

# CONSTITUTIONALISING INDEPENDENT ANTI-CORRUPTION AGENCIES IN NIGERIA

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## **Abstract**

*Since 1979, Nigeria's Constitution has always mandated the government to abolish corruption (and abuse of power). The extant Constitution of 1999 which also stipulates this, generally mandates the government to establish bodies to give effect to this and other directives in the policy clause where the mandate is conferred. By 2002 and 2003, Nigeria established two agencies through Acts of the National Assembly with specific powers to tackle corruption and other official and private (financial) malfeasance. While these agencies have been quite visible and active in anti-corruption prosecution efforts, questions remain about their operational independence and funding arrangements, among other concerns. In this paper, these issues are discussed by examining relevant sections of the statutes creating the agencies. Using the context of cross-country comparison and global best practices, the paper argues for the constitutionalisation of these agencies to strengthen their effectiveness.*

**Keywords:** Agency; Anti-Corruption; Constitutionalisation; Corruption; Independence.

## **INTRODUCTION**

One issue about which there seems to be a national consensus in Nigeria is the prevalence of corruption across virtually every strata of society. The cankerworm appears to have existed for decades. In his coup-day speech on 15 January, 1966 Major Kaduna Nzeogwu, leader of the putsch, identified increasing cases of corruption and their impact on development as major

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reasons for the first military coup in Nigeria.<sup>1</sup> Subsequent military interventions were justified by complaints of upsurge in corrupt practices.<sup>2</sup> Perhaps, to underscore the longstanding concerns about the need to stamp corruption out of the country, framers of the 1979 Constitution inserted a policy directive in section 15 (5) requiring the government to abolish corruption and abuse of power. This directive is retained in the same portion of the current Constitution of 1999. It is against this background, and concerted global crusade to strengthen municipal efforts against corruption that the government of President Olusegun Obasanjo took the novel action of establishing two national anti-corruption agencies. The Independent Corrupt Practices Commission (ICPC), established by an Act of 2002 and the Economic and Financial Crimes Commission (EFCC) established by an Act of 2003 are charged with mandates which invariably focus on corruption and abuse of public trust in financial and related matters.

Despite the positive intentions behind the establishment of these agencies and the efforts so far exhibited by them, there are clear indications of growing public perception that they are increasingly being used for purposes not entirely altruistic.<sup>3</sup> This impression remains despite the apparent independence of the agencies as provided by the legislations establishing them.<sup>4</sup> This paper examines the relevant sections of the legislations' to determine the extent of

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<sup>1</sup> Major Chukwuma Kaduna Nzeogwu Radio Broadcast – Announcing Nigeria’s First Military Coup on Radio Nigeria, Kaduna On January 15, 1966. Published by *Vanguard Newspapers* (Nigeria, 30 September, 2010).

<https://www.Vanguardngr.Com/2010/09/Radio-Broadcast-By-Major-Chukwuma-Kaduna-Nzeogwu-%E2%80%93-Announcing-Nigeria%E2%80%99s-First-Military-Coup-On-Radio-Nigeria-Kaduna-On-January-15-1966/> accessed 7 August 2018.

<sup>2</sup> Olorungbemi S T ‘The Impact of Military Coup D’etat on Political Development in Nigeria’ [2015] (6) (10) *International Journal of Business and Social Science*, 198. [https://ijbssnet.com/journals/Vol\\_6\\_No\\_10\\_October\\_2015/17.pdf](https://ijbssnet.com/journals/Vol_6_No_10_October_2015/17.pdf) accessed 7 August 2018.

<sup>3</sup> Editorial of the Daily Trust Newspaper ‘Challenges the EFCC must address’ Daily Trust Newspaper (Nigeria, 17 September, 2013) <https://www.dailytrust.com.ng/daily/editorial/5607-challenges-the-efcc-must-address> accessed 8 August 2018.

<sup>4</sup> See sections 6 & 7 of EFCC Act Cap E1, LFN 2004 & Section 1(14) of ICPC Act, Cap C 31, LFN 2004.

independence conferred on them. The paper discusses the need to constitutionalize anti-corruption agencies in Nigeria, using cross-country illustration and global best practices in that regard. The focus is to strengthen the institutional capacity of anti-corruption efforts in order to make the crusade more effective and less susceptible to manipulation.

## Conceptual Clarification

### *Corruption*

The term ‘corruption’ has been variously defined, underscoring its complexity and multi-dimensional nature.<sup>5</sup> The etymology of corruption is derived from the Latin *corruptus*, meaning “to break”.<sup>6</sup> Perhaps, the most popular definition of corruption is that offered by the Organisation for Economic Cooperation and Development (OECD) *Glossary of Statistical Terms* (2007) which defines corruption as “the active or passive misuse of the powers of public officials (appointed or elected) for private financial or other benefits”.<sup>7</sup> Corruption has also been defined as “the intentional non-compliance with the arm’s length principle aimed at deriving some advantage for oneself or for related individuals from this behaviour.”<sup>8</sup>

A core component of the principle is that personal or other relationships should play no part in the economic decisions that involve more than one party and that equal treatment of all economic agents is essential for a well-working market economy.<sup>9</sup> The principle postulates that bias towards particular

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<sup>5</sup>. See generally, Jonathan Rose ‘The Meaning of Corruption: Testing the Coherence of Adequacy of Corruption Definitions’ [2018] (20) (3) *Journal of Public Integrity*, 220-233; Staffen Anderson ‘The Varieties of Corruption: Lessons from a Least Corrupt Case’ [2013] 26-27 *Bergen*, 1-36, <[www.diva.portal.org](http://www.diva.portal.org)>accessed 8 August 2018.

<sup>6</sup>. See Gorai M G ‘Foundational Understanding of Corruption’ a publication of The Ethics and Anti-Corruption Commission Kenya, <<http://legaloffice.uonbi.ac.ke/sites/default/files/centraladmin/legaloffice/Foundational%20Understanding%20of%20Corruption.pdf>>accessed 8 August 2018

<sup>7</sup>. <<https://stats.oecd.org/glossary/details.asp?ID=4773>> 152, accessed 14 August 2018.

<sup>8</sup>. Boris Begovic ‘Corruption: Concepts, Types, Causes, and Consequences’ [2005] published by the Center for International Private Enterprise an affiliate of the U.S. Chamber of Commerce 1155 Fifteenth Street NW • Suite 700 • Washington, DC <https://www.scribd.com/.../Corruption-Concepts-Types-Causes-and-Consequences>-accessed 14 August 2018

<sup>9</sup>. See generally, Wenli Cheng and Dingsheng Zhang ‘The Arm’s Length Principle, Transfer Pricing and Foreclosure under Imperfect Competition’, [2010] Department

economic agents creates a necessary condition for corruption.<sup>10</sup> Corruption can occur in any circumstance – whether in the public or private sector, where someone acts as an agent of another person or group. It affects all levels of society, from local to national governments, civil society, judiciary, and in large and small businesses.<sup>11</sup> The ICPC Act defines corruption to include “...bribery, fraud and other related offences.”<sup>12</sup> Viewed from the above perspectives, certain elements are inescapable in determining what constitutes corruption. Corruption is invariably a dishonest act. Added to the legal strictures attached to it, corruption is immoral and antithetical to the virtues of society.<sup>13</sup> It constitutes an abuse or misuse of position, power and authority.<sup>14</sup>

### ***Why Constitutionalisation?***

Constitutionalisation is derived from the idea of a constitution. It is the practice of making something or a phenomenon subject to the constitution or to incorporate into or sanction under and made subject to the constitution.<sup>15</sup>

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Economics Discussion Paper, Monash University, Australia  
<https://pdf.semanticscholars.org> accessed 15 August 2018.

<sup>10</sup>. These guiding principles are necessary in determining whether or not an act or omission by an economic agent amounts to corruption. For instance accidental violation of the arm’s length principle does not represent corruption. Also there must be some advantage for the individual who commits a violation of the arm’s-length principle; otherwise, there is no corruption. Impartiality may sometimes represent racism, but not corruption. See Boris Begovic ‘Corruption: Concepts, Types, Causes, and Consequences’ Ibid note 2.

<sup>11</sup>. M Zoe, M Shannon and B. Peter ‘A Comparative Analysis of the OECD Anti-Corruption Models (Asia & Europe) And Australia’s Existing Anti-Corruption Platform’ *International Journal of Business and Commerce Vol. 4, No 03 [01-23] (ISSN: 2225-2436)*<[www.ijbcnet.com](http://www.ijbcnet.com)>accessed 15 August 2018 .

<sup>12</sup>. See Section 2 of the ICPC Act, Cap C 38, LFN 2004.

<sup>13</sup>. See Yuechin Diao “Ethical Analysis of Corruption” (2012) Vol. 11 (5) *Canadian Social Science*, 146-149; Charles Garofalo, Dean Geuras, Thomas D Lynch and Cynthia E Lynch “Applying Virtue Ethics to the Challenges of Corruption” (2001) Vol. 6 (2) *The Innovational Journal: The Public Sector Innovation Journal*, 1-13; Lebohang Tseki (2014) “Corruption: A Moral Issue” <[www.corruptionwatch.org.za](http://www.corruptionwatch.org.za)> accessed 13 August 2018

<sup>14</sup>. See Gorai M G, note 6 at 2.

<sup>15</sup>. See Larry Cata Backer ‘The Concept of Constitutionalisation and the Multi-Corporate Enterprise in the 21<sup>st</sup> Century’ [2014] CPE Working Paper 6/1.

Constitutions impose substantive limits on the actions of government, especially via the constitutionalisation of rights.<sup>16</sup> Constitutionalisation holds sway in many jurisdictions because it is argued that a "... constitution has a potentially decisive influence on public policies in a given country, especially when it comes to defining the rules of the political game and the limits of legality of the decisions resulting from this game."<sup>17</sup> As the constitution is the source from which all other laws, powers and authority are derived, it is the substratum of the essential normative values of a nation-state that operates constitutional democracy. Most constitutions list key institutions of government including their composition, powers and functions.<sup>18</sup>

This pattern is adopted in Nigeria. Thus, section 153 of the 1999 Constitution lists certain key agencies of government which derive their powers directly from the Constitution.<sup>19</sup> Nonetheless, it is impossible for constitutions to contain all key agencies of government.<sup>20</sup> Depending on the evolutionary pattern and longevity of the constitutional system of a country, the need may arise to amend the constitution at given times to reflect the yearnings and

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<<https://www.ssrn.com/abstract=2458965>>; Reva B Siegal 'The Constitutionalization of Abortion' [2012] Available at <[www.oxfordhandbooks.com](http://www.oxfordhandbooks.com)>.

16. L R Giovanna de Moura & C G Cláudio "The Constitutionalization of Public Policy and its impacts on policy making" [http://paperroom.ipsa.org/papers/paper\\_35737.pdf](http://paperroom.ipsa.org/papers/paper_35737.pdf). Accessed 13 August 2018.
17. Giovanna & Cláudio 'The Constitutionalization of Public Policy and its impacts on policy making' *ibid* 3.
18. See Ruth Gavison 'What Belongs in a Constitution?' [2002] 13 *Constitutional Political Economy* 89-105; Jon L. Mill 'Principles of Constitutions and Institutions in Promoting the Rule of Law'. University of Florida Levin College of Law. *UF Law Scholarship Repository* [2004]. Available at <<https://scholarship.law.ufl.edu>> accessed 15 August 2018
19. Section 153 of the Constitution lists a number of federal executive bodies, namely: Code of Conduct Bureau, Council of State, Federal Character Commission, Federal Civil Service Commission, Federal Judicial Service Commission, Independent National Electoral Commission, National Defence Council, National Economic Council, National Judicial Council, National Population Commission, National Security Council, Nigeria Police Council, Police Service Commission, and Revenue Mobilisation Allocation and Fiscal Commission.
20. Di Neliana Rodean 'Popular facets of constitution-making and constitution-amendment powers' <<http://www.forumcostituzionale.it/wordpress/wp-content/uploads/2018/03/rodean.pdf>> accessed 15 August 2018.

aspirations of the people.<sup>21</sup> Although section 15 (5) of the Nigerian Constitution directs the government to abolish corruption and abuse of power, this only suggests that the constitutional framers recognized the serious negative implications of corruption enough to expressly require its abolition by government. However, the constitution does not specifically establish any agency to tackle the menace as it did in establishing other agencies considered important enough to merit constitutionalisation. Given the critical dimension which the menace of corruption has assumed across the country and the increasing perception of politicization of the anti-corruption crusade through the agencies established to deal with the problem, it may now be appropriate to determine if the cause can be better served by inclusion or consolidation of those agencies in the constitution.<sup>22</sup>

Many countries have established specialized agencies to tackle corruption. Whether these specialized anti-corruption institutions should be enshrined in the constitution or should be created by ordinary law has provoked some inquiries.<sup>23</sup> Most anti-corruption agencies (ACAs) including many considered highly successful are not mandated by the constitution.<sup>24</sup> Only in a few countries are specialized anti-corruption agencies explicitly established (or required) by the constitution.<sup>25</sup> There are those who support constitutionalizing

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<sup>21</sup>. See Section 9 of the 1999 Constitution.

<sup>22</sup>. See Abubakar Ahmed 'Elite Brinkmanship and the Politicization of Anti-Corruption War under the Buhari Administration' [2018] (6)(1) *Sociology and Anthropology* 74-85; John N N Ugoani 'Political Will and Anti-Corruption Crusade Management in Nigeria', [2016] (7)(1) *Independent Journal of Management and Production* 72-97; Lemdi Edmond and Fredrick Wilson 'An Assessment of Media Coverage of Anti-Corruption Campaign by the Buhari Administration in 2016: A Study of the Nation and Daily Trust Newspaper', [2018] (8)(4) *Journal of Mass Communication and Journalism* 1-16; John Sunday Ojo 'Looting the Looters: The Paradox of Anti-Corruption Crusades in Nigeria's Fourth Republic (1999-2014)', [2016] (12)(9) *Canadian Social Science*, 1-20.

<sup>23</sup>. Courtney Millian 'When should we put Anticorruption Agencies in the Constitution?' *Published by The Global Anticorruption Blog (GAB) on Law, Social Science, and Policy.* <<https://globalanticorruptionblog.com/2016/07/18/when-should-we-put-anticorruption-agencies-in-the-constitution/>> accessed 20 September 2018.

<sup>24</sup>. Examples of Anticorruption Agencies not mandated by their constitution include; Belgium, Spain and Botswana

<sup>25</sup>. These include; Tunisia, the Philippines and Egypt.

anti-corruption agencies because of the need to shield them from political interference.<sup>26</sup> There are others who believe that the inclusion of such agencies in the constitution does not guarantee greater insulation from political interference especially in countries where constitutions are flagrantly ignored and violated.<sup>27</sup> Nonetheless, the argument that constitutionalisation will guaranty the permanence of these agencies and make them more effective seems to be attractive. The United Nations Office on Drugs and Crime (UNODC) recommends that in order to guarantee the permanence of ACAs, they should “...in accordance with the basic legal principles of their countries, be established by proper and stable legal framework, such as the constitution or a special law to ensure continuity...”<sup>28</sup>

The general perception is that where an ACA is constitutionalized it may guarantee its institutionalization much more than if it exists through ordinary legislation. Although the most important determinant for the success of an institution is whether or not it has the resources and independence to be effective, constitutionalizing anticorruption institutions may be a powerful way to realize those objectives. Constitutionalisation of an agency or policy of the government is said to encourage responsiveness, transparency and accountability.<sup>29</sup> A further justification is that constitutionalisation may make it difficult for anti-corruption institutions to be compromised by self-serving legislature through (casual) adverse legislative process. The result is that it will be difficult to compromise or suspend the activities of such institutions as this will require a constitutional amendment to achieve, a process that is often rigorous especially in countries, such as Nigeria, with rigid constitutions.<sup>30</sup> It

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<sup>26</sup>. Courtney Millian, note 23 at 2.

<sup>27</sup>. *Ibid* at 3.

<sup>28</sup>. The UNODC Statement on Principles for Anti-Corruption Agencies At the gathering of current and former heads of anti-corruption agencies (ACAs) in Jakarta, 26-27 November 2012. Full text at <[https://www.unodc.org/documents/corruption/WG-Prevention/Art\\_6\\_Preventive\\_anti-corruption\\_bodies/JAKARTA\\_STATEMENT\\_en.pdf](https://www.unodc.org/documents/corruption/WG-Prevention/Art_6_Preventive_anti-corruption_bodies/JAKARTA_STATEMENT_en.pdf).> accessed on 11 October 2018.

<sup>29</sup>. Dele Olowu ‘The Constitutionalization of Local Government in Developing Countries— Analysis of African Experiences in Global Perspective’ [2012] (3) 42-50 <[https://file.scirp.org/pdf/BLR20120200004\\_37511727.pdf](https://file.scirp.org/pdf/BLR20120200004_37511727.pdf).> accessed 16 August 2018

<sup>30</sup>. Daniel Weinstock ‘On Some Advantages of Constitutionalizing the Right to Secede’ [2001] *Journal of Political Philosophy*, <<https://onlinelibrary.wiley.com/>> accessed 19 August 2018.

is in this context that we now examine the powers of the two agencies specially established in Nigeria to tackle corruption and related malfeasance.

### **Powers of ICPC and EFCC to Combat Corruption and Financial Crimes: Challenges of Non-Constitutionalisation**

Section 3(1) of the ICPC Act provides for the establishment of a Commission to be known as the Independent Corrupt Practices and Other Related Offences Commission.<sup>31</sup> Section 6 (1) of the Act provides for the composition of members of the Commission. The Chairman and members of the Commission are to be appointed by the President, subject to confirmation by the Senate. Section 8(1) of the Act equally gives the President power to remove the Chairman or any member of the Commission where acting on an address supported by two-thirds (2/3) majority of the Senate praying that he be removed for inability to discharge the functions of the office (whether arising from the infirmity of mind or body or any other cause) or for misconduct. The powers of the Commission are provided in section 5 of the Act. Section 26 (2) & (3) makes the power of the Commission to prosecute offences subject to approval by the Attorney General.<sup>32</sup> The Economic and Financial Crimes Commission (EFCC) is established by section 1(1) of the EFCC Act.<sup>33</sup> Section 2 provides for membership of the Commission, who are to be appointed by the

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<sup>31</sup>. It is noteworthy that although the commission popularly bears the name *Independent Corrupt Practices Commission* (ICPC), this name and acronym are not provided in any portion of the ICPC Act.

<sup>32</sup>. This provision is probably one of the most limiting portions of the Act which calls to question the independence of the agency. Although the section merely reiterates the overriding constitutional power of the Attorney General of the Federation over public prosecution, the fresh restatement of it in the Act seems to be unhelpful given the imperative need to insulate the agency from external direction in its core mandate. The provision easily provides incentives to an obtrusive Attorney General to teleguide or even block prosecutorial efforts of the agency. This scenario was witnessed early in the Buhari Administration when its sister agency, the EFCC, and the Attorney General were at loggerheads over prosecution of high profile corruption cases. The rift only ended when the agency succumbed by surrendering those matters to the Attorney General. See Joseph Onyekwere and Godwin Dunia “Rift over prosecution of high-profile cases ends as Justice Minister creates central body”, Guardian Newspaper 5 September, 2017.

<sup>33</sup>. Economic and Financial Crimes Commission (Establishment) Act, Cap A1 2004.



President subject to confirmation of the Senate.<sup>34</sup> The powers and functions of the Commission are as provided in section 6, while the funding arrangement for the Commission is as inferred from Section 35 (2) of the Act. The gravamen of the section is that the Commission is funded as may each year be approved by the National Assembly.

Looking closely at key provisions of both legislations, the question may be asked whether the agencies are well-positioned to combat corruption and financial crimes. This brings to fore certain established key indicators of an effective anti-corruption crusade. There seem to be a link between the ability of anti-corruption agencies to be effective, the manner of their composition and the security of their tenure.<sup>35</sup> It has been contended that where the appointing mechanism ensures consensus support for an appointee through parliament, rather than the executive branch of government alone; and accountability mechanism exists outside government, the space for abuse and partisanship may be minimized.<sup>36</sup> In this regard, it has been suggested that in composing an anti-corruption agency, the appointing procedure should be mindful of the mandate to be exercised by the appointees even upon the appointing body.<sup>37</sup> Therefore, the procedure of appointment must strike a balance as to insulate the appointee from interference and manipulation. Otherwise, where the executive branch alone appoints members of the agencies without parliamentary scrutiny, the chances of loss of independence, of practical ineffectiveness and of low public confidence are high.<sup>38</sup>

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<sup>34</sup>. See Section 2(2) of the Act

<sup>35</sup>. Bolanle W Shiyabade, and Others ‘Assessing the Efficiency and Impact of National Anti-Corruption Institutions in the Control of Corruption in Nigerian Society, [2017] (22)(7) *Journal of Humanity and Social Science* 56-64; Nnamdi Nwaodu, David Adam and Okechukwu Okereke ‘A Review of Anti-Corruption Wars in Nigeria’ [2014] *Africa’s Public Service Delivery & Performance Review*, 153-174

<sup>36</sup>. ‘Confronting Corruption: The Elements of a National Integrity System’ Source Book 2000 <<https://bsahely.com/wp-content/uploads/2016/10/11.pdf>> accessed 20 August 2018.

<sup>37</sup>. *Ibid*, at 2.

<sup>38</sup>. See generally John R. Heilbrunn ‘Anti-Corruption Commissions Panacea or Real Medicine to Fight Corruption?’ Published for the World Bank Institute 2004. <<http://siteresources.worldbank.org/WBI/Resources/wbi37234Heilbrunn.pdf>> accessed 20 August 2018.

Another key indicator of an effective anti-corruption agency is its funding arrangements.<sup>39</sup> Funding is key to the smooth functioning of any organization. Viewed critically, provisions of the EFCC Act dealing with funding seem to be insufficient to guarantee the agency's independence and effectiveness.<sup>40</sup> Funding of the Commission's operation is dependent substantially on government budgetary allocation. The Act does not indicate which body has the power to prepare the budget of the Commission unlike other federal commissions such as, for instance, the Nigeria Law Reform Commission.<sup>41</sup> Rather, it provides that the Commission will only be paid and credited funds as May each year be approved by the National Assembly.<sup>42</sup> The inference is that the executive branch prepares the Commission's budget. This essentially casts doubt over whether the key indicator of satisfactory funding arrangement to guarantee the effectiveness of anti-corruption institutions has been met.

A further key indicator is the extent of operational independence of an anti-corruption agency in the course of its routine activities.<sup>43</sup> Section 43 of the EFCC Act confers power on the Attorney General of the Federation to make rules or regulations with respect to the exercise of any duty, functions or powers of the Commission. Section 26 (2) & (3) makes the power of the Commission to prosecute offences subject to approval by the Attorney General. These provisions virtually rob the agency of its operational independence, which in turn impedes its ability to combat corruption and other financial crimes. Operational independence appears to be better guaranteed if the agency were subject only to legislative scrutiny for the purpose of instituting accountability. Perhaps, it is in this regard that Section 37 of the EFCC Act requires that the Annual Report of the Commission's activities be submitted to the National Assembly. However, that section does not provide consequences or penalties for non-compliance, a loophole which the

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<sup>39</sup>. *Ibid* at 12.

<sup>40</sup>. See Section 35(2) of the EFCC Act.

<sup>41</sup>. See Section 11(1) of the Nigerian Law Reform Commission Act, Cap N118 Laws of the Federation of Nigeria, 2010.

<sup>42</sup>. See Section 35(2) of the EFCC Act.

<sup>43</sup>. See John R. Heilbrunn, note 38 at 12.

Commission appears to have exploited a number of times by failing to submit its annual report of activities as required by the Act.<sup>44</sup>

The forgoing seems to reinforce the argument for constitutionalisation of anti-corruption institutions in Nigeria. However, given the rigorous process of constitutional review requiring broad support to meet the super-majority provisions for constitutional alteration under section 9 of the 1999 Constitution, it is necessary to undertake cross-country review of developments in other jurisdictions, as anti-corruption crusade has assumed a global life of its own and the experience garnered, including institutional mechanism established elsewhere, can help to convince municipal political actors on the need for constitutionalisation. The best practice model can also be helpful in strengthening reform proposals in this direction. It is in this regard that the next section is devoted to a review of the position in Hong Kong and Tunisia.

## **Cross-Country Experience of Constitutionalisation**

### ***Hong Kong***

The Hong Kong's Independent Commission against Corruption (ICAC) was established in 1974. It is enshrined under Article 57 of the Hong Kong *Basic Law*.<sup>45</sup> The inclusion of ICAC in the constitutional framework of Hong Kong has been cited as one major reason for the agency's effectiveness and ultimately the universally acknowledged success of Hong Kong's anti-corruption efforts.<sup>46</sup> An important feature of this constitutional order is the specific embedding of the role of the ICAC as an independent body accountable only to the Chief Executive, unlike in Nigeria whereas we have discussed, the operational independence of the ICPC and the EFCC is made subject in prosecutorial matters, at least, to the Attorney General of the

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<sup>44</sup>. Henry Umoru 'EFCC, other agencies have not submitted audited reports for years to Senate' *Vanguard Newspaper* (Lagos, 8 March 2018) <<https://www.vanguardngr.com/2018/03/efcc-agencies-not-submitted-audited-reports-years-senate/>> accessed 17 October, 2018.

<sup>45</sup>. Often referred to as the Hong Kong's mini-constitution. See D Gittings *Introduction to Hong Kong Basic Law* (Hong Kong University Press, 2016) <<https://www.hkupress.hku.hk/pro/con/1591.pdf>> accessed 4 September 2018.

<sup>46</sup>. See 'Forty Years since its creation, how the ICAC cleaned up corruption in Hong Kong' (2014) <<https://www.scmp.com>> accessed 27 August 2018.

Federation.<sup>47</sup> Since inception ICAC has established a strong reputation for thorough investigations, successful prosecutions and a tough crackdown on large scale corruption without interference.<sup>48</sup>

In addition to the foregoing, there are some specific mechanisms that seem to make the Hong Kong Model even more effective. It adopts the mechanisms of *prevention, prosecution and education*. Prevention (including community education and deployment of awareness strategies) has been a core aspect of the model.<sup>49</sup> The ICAC is also empowered to address not only misconduct by public officials but also fraud and corruption in the context of purely private transactions. The Hong Kong Ethics Development Center (HKEDC), established under the umbrella of ICAC, provides many materials and supports training activities targeting small and medium-sized enterprises. Having a government agency directly involved in the dissemination of business ethics is noteworthy and it reflects the very strong policy of prevention implemented in Hong Kong on the strength of clear constitutional backing.<sup>50</sup>

The ICAC enjoys independence from the government with the authority to appoint, manage and dismiss its staff. Allegations of corruption and related criminal offences against ICAC officers are investigated by a special unit of

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<sup>47</sup>. Anna Wu, 'Hong Kong's Fight against Corruption Has Lessons for others' *Hong Kong Journal (HKJ)* <[www.carnegieendowment.org/hkjjournal/pdf/2006\\_spring/wu.pdf](http://www.carnegieendowment.org/hkjjournal/pdf/2006_spring/wu.pdf)> accessed 27 August, 2018.

<sup>48</sup>. See the ICAC global recognition publication on its website <[www.icac.org.hk/en/intl-persp/priase/index.html](http://www.icac.org.hk/en/intl-persp/priase/index.html)> accessed 28 August 2018.

<sup>49</sup>. Jeremy Pope 'Confronting Corruption: The Elements of a National Integrity System' [2002] <<https://spectrumsdkn.org/>> accessed 28<sup>th</sup> August 2018. Also, see generally: Wing-chi Hui 'Combating Corruption: The Hong Kong Experience' [2013] (6) *Tsinghua China Law Review*, 239-256; Hubert W J C Leo 'Anti-corruption Strategies: The Hong Kong Model in International Context' [2000] 2 (3) *Journal of Public Integrity*, 211-228

<sup>50</sup>. World Bank, *Fighting Corruption in East Asia: Solutions from the Private Sector*, <[www.untag-smd.ac.id/.../CORRUPTION%20Fighting\\_Corruption\\_in\\_East\\_Asia\\_Solut.>](http://www.untag-smd.ac.id/.../CORRUPTION%20Fighting_Corruption_in_East_Asia_Solut.>).. accessed 28 August 2018.

the commission. Although the head of the commission is appointed by the Chief Executive of Hong Kong and reports to the latter, ICAC as a body reports regularly to the Executive Council and tenders formal reports to the Legislative Council.<sup>51</sup> The Hong Kong model is particularly celebrated for the work being done by the HKEDC which has perfected a system of sensitizing the Hong Kong public about the anti-corruption mandate of ICAC and creating wide-spread awareness on the negative impact of corruption.<sup>52</sup>

The anti-corruption crusade in Nigeria seems to have borrowed some lessons from the Hong Kong Model with the exception that the emphasis in Nigeria appears to be more on prosecution rather than prevention and education.<sup>53</sup> In particular, the Nigerian experience shows very limited use of sensitization strategies apparently because both the EFCC and the ICPC are required to operate nationally.<sup>54</sup> For a population of nearly 200 million, and with the high prevalence of corruption at virtually all levels of the country's public and private lives, it is virtually impracticable for these two agencies to cover every part of the country directly from the federal capital in Abuja.<sup>55</sup> Nigeria's population and diversity is incomparable to that of Hong Kong, yet that country has since constitutionalized its anti-corruption institution. Adopting such an approach in Nigeria can help to give more impetus to anti-corruption

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<sup>51</sup>. See Article 57 of the Basic Law of Hong Kong.

<sup>52</sup>. N G Raymond 'Community Engagement and Value Education – A target-oriented Approach to Transform Public Attitude against Corruption in Hong Kong', <https://www.icac.org.hk/symposium/2015/pdf/Raymond%20NG.ppt.pdf> accessed 28 August 2018.

<sup>53</sup>. Although Section 6 paragraph p of the EFCC Act enjoins the commission to carry out and sustain rigorous public enlightenment campaign against economic and financial crimes within and outside Nigeria, its effect is yet to be felt and more needs to be done in this regard. The recent introduction of Anti-corruption and Integrity clubs in Secondary Schools across Nigeria is a welcome development. See 'EFCC Establishes 150 Integrity Clubs in Secondary Schools Nationwide' Reported by Segun Adebawale Published for the Eagle Newsletter, an EFCC publication May 1 2014. <<https://theeagleonline.com.ng/efcc-establishes-150-integrity-clubs-in-secondary-schools-nationwide/>> accessed 17 October 2018.

<sup>54</sup>. For instance section 1 of the EFCC ACT, establishing the commission did not provide for state offices across the 36 States as with other agencies like the independent Electoral Commission (INEC).

<sup>55</sup>. See Sheriff Folarin 'The Anti-Corruption War in Nigeria: A Critical Appraisal of the Role of the ICPC and EFCC' [2009] (2), *Nigeria Journal of Economic and Financial Crimes*, 14-30.

crusade and give meaning to the constitutional directive to the government to abolish corruption. A sensible strategy may be to direct government at all levels to abolish corruption, with separate constitutionally mandated agencies to stamp out the menace. This strategy of decentralization has a number of cost/benefit and efficiency/benefit which cannot be overemphasized.<sup>56</sup>

Sadly, however, judicial attitude of Nigeria's apex court to the proven benefit of decentralizing anti-corruption efforts has been unfavourable, despite constitutional leeway created under section 15 (5) of the 1999 Constitution requiring government (local government councils, states and federal), not just the federal government alone, to abolish corruption. Thus, in *Attorney General of Ondo State v Attorney General of Federation*,<sup>57</sup> the Supreme Court endorsed the overriding power of the federal government over anti-corruption crusade when the government of Ondo State challenged the enactment of the ICPC Act which vests the agency with powers to implead state government officers in furtherance of the crusade. This decision has been criticized for diminishing the ability of states to get involved in the crusade.<sup>58</sup> A better approach for the country is to federalize the crusade for efficiency.<sup>59</sup>

### ***Tunisia***

Tunisia's effort to curb corruption culminated in constitutionalizing its anti-corruption agency. The new Constitution of Tunisia (2014) takes an important step in this direction. Article 125 establishes a body known as *Good Governance and Anti-Corruption Agency* (GGAA) and saddles it with a

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<sup>56</sup>. See generally Raymond Fisman 'Decentralization and Corruption: Cross Country – State Evidence' [1999] <https://www1.worldbank.org/publicsector/anticorrupt/deccorr3.pdf> ; Lucica Matei and Ani Matei "Corruption in the Public Organisations: Toward a Model of Cost-Benefit Analysis for Anti-Corruption Strategies (2009). Munich Personal RePEc Archive, <<https://mpira.ub.uni-muenchen.de>> accessed 28 August 2018.

<sup>57</sup>. (2002) 9 NWLR (Pt 772).

<sup>58</sup>. See Edoba B Omoregie "Federalism Jurisprudence of the Supreme Court of Nigeria" in Okechukwu Ibeanu and Mohammed J Kuna *Nigerian Federalism: Continuing Quest for Stability and Nation-Building*. (Safari Books, 2016) 209-222.

<sup>59</sup>. See Roderick M Hills, Jr 'Corruption and Federalism: (When) Do Federal Criminal Prosecution improve Non-Federal Democracy' [2005] (6) (113), *Theoretical Inquiries in Law*, 114-154.

mandate to abolish corruption. The agency is empowered with financial and administrative independence.<sup>60</sup> Article 130 of the Constitution clearly spells out the functions, composition and powers of the agency. By embedding the agency in the Constitution thereby guaranteeing its continuance, Tunisia has taken a very important step forward making it virtually impossible for subsequent laws to undermine the agency. Although barely four years old and therefore too early to evaluate its impact, this important constitutional development marks a watershed in anti-corruption effort which Nigeria can emulate. This is especially so as Nigeria operates a rigid constitutional system making it considerably difficult to subsequently alter the constitution after it might have been reformed to include bodies such as the GGAA. As discussed in the next rubric, establishing anti-corruption agencies as constitutional bodies as done in Hong Kong and Tunisia meets with international best practices.<sup>61</sup>

### ***International Best Practices***

In the international arena, constitutionalisation is accepted as a best practice in fighting corruption. It is perceived as having the potential of setting the tone for other legislative and policy measures towards the effort, such as paying civil servants well; *creating transparency and openness in government spending; cutting bureaucratic red tape; replacing regressive and distorting subsidies with targeted cash transfers; establishing international conventions, and deploying smart technology.*<sup>62</sup> *In making a case for constitutionalisation as an anti-corruption strategy, a writer has argued that such strategy should be placed on the same pedestal as separation of powers and federalism principles are accorded in national constitutions; with the primary purpose of giving anti-corruption effort an independent weight to confront the challenges*

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<sup>60</sup>. UNDP-ACIAC, 'Tunisia Embeds Anti-Corruption Agency in Constitution' <[www.undpaciac.org/publications/ac/Newspiece/Tunisia%20new%20constitution.pdf](http://www.undpaciac.org/publications/ac/Newspiece/Tunisia%20new%20constitution.pdf)> accessed 28 August 2018.

<sup>61</sup>. See *Combating Corruption: Constitutional Framework for the Middle East and North Africa* (2014) at 39-40, Joint report of Center for Constitutional Transitions, International IDEA and the United Nations Development Programme <<https://www.idea.int/sites/default/files/publications/combating-corruption-constitutional-frameworks-for-the-middle-east-and-north-africa.pdf>> accessed 28 August 2018.

<sup>62</sup>. Augusto Lopez-Claros 'Six Strategies to Fight Corruption' <<http://blogs.worldbank.org/futuredevelopment/six-strategies-fight-corruption>> accessed August 25 2018.

*involved in combating corruption.*<sup>63</sup> The global pushback against corruption using institutional measures embedded in the constitution seems to be strengthened by the call from *Transparency International* (TI) suggesting that laws directly regulating corruption offences should be complemented by much wider range of legal provisions to serve as a deterrent against corruption, as well as the creation of an enabling environment for anti-corruption efforts.<sup>64</sup>

A number of national constitutions make provisions creating institutions or “such enabling environment” with a clear mandate to tackle corruption in tandem with TI’s suggestion. Of particular note is the Constitution of Nepal which creates a body known as the Commission for the Investigation of Abuse of Authority (CIAA) drawing directly from the suggestion.<sup>65</sup> This body is charged with the responsibility of conducting “inquiries and investigation of improper conduct or corruption by a person holding public office”.<sup>66</sup> The Constitution of Ecuador, 1998 also establishes a similar body known as the Civic Commission for the Control of Corruption (CCCC) relying on international standards.<sup>67</sup>

In its effort to set acceptable standard for tackling corruption on the European continent, the European Union (which is a supranational union with a constitution) issued a Framework Decision (2003) directing member states to criminalize acts of active and passive corruption, and enjoining members to

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<sup>63.</sup> Zephyr Teachout ‘The Anti-Corruption Principle’ *Cornell Law Review* Volume 94 Issue 2 published January 2009.  
<<https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=3123&context=>> accessed August 25 2018.

<sup>64.</sup> Marie Chene & Robin Hodess ‘International good practice in Anti-Corruption legislation’ A publication of Transparency International’  
<<https://www.u4.no/publications/international-good-practice-in-anti-corruption-legislation.pdf>> accessed August 25 2018.

<sup>65.</sup> Part 12, Article 97 and 98, of Constitution of the Kingdom of Nepal, 1990.

<sup>66.</sup> *Ibid.* See also “Corruption Control in Nepal”, a paper presented in the biennial International Anti-Corruption Conference, held in Republic of Korea, May 25-28, 2003  
<<http://www1.worldbank.org/publicsector/anticorrupt/IACC/corruptioncontrol.doc>> accessed August 25 2018.

<sup>67.</sup> See Articles 20 and 21.



attach particular importance to tackling corruption in the public and private sectors.<sup>68</sup> As a practical measure in this regard, the Framework Decision charges member states to identify corruption as a criminal behaviour in the same category as organized crime for which priority actions and measures must be taken to define minimum rules about its constituent elements and the nature of penalties to be imposed.<sup>69</sup> These directives are important to the extent that they take their inspiration from the constitutional powers vested on the EU to issue binding standards of best practices to all member states.

In the African international arena, the Convention on the Prevention and Combating of Corruption was adopted by the African Union in 2003. This convention is either directly applicable in each countries' municipal environment or is required to be domesticated through provisions of respective national constitutions, such as is the case in Nigeria under section 12 of the 1999 Constitution.<sup>70</sup> The convention is an important mechanism in the effort to defeat corruption in the African municipal environment, although it has received some criticisms for its "excessive use of claw-back clauses" and lacking "serious and effective mechanism for holding (African) states accountable".<sup>71</sup>

## CONCLUSION

There is no doubt that anti-corruption efforts have gained traction in Nigeria since 2002/2003 when the ICPC and the EFCC were established. If anything, this is in sharp contrast to decades before when the mandate to abolish

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<sup>68</sup>. 'Anti-Corruption Best Practice Manual' A publication of PLMJ (a Portuguese law firm with its headquarters in Lisbon) <[http://www.plmj.com/xms/files/Guias\\_Investimento/Anti\\_Corruption\\_Best\\_Practice\\_Manual.pdf](http://www.plmj.com/xms/files/Guias_Investimento/Anti_Corruption_Best_Practice_Manual.pdf)>. The European Union (EU) is regarded as a "supranational" union for reason that it is a multinational political body which possesses powers delegated to it by the government of member states. The EU constitution is a treaty which binds member states. See generally Kimmo Kiljunen *The European Constitution in the Making*, (Brussels: Centre for European Policy Studies, 2004), <[http://aei.pitt.edu/32581/1/20.\\_EU\\_Constitution.pdf](http://aei.pitt.edu/32581/1/20._EU_Constitution.pdf)> accessed 17 October 2018.

<sup>69</sup>. *Ibid*, at 20-22.

<sup>70</sup>. Mohammed Albakariya Kabir [2015] (9) (4) "Anti-corruption Conventions in Nigeria: Legal and Administrative Challenges" *International Journal of Law and Political Sciences*, 1174-1184.

<sup>71</sup>. Kolawole Olaniyan [2004] (4) 'The African Union Convention on Preventing and Combating Corruption: A Critical Appraisal' *African Human Rights Law Journal*, 74-92.

corruption did not go beyond a mere constitutional policy directive. Public awareness of the existence of these agencies is not only high, but it has also spawned a number of concerns about the effectiveness of the anti-corruption crusade as a whole including concerns about the operational independence and funding arrangements of the agencies. This paper traversed these and other issues. In particular, the paper discussed constitutionalisation as a viable institutional option towards strengthening anti-corruption efforts.

The paper identified Hong Kong and Tunisia as countries where this option has been adopted, noting that the Hong Kong model is universally celebrated as having benefitted from constitutionalisation. Although Tunisia adopted the option only in 2014, the fact that the country chose that path is noted as giving further support to the possibility of constitutionalizing anti-corruption institutions. The paper identified some best practices in the international arena which also justify the choice of constitutionalisation. We conclude on the note that Nigeria's anti-corruption efforts, which are increasingly being perceived as politicized and weakened by certain institutional flaws, can benefit from constitutionalisation with a view to establishing its ACAs as truly operationally independent, with a satisfactory funding system in tow. The context of cross-country comparison and international best practices provided in the paper underscore this imperative choice.