CAN NIGERIAN DEMOCRACY SURVIVE "THE FIGHT" AGAINST CORRUPTION?

By Professor I.E. Sagay, SAN

1. **Introduction**:

It is befitting that an annual memorial colloquium is being held in memory of the late Colossus of the law, Chief F.R.A. Williams. His contributions to constitutional development, the supremacy of the rule of law, and the sustenance of democracy are unrivaled. I am therefore honoured to be part of today's programme.

Can Nigerian Democracy Survive "The Fight" against Corruption? This is a very odd title. For in principle, democracy is enhanced and strengthened by the eradication and elimination of corruption. Indeed, available empirical evidence indicate quite clearly that the upsurge in corruption and its present overwhelming stature in the Nigerian culture, is a function of military intervention in governance and the long absence of democratic rule.

This is confirmed by the Hon. Justice M.M.A. Akanbi, CFR, the first Chairman of the Independent Corrupt Practices and other Related Offences Commission. In a paper delivered in March 2003, the Hon. Justice Akanbi stated inter alia as follows:

> "Unfortunately, following the various coups d'etat in this country and the long years of military rule, the course of history changed, our value judgment changed, honesty and integrity were relegated to the background. The rule of law gave way to the rule of force. The craze for wealth, ill-gotten gain escalated or gained ascendancy. We became more and more materialistic so much that it was no longer possible to convince the average Nigerian child that he can achieve greatness and position of respectability without necessarily being corrupt or that he can still achieve financial success in business or in life without having recourse to corrupt means or

> corrupt dealings. As the years rolled by, so overwhelming was the situation that for some, the worship of money became the order of the day. Flamboyance and ostentation took over and today we are in a 'fix'"[1]

Why then should the fight against corruption be a threat to democracy in Nigeria? My answer is that this threat arises from some aspects of recent laws against corruption and economic crime generally and the manner in which we have chosen to implement them.

This is particularly so with respect to the laws establishing the I.C.P.C. and EFCC.

One other preliminary point ought to be made. Democracy and federalism are inseparable twins. There can be no real federalism without democracy and there can be no real democracy in a federal system in which the autonomy of the federating units is not protected and respected. As Stephanie Dion, the former President of the Canadian Privy Council and Minister of Intergovernmental Affairs observed in April 2000,[2] democracy is indispensable to federalism. The two are a pair of concepts which lead, one to the other. Every federation experiences an on going dialectic between the autonomy of its components and the solidarity that unites them. In her observation on democracy and federalism, she propounds that:

> "Without democracy, genuine federalism is impossible. To be sure, there have been dictatorships or totalitarian regimes that have claimed to be federations. Some still exist today. But genuine federalism presupposes the respect of a division of constitutional powers between two orders of government. If all the political powers in the country are infact under the control of a single party, it is difficult for the federative form of the state to be anything more

[1] Fighting Corruption – The Journey So Far, a paper presented by Hon. Justice M.M.A. Akanbi, CFR.

[2] "Federalism and democracy: the Canadian Experience", an address dated 14 April 2000 at Winnipeg in Manitoba.

than a façade. It is within a democracy that federalism finds its true meaning."

I will illustrate with brief references to the two institutions mentioned above and the laws establishing them.

2. **The Corrupt Practices and Other Related Offences Act 2000.**

The major problem with the Act establishing the Commission is the total disregard it has for the federal nature of this country. It is common knowledge that legislation in the area of criminal law is a residual one in our Constitutional law since crimes and criminal law are not listed in both the exclusive legislative list and the concurrent legislative list. And yet not only does the I.C.P.C. Act constitute a major law on the crime of corruption applicable throughout Nigeria, but it also extends the jurisdiction of the I.C.P.C. to acts of corruption in the public service of the states. Indeed, the definition of public officer in the Act shows conclusively that the jurisdiction of the Commission extends to state offices and officers. The Act provides as follows:

> "**Public Officer**" means a person employed or engaged in any capacity in the public service of the Federation, State or Local Government, public corporations or private company wholly or jointly floated by any government or its agency including the subsidiary of any such company whether located within or outside Nigeria and includes Judicial officers serving in Magistrate, Area or Customary courts or Tribunals;

Indeed, this overarching power of the federal government and its intrusion into an exclusive area of state authority has been held to be valid by the Supreme Court in the Attorney General of Ondo State v. Attorney General of the Federation & 35 Ors.[3] The Supreme Court relied on Section 15 (5) of the Constitution which provides that the state shall abolish all corrupt practices and abuse of power. Because the Act creates offences and criminal sanctions for corruption

[3] [2002] 27 WRN 1

throughout Nigeria, including the states, its validity was challenged by Ondo State. The following issues arose for consideration:

> "1. Whether the Corrupt Practices and Other Related Offences Act, 2000, is a law with respect to a matter or matters upon which the National Assembly is empowered to make laws for the peace, order and good government of Nigeria under the 1999 Constitution of the Federal Republic of Nigeria.
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> 2. Further and in the alternative to question (i), whether the National Assembly has power to make laws for the peace, order and good government of the Federal Republic of Nigeria with respect to the criminal offences contained in the Corrupt Practices and Other Related Offences Act, 2000.
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> 3. Whether the Attorney-General of the Federation or any person authorized by the Independent Corrupt Practices and Other Related Offences Commission can lawfully 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 any of the provisions of the said Corrupt Practices and Other Related Offences Act 2000.
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> 4. Whether all the powers conferred on the Independent Corrupt Practices and Other Related Offences Commission or on other functionaries or agencies of the Federal Government by the Corrupt Practices and Other Related Offences Act, 2000 are exercisable in Ondo State in relation to the activities of any person in that state (including any public officer or functionary or officer or servant of the government of Ondo State)."

In his leading judgment upholding the validity of the ICPC Act, Uwais, CJN, stated as follows:

"Now section 4 subsection (2) of the Constitution provides that 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. This means that the National Assembly is empowered to legislate under item 60(a) for the purpose of establishing and regulating the ICPC for the Federation. This the National Assembly has done by enacting the Act.

The ICPC is, by the provisions of item 60(a), to promote and enforce the observance of the fundamental objectives and directive principles of state policy as contained under chapter II of the Constitution. The question is: how can the ICPC enforce the observance? Is it to use of force? Is it to legislate or what? The ICPC cannot do either of these because to use force or coercion in enforcing the observance will require legislation. The ICPC has no power to legislate. Only the National Assembly can legislate.

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Since the subject of promoting and enforcing the observance comes under the exclusive legislative list it seems to me that the provisions of item 68 of the exclusive legislative list come into play. Therefore, it is incidental or supplementary for the National

Assembly to enact the law that will enable the ICPC to enforce the observance of the fundamental objectives and directive principles of the state policy. Hence the enactment of the Act which contains provisions in respect of both the establishment and regulation of ICPC and the authority for the ICPC to enforce the observance of the provisions of section 15 subsection (5) of the Constitution. To hold otherwise is to render the provisions of item 60(a) idle and leave the ICPC with no authority whatsoever. This cannot have been the intendment of the Constitution Paragraph 2 (a) of part III

> of the second schedule to the Constitution, which provides that reference to incidental and supplementary matters in the Constitution (and therefore item 60(a) of the exclusive legislative list) includes reference to offences, I think strengthens the view which I hold."

It should be noted that Section 15 of the Constitution is contained in the fundamental objectives and directives principles of state policy which are non-justiciable. If the Supreme Court argument is followed to its logical conclusion then both the federal and state governments can make laws on political, economic and social objectives which then become binding and enforceable, contrary to Section 6 (6) (C) of the Constitution which expressly makes all the provisions of Chapter 2 of the Constitution non-justiciable. I agree entirely with Prof. Nwabueze when he states as follows in his book, Constitutional Democracy in Africa, vol. 1.[4]

> "Surely, the practical effect of all these provisions of the Act is that the management of nearly all aspects of the affairs of a state government is subject to control and interference by the commission, its officials and other authorities of the federal government. Little, if anything, is left of the autonomy of the state governments; the federal system would have ceased to exist in all but name, and would, for all practical purposes, have been converted to a unitary system.
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> The Act will be like the Sword of Damocles which the president can hold over the heads of the state governors to coerce them to fall in line with his wishes and schemes. The governors will have lost their independence as the heads of autonomous governments as the names of those opposed to his wishes and designs will be sent, one after another, to the commission to be investigated ostensibly for alleged corruption under Section 52(1) of the Act. This is the

[4] Spectrum Books 2003, pp 99 – 100.

evil use to which the Act is susceptible, and for which it is being used.

The inequality flowing from a situation where the head of the federal government can submit to the commission for investigation for alleged corruption, the name of the head of a state government, but the latter cannot do the same to him is too glaring and blatant to be compatible with true federalism. And a federal system which permits the removal, for corruption or for any other reason, of the head of a state government at the instance of the head of the federal government, or even *vice-versa*, is no true federal system at all. No interference could be worse than that. And it is no less an interference because the removal is for corruption, our abhorrence of corruption notwithstanding.

The autonomy of a state government is also clearly interfered with by the duty imposed on the chief judge of a state to "designate, by order under his hand, a court or judge or such number of courts or judges as he shall deem appropriate to hear and determine all cases of bribery, corruption, fraud or related offences arising under the Act or under any other law" – a court or judge so designated shall not, while the designating order subsists, hear any other cases (Section 61 (3) of the Act). This provision is clearly unconstitutional, and void by the decision of the Supreme Court in Attorney General of Ogun State & Others v. Attorney-General of the Federation & Others (1982) 3 NCLR 583."[5]

3. **The Economic and Financial Crimes Commission (Establishment) Act 2004.** Here again with the undoubted intention of promoting the public good, the Act has trampled on the Constitution and to a certain extent, the doctrine of

[5] At pages 99 - 100

federalism and the autonomy of the federating units. Thus Section 6 (functions of the Commission) provides inter alia as follows:

> "(b) the investigation of all financial crimes including advance fee fraud, money laundering, counterfeiting, illegal charge transfer, futures market fraud, fraudulent encashment of negotiable instruments, computer credit card fraud, contract scam, etc.
> (c) the co-ordination and enforcement of all economic and financial crimes laws and enforcement functions conferred on any other person or authority;
> (m) taking charge of, supervising, controlling, co-ordinating all the responsibilities, functions and activities relating to the current investigation and prosecution of all offences connected with or relating to economic and financial crimes;
> (n) the co-ordination of all existing economic and financial crimes, investigating units in Nigeria."

The portions of the Act mentioned above appear to be inconsistent with various provisions of the Constitution because they constitute the EFCC into a separate additional police force under the unfettered control and direction of the President. The provisions would also appear to undermine the Constitutional authority of the Attorney-General of the Federation in the sense that it places the co-ordination, enforcement, investigation and prosecution of all offences connected with or relating to Economic and Financial Crimes in the hands of the Commission instead of that of the Attorney-General of the Federation. And yet the Constitution clearly provides as follows on sections 150(1) and 174(1).

> "150 (1) There shall be an Attorney-General of the Federation who shall be the Chief Law Officer of the Federation and a Minister of the Government of the Federation."

> 174 (1) The Attorney-General of the Federation shall have power -

(a) to institute and undertake criminal proceedings against any person before any court of law in Nigeria, other than a court-martial, in respect of any offence created by or under any Act of the National Assembly.
(b) To take over and continue any such criminal proceedings that may have been instituted by any other authority or person; and
(c) To discontinue at any stage before judgment is delivered any such criminal proceedings instituted or undertaken by him or any authority or person."

Furthermore, it should be noted that the authority of the EFCC is pan Nigeria in nature. In other words its powers of investigation, prosecution, enforcement including arrest for financial and economic crimes extend to state and Local Government offices, officials, and crimes exclusively involving a state's resources. Therefore my earlier criticism of the intrusive ramification of the powers of the I.C.P.C. applies equally to the powers of the EFCC.

The Vanguard Newspaper of Monday 24th April published a suit filed by the Abia State Government, challenging the constitutionality of various powers and functions conferred on the Commission by the EFCC Act. These included the controversial power to freeze bank accounts of States. Some of the issues put forward for the court's determination, include:

"Whether Section 40 of the EFCC Act 2004 is not unconstitutional having regard to the provisions of Section 36 of the 1999 Constitution.

The said Section 40 of the EFCC Establishment Act reads: "Subject to the provisions of the Constitution of Federal Republic of Nigeria, 1999, an application for stay of proceedings in respect of any criminal matter brought out by the commission before the high court shall not be entertained until judgment is delivered by the high court."

Other questions posed for determination are:

Further or in the alternative, whether Section 40 of the EFCC Establishment Act 2004 is not a legislative judgment;

Whether it is lawful or not for the EFCC to freeze the account of any person pursuant to its powers under Section 34 (1) of the EFCC Act, notwithstanding the provisions of Section 36(1) and (5) of the 1999 Constitution of the Federal Republic of Nigeria 1999;

Whether the powers conferred on the Economic and Financial Crimes Commission (EFCC) by Section 7(1) of the EFCC Act, 2004 extend to investigations into the financial affairs of a state government;

Whether the Government of Abia State is a person, corporate body or organization cognizable under Section 7(1) of the EFCC Act 2004; and

Whether the EFCC has powers by virtue of Section 34(1) and (2) of the EFCC Act 2004 to freeze any account belonging to any government in the Federation including the Abia State Government or at all."

I am precluded publicly expressing an opinion on these issues since the matter is subjudice.

4. **Conclusion**

In assessing the establishment and operation of these two major anti-corruption agencies, one is confronted with a major dilemma.

In the first place, we are being compelled to choose between the obvious sanitizing impact they have had in our society and the curtailment of democracy, the rule of law and federalism associated with their operations. Before the arrival of the twin anti-corrupt and anti-fraud agencies in the Nigerian legal firmament,

the country was virtually overwhelmed and at the point of succumbing to the relentless onslaught of corruption and fraud in our polity. The activities of the two agencies are obviously having a positive impact on our society, although we are still a long way from salvation.

There has been a drastic reduction in cases of advanced fee fraud and the criminal use of the internet. There has also been a breakthrough in a former no-go area, namely, the arrest, prosecution and conviction of some of society's "sacred cows". But much needs to be done to maximize the impact of the two agencies. Firstly, regardless of the wiles, whims, caprices and private agenda of politicians in power, the officers of the agencies including their chairmen should endeavour to defuse the widely held impression that their agencies can be used and are being used to haunt down political opponents whilst political associates of the powerful, with criminal records are being shielded from arrest and prosecution. Secondly, persons arrested in the course of the operation of the two agencies should be accorded their full constitutional rights, namely legal representation and bail as soon as possible. Thirdly, the states of the federation should in future be encouraged to make laws empowering the two agencies to operate within state jurisdiction rather than the present doubtful intrusion into state jurisdiction without appropriate constitutional authority.

The Supreme Court in the Ondo State case, had to engage in a strained interpretation of the Constitution, in order to discover a Federal jurisdiction to make a criminal law applicable to states, i.e., by connecting sections 4(2), 15(5) and items 60(a), 67 and 68 in the Exclusive Legislative list and item 2(a) of part III of Schedule 2, i.e., "Supplemental Interpretation". Any interpretation that requires so much help to achieve justification is suspect. We must admit on the other hand that there was a strong dose of the promotion of public policy in the arguments of the Justices.

In other words, the Supreme Court was here engaged in judicial activism; using law and the Constitution as instruments of social engineering. Uwais, CJN

revealed the crusading spirit behind his interpretation of the Constitution in the following passage from his judgment:

> "It has been argued that the fundamental objectives and the directive principles of state policy are meant for authorities that exercise legislative, executive and judicial powers only and therefore any enactment to enforce their observance can apply only to such persons in authority and should not be extended to private persons, companies or private organizations. This may well be so, if narrow interpretation is to be given to the provisions, but it must be remembered that we are here concerned not with the interpretation of a statute but the Constitution which is our organic law or grundnorm. Any narrow interpretation of its provisions will do violence to it and will fail to achieve the goal set by the Constitution. See Nafiu Rabiu v. State (1980) 8 – 11 S.C. 130; (1982) 2 NWLR 117; and Aqua Ltd. V. Ondo State Sports Council (1988) 4 NWLR (Pt. 91) 622; Tukur v. Gov., Gongola State (1989) 4 NWLR (Pt. 117) 517 and Ishola v. Ajiboye (1994) 6 NWLR (Pt. 352) 506.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."

In other words this judgment was intended to be a partner in the fight to eradicate corruption from our society. It was a judgment with a social agenda.

And so my verdict on the issue, "Can Nigerian Democracy Survive " the Fight" against Corruption" is therefore as follows. Inspite of the numerous blemishes in the current fight against corruption, it is producing positive results in the social and economic life of the country. The critical question is, how these can be achieved without sacrificing democratic rights, the rule of law and Federalism. We must endeavour to amend those aspects of the laws establishing the two

agencies in order to eliminate their anti-democratic and anti-federalism character and insist that they should operate objectively and even handedly in our polity and society regardless of whose ox is gored. That is the only way in which universal confidence and the appropriate societal support can be generated for their operations nation wide.