, the Penal Code and the Corrupt Practices and Other Related Offences Act, the Money Laundering (Prohibition) Act and the Advance Fee Fraud and Other Fraud Related Offences Act, generally provide for imprisonment of not more than seven years, the EFCC Act sings a different song of penalty. Reading section 17 and the definition of economic crime in section 40 of the Act together, reveal that an accused person who commits anti-corruption offence could be punished for a term not less than fifteen years and not exceeding twenty-five years.¹¹² As it is, it is almost a game of luck, if not really one, under what statute an accused is charged. That is not good for the administration of criminal justice, as it violates the well known principles of criminology and penology. It is in the interest of both that the offences are streamlined.

2. Investigation and interrogation of anti-corruption offences should, in the interest of the rule of law, comply with the provisions of the Criminal Procedure Act, the Criminal Procedure Code, the Judges Rules of England 1964 and the Criminal Procedure (Statement to Police Officers) Rules, 1960. In other words, while offences committed in the Northern States should comply with the Criminal Procedure Code and the Criminal Procedure (Statement to Police Officers) Rules, 1960, those committed in the Southern States should comply with the Criminal Procedure Act and Judges Rules of England, 1964. Above all, accused persons must, in the process of investigation and interrogation, be given their

¹¹² See section 17(2) of the Act.

constitutional rights, as breach of those rights will be breach of the rule of law. It is sad to note that some of the investigations and interrogations of accused persons under the Corrupt Practice and Other Related Offences Act and the EFCC Act are violations of the rule of law. Police brutality in the interrogation rooms is said to be on a large scale, all in the desire to obtain inculpatory evidence to commit the accused.

3. The Constitution of the Federal Republic of Nigeria, 1999 is clear on who takes the decision to prosecute and who prosecutes offences in Nigeria. The Constitution vests the decision on the Attorney-General of the Federation in respect of federal offences and on the Attorney-General of a State in respect of State offences. That apart, the Police have the right to prosecute certain offences. That is subject however to the constitutional power of the Attorney-General “to take over and continue criminal proceedings that may have been instituted by any other authority”. The recent quarrel over who is entitled to prosecute offences under the Act is not in the interest of the rule of law. The position taken by the Attorney-General of the Federation during the quarrel is valid in law.

4. As all anti-corruption offences are bailable,¹¹³ accused persons must, as a matter of constitutionality or constitutionalism, be released on bail. The law of bail requires the Judge to exercise his discretion judicially and judiciously. Stringent and outrageous bail conditions amount to a wrong exercise of discretion. Money bail out of the reach of accused person is not judicial or judicious. Trial Judges must give conditions that will enable the accused return to take his trial. Trial Judges should stop giving outrageous and impossible conditions that will make accused persons stay in pre-trial custody and therefore unable to source for exculpatory evidence in their defence. Some of the trial Judges seem to be playing to the gallery in the bail decision. Unfortunately, there is no gallery space in the court. Outrageous and impossible bail conditions are tantamount to denying

¹¹³ See section 42(1) of the Corrupt Practices and Other Related Offences Act which provides that “every offence under this Act shall be a bailable offence for the purpose of the Criminal Procedure Act or Code.”

accused persons bail. Let no Judge do that. It is not the province of the rule of law that an accused person should languish in prison custody pending proof that he is guilty of an offence. The argument justifying the stringent bail conditions as reflection of the need to stamp out corruption in the Nigerian society is not supported by law, as it is a mere expression of sentiment which has no place in law.

5. Some of the provisions in the Corrupt Practices and Other Related Offences Act and the EFCC Act violate the rule of law. They violate existing laws in our practice and procedure and the law of evidence. The provisions have been taken above. One example is the burden of proof shifted on the accused. That is clearly against the presumption of innocence of an accused person until proved guilty.¹¹⁴ It is suggested that all provisions in the Acts which violate the rule of law should be expunged forthwith in the interest of the rule of law.

6. Jurisdiction of the courts in the Acts should be streamlined in the interest of the administration of criminal justice. As venue plays a very big and important role in the jurisdiction of the courts, the prosecuting bodies should have regard to the venue of the court in their charge decision. Forum shopping, as encouraged by the statutes is not in the interest of the rule of law. It is unthinkable to prosecute an offence committed in Ibadan in Kano. That is against the provisions of the Criminal Procedure Act and the Criminal Procedure Code. The practice should stop.

In sum, one innate and cancerous problem in Nigeria is corruption. It is one problem which virtually the whole country seems to disclaim and detest, but which unfortunately is the bane of the country. It is the issue most talked about in the country, particularly in contemporary times, and yet no solution has been found and none is in proximity or in sight. Corruption is a social malady that is fastly eating up the fabrics and the dynamics of the Nigerian economy. It blinds the eyes of the corrupt persons to do the wrong thing most of the time if not all the

¹¹⁴ Section 36(5), *ibid.*

time. It is an evil, a complete evil. It must be destroyed from the society for good of the society and mankind. When that happens, society will be happy. Man in society will be happy too. Sociology and Economics will triumph to the egalitarian advantage of the entire nation. It was in the news a couple of months ago that efforts are on to introduce anti-corruption studies in educational institutions. Let that day come quickly before society decays and completely ruined because of corruption. For now, it is causing so much harm to the Nigerian economy. And that worries me. It bothers me too.

Thank you and thank you.