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DECENTRALIZATION OF THE ANTI-CORRUPTION FIGHT IN NIGERIA: A REVIEW OF THE LAGOS STATE PUBLIC COMPLAINTS AND ANTI-CORRUPTION COMMISSION LAW.



Introduction

Corruption is a recurring problem hindering the economic development of Nigeria. Before now, the fight against corruption and/or financial crimes in the country appeared to be an exclusive preserve of the Economic and Financial Crime Commission (“EFCC”) and the Independent Corrupt Practices and Other Related Offences (“ICPC”) – Federal Government agencies. Indeed, the general assumption, although erroneous, was that these federal agencies – outside the offices of the Attorney General of the Federation and States – are the only bodies that could investigate and prosecute corrupt practices and other related offences in Nigeria.

Thus, in an attempt to decentralise the fight against corruption in the country, the Lagos State Government recently established an anti-corruption agency tasked with the responsibility to investigate any alleged corrupt practices or financial crimes emanating from administrative actions taken by any Lagos

State Government's ministry, department, agency, parastatal, local governments, statutory corporations, public institutions, companies owned by the State Government, and any officer of the above-mentioned bodies, agencies or ministries. The anti-corruption agency is also empowered to investigate any offence under the criminal laws of the State – especially as it concerns corruption and financial crimes, abuse of office, obtaining property by false pretence, receiving stolen properties or fraudulently obtaining properties and similar offence, fraudulently dealing with properties by debtors; and offences relating to the administration of justice.¹

The Law establishing the Anti-Corruption Agency was signed into law on 19 April 2021² by His Excellency, Babajide Sanwo-Olu, the Governor of Lagos State. The Law is known as the 'Lagos State Public Complaints and Anti-Corruption Commission Law, 2021' (the “Law”). This Law is a commendable step taken by the Lagos State Government to deepen the culture of accountability and transparency in the affairs of government, increase public trust, improve the confidence of investors and, overall, attract foreign investment and grow the economy of Lagos State – which is already Nigeria's economic and financial capital.

²See Section 13(1) & (2) of the Lagos State Public Complaints and Anti-Corruption Commission Law, 2021 (“Lagos Anti-Corruption Law”)

²<https://lagosstate.gov.ng/blog/2021/04/19/lagos-to-establish-anti-corruption-agency-as-sanwo-olu-signs-bill-deepening-accountability-in-governance/> accessed on 30 April 2021.

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By enacting the Law, Lagos State has followed the precedent set by Kano State, who in 2009 set up the Kano State Public Complaints and Anti-Corruption Commission³ and recently, the Oyo State Government, also established its own Anti-Corruption Agency, known as 'Oyo State Anti-Corruption Agency'⁴. This shows that States are now prepared to reclaim their constitutional power by decentralising the fight against corruption as expected in a true Federal State.

In this newsletter, we briefly examined the legality of the Law, address the key provisions of the Law and their effectiveness from an anti-Corruption and compliance standpoints.



Legality of The Law

Generally, in a Federal State like Nigeria, where the centre enjoys overwhelming powers concentrated in the exclusive legislative list as contained in Part 1 of the 2nd Schedule to the Constitution of the Federal Republic of Nigeria, 1999 (as amended) [the “Constitution”], there is no doubt that some will raise eyebrows regarding the constitutionality or otherwise of the Law. We do not intend to exhaust the arguments both for and against the Law; rather we briefly proffered our view on the constitutional standing of the Law. Thus, the anticipated controversy surrounding this Law will be resolved by the Constitution itself.

It is not in doubt that the legislative powers of each level of government in the country – i.e., the Federal and State Governments – are assigned and circumscribed by the Constitution. The National Assembly – the legislative arm of the Federal Government – is conferred with the exclusive power to legislate on items found in the Exclusive Legislative List.⁵ The National Assembly is also empowered to legislate, along with State Governments, on items contained in the Concurrent Legislative List⁶ or as specifically assigned by any other provision of the Constitution.⁷ State Houses of Assembly – the legislative houses of each State in Nigeria – are empowered to jointly legislate on Concurrent Legislative List with the National Assembly.⁸ Where there is a conflict between the laws made by a State House of Assembly and the one made by the National Assembly on any of the items contained in the concurrent Legislative List, the conflict is resolved by invoking the doctrine of covering the field, which upholds the federal law as having covered the field in the areas of conflict.⁹

Constitutionally, the doctrine of covering the field is used to resolve conflicts emanating from the exercise of legislative powers contained in the Concurrent List. Section 4(5) of the Constitution is only invoked to uphold laws validly made by the National Assembly in the exercise of legislative powers conferred on it by the Constitution. This power does not extend to areas that the National Assembly does not have power to make law, such as residual matters. Thus, a State House of Assembly is empowered to exclusively legislate on matters that are not listed in the exclusive and concurrent legislative lists nor expressly reserved for the Federal Government in any provision of the Constitution.¹⁰ These are known as “residual matters” recognised by the courts in the interpretation of section 4(7)(c) of the Constitution.¹¹ Now, the word “corruption” is neither contained in the exclusive nor concurrent legislative list.¹² There is nowhere in the Constitution where the National Assembly is conferred with an exclusive power to legislate on matter relating to “corruption” or

³<https://www.pcacc.org.ng/pdf/law1.pdf> accessed on 30 April 2021.

⁴<https://tribuneonline.ng.com/makinde-inaugurates-oyo-state-anti-corruption-agency/> accessed on 30 April 2021.

⁵Sections 4(3) and 4(7)(a) of the Constitution

⁶Part II of the Second Schedule to the Constitution.

⁷Section 4(4)(a) of the Constitution.

⁸Section 4(7)(b) of the Constitution.

⁹*Environmental Health Officers Registration Council of Nig. v. LAWMA & Ors* (2012) LPELR-15418(CA)

¹⁰Section 4(7)(C) of the Constitution.

¹¹*AG Lagos State v. AG Federation & Ors* (2003) LPELR-620(SC). ¹²The Supreme Court in *A.G. Ondo State v. A.G Federation* (2002) 9 NWLR (PT. 772) 222 held that both the National Assembly and State Houses of Assembly have the powers to make anti-corruption laws. It must be added that such powers must relate to the legislative powers conferred on either of the legislative houses.

“Crime”. Rather, Section 88(1) & (2) of the Constitution empowers the National Assembly to direct the investigation of any matter within its legislative competence; and, also, to expose corruption, inefficiency or waste in the administration or execution of laws within its legislative competence. As expressly provided in section 88(1) & (2), the powers of the National Assembly to investigate, direct the investigation of corruption/crime or to make laws relating thereto is circumscribed to the extent of the legislative powers granted the National Assembly by the Constitution.¹² To this extent, the powers to investigate and/or make laws relating to corruption or crime against a State Government is a residual matter that only the State concerned can legislate on.

Therefore, Lagos State House of Assembly or the legislative house of any other State in Nigeria enjoys the exclusive power of legislating on corrupt practices or crimes against it.



The Commission

The Law establishes the Lagos State Public Complaints and Anti-Corruption Commission (the “Commission”) which shall be responsible for the administration of the Law as it relates to the investigation and prosecution of allegations of financial crimes, and corrupt practices in Lagos State, especially where the finances and/or assets of the Lagos State Government are affected.¹³

The Commission has the exclusive power to prosecute and investigate and/or coordinate the investigation of corruption and financial crimes involving the finances and assets of the Lagos State Government.¹⁴ However, once a matter is pending before a court of law, the Commission lacks the power to investigate such matter.¹⁵ Specifically, this provision seeks, to exclude other investigative agencies and anti-corruption agencies from investigating or prosecuting financial crimes involving the finances and assets of Lagos State. This provision must have been informed by the established constitutional order that a State enjoys exclusive legislative powers over residual matters. Indeed, the federal legislature's power to make laws relating to the investigation and prosecution of corrupt practices and crimes are circumscribed by its constitutionally conferred powers, none of which relates to residual matters solely affecting the affairs of a State Government.

Furthermore, the Commission has the power to investigate any offence either on its own initiative or following complaints lodged before it by any person on any administrative action taken by any public institution or statutory corporation and its staff, owned by the state. It is important to note that where the Commission decides not to investigate any complaint, the Commission is mandated by the Law to state its reason for not investigating such complaints in writing within 7 days of its receipt of the complaint.¹⁶ This provision is commendable for instilling the tenets of transparency and accountability in the fight against corruption as there is the tendency for investigative and anti- corruption bodies to cherry pick the matters they choose to investigate, without reason.

In the performance of its functions, the Commission is also empowered to invite and/or arrest any accused person, seize assets, search properties of accused persons, trace and attach assets, to aid its investigation or prosecution of the alleged offence(s).

¹²Section 14 of the Lagos Anti-Corruption Law.

¹³Section 13(5) of the Lagos Anti-Corruption Law.

¹⁴Section 17(1) of the Lagos Anti-Corruption Law.

¹⁵Section 17(2) of the Lagos Anti-Corruption Law.

¹⁶Section 24 of the Lagos Anti-Corruption Law.

The Commission also has the power to accept gifts, donations, grants, endowments, and testamentary dispositions, in aid of its objectives, except where the condition attached to the receipt of such gifts are inconsistent with the aid of the Commission¹⁷. This provision, given present economic realities can be said to have been made with the intention of ensuring continuous funding for the Commission. However, this provision may be abused, given that the Commission has the discretionary power, to determine what gifts to receive and to determine the intent behind a gift, which could erode public trust. There is also the concern that certain donors would expect preferential treatment from the Commission when discharging its functions and as such, there is a need to have some form of regulation or policy governing the receipt of gifts or external funding if this provision would be retained going forward.



Corrupt Practices

Under the Law, corruption of public officers encompasses the giving, demand, receipt, conferment or procurement of any property or benefit to a public officer or the mere offer to give, confer or procure any property or benefit to a public officer in return for the act, omission, benefit or detriment to be done or granted by a public officer¹⁸. Any person in breach of the Law in this regard is liable on conviction to a term of two years custodial sentence and shall forfeit to the Lagos State Government, any such benefit, money or property which was received as a result of the corrupt act.¹⁹

Furthermore, the corruption of a public officer within the context of the Law extends to anyone who promises to/or gives any property, benefit to a public officer while holding or seeking to obtain an interest in a contract, licence, permit, employment, or anything whatsoever from a government department, public body, organisation, or institution in which the public officer serves²⁰. Anyone found in breach of this provision is liable upon conviction to imprisonment for a term of one (1) year and a refund of the current market value of the obtained property and/or a fine of not less than One Million Naira.²¹

The Law also criminalises the gratification of public officers using a third party or an agent as such agent(s) is/are liable to prosecution and possible imprisonment upon conviction for a term of one (1) year.



Examination of Sources of Income/Assets – Disclosure, Tracing and Attachment of Assets

This Law empowers the Commission to examine the sources of income of a public officer upon a reasonable suspicion that such public officer's lifestyle and assets are not justified by his/her legitimate source of income²². The import of this provision is that even where a crime has not been alleged or suspected, the mere fact that a public officer spends or holds resources that the Commission suspects to be beyond his or her legitimate earnings can lead to an investigation and examination of the sources of income of such persons.

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¹⁷Section 29(1) of the Lagos Anti-Corruption Law.

¹⁸Ibid

¹⁹Section 29(2) of the Lagos Anti-Corruption Law.

²⁰Section 34 of the Lagos Anti-Corruption Law.

²¹Section 13(4) of the Lagos Anti-Corruption Law.

²²Section 60(1) of the Lagos Anti-Corruption Law.

²³Section 60(2) of the Lagos Anti-Corruption Law.

²⁴Section 61 of the Lagos Anti-Corruption Law.

public officer spends or holds resources that the Commission suspects to be beyond his or her legitimate earnings can lead to an investigation and examination of the sources of income of such persons.



Compelling The Attendance of Persons – Invitation and Arrest

The Commission has the power to either invite or arrest a suspect for the purpose of investigating allegations of financial crimes, corrupt practices and any other offences under the Law or the Criminal Law of Lagos State.

The Law further provides that the Commission may invite any person who is alleged to have committed an offence under the Law or any other person that may aid or facilitate the investigation of the allegation²⁷. Specifically, the Law provides that any person invited by the Commission shall appear in person for examination, and shall produce any book, document or any information that he believes would assist the investigation of the offence for which he was given the notice to produce.²⁸ The refusal to comply with the invitation of the Commission or to provide any such book, document or disclose the requested information is an offence under the Law which could lead to the imposition of a maximum of 6 months imprisonment on the offender upon conviction²⁹.

Furthermore, any person who refuses to acknowledge receipt of an invitation from the Commission may be arrested by the police or any enforcement agency with the power of arrest³⁰. Such person may also be liable to pay fines or imposed with a maximum of 1-month imprisonment upon conviction³¹. However, where an invited person fails to appear before the Commission, the Commission may obtain a warrant of arrest from a Nigerian court to arrest such person³²; and once arrested, the Commission is mandated to take the person before a court within forty-eight hours from the time of arrest³³.



Obtaining Information – Investigation, Searches and Examination

The Commission is empowered to obtain information relating to the offences enforceable by it under the Law from any person, whether natural or juristic, without any obstruction or restriction³⁴. The Law further mandates any person from whom information is sought by the Commission, to provide the Commission with the information it requires; otherwise, such person will be liable, upon conviction, to a maximum of six (6) months imprisonment or a maximum of One Million Naira fine³⁵.

The Law also penalises any person who makes a false, inconsistent, or misleading statement to the Commission as such a person can be liable, upon conviction, to a maximum of one (1) year imprisonment or a maximum of One Million Naira fine³⁶.

A person may also be held liable for obstruction of investigation where the person destroys, alters, mutilates or falsifies any book, document or digital storage systems.³⁷ The practical implication of this provision is that where a person is under investigation, any attempt to delete the emails or destroy physical documents relating the offence alleged, however remotely, may be considered as an obstruction of investigation.

²⁷Section 60(1) of the Lagos Anti-Corruption Law.

²⁸Section 60(2) of the Lagos Anti-Corruption Law.

²⁹Section 61 of the Lagos Anti-Corruption Law.

³⁰Ibid.

³¹Section 38 of the Lagos Anti-Corruption Law.

³²Section 38(2) of the Lagos Anti-Corruption Law.

³³Section 38(8) of the Lagos Anti-Corruption Law.

³⁴Section 42 of the Lagos Anti-Corruption Law.

³⁵Ibid

³⁶Section 43 of the Lagos Anti-Corruption Law.

³⁷Section 49 of the Lagos Anti-Corruption Law.

³⁸Section 41 of the Lagos Anti-Corruption Law.

³⁹Section 46 of the Lagos Anti-Corruption Law.

⁴⁰Section 57 of the Lagos Anti-Corruption Law.

⁴¹Section 31 of the Lagos Anti-Corruption Law.

In a bid to obtain information, the Commission is empowered to enter any land or premises to conduct searches in furtherance of its investigation of an allegation³⁸. The Law does not specifically state that the Commission would require a warrant to conduct searches on lands or premises and this may imply that they do not require any. The conduct of searches without search warrants will raise fundamental rights concerns because the extant position of the law in Nigeria is that, as a general rule, a search conducted on the premises of any person, including a suspect of a crime, without a warrant is unlawful and unconstitutional and as such the provision, if challenged, could be struck out as it amounts to the breach of a person's constitutional right to privacy as guaranteed by section 37 of the Constitution³⁹.

The power to conduct searches also extends to searches or examination of the body of persons who are suspected to have information relating to the allegation being investigated⁴⁰. The obstruction of the conduct of the searches by the Commission in any manner is an offence under the Law, and the offender will be liable, upon conviction, to a maximum of two (2) years imprisonment or a maximum of One Million Naira fine⁴¹.

There are also reporting obligations as the Commission is required to submit a progress report of its activities to the office of the governor and to the house of the assembly of the state respectively on a yearly basis⁴².



Dealing with The Assets Under Investigation – Seizure, Forfeiture and Freezing Orders

The Law gives the Commission a wide range of powers to deal with the assets of a person under investigation or assets that it reasonably believes to be connected with the commission of an offence. For instance, the Commission may, apply to a court for an ex parte order to seize any movable or immovable property which it believes to contain information or evidence relating to the commission of an offence, and deposit such properties at the office of the Commission⁴³.

Following the seizure of those properties, the Commission may proceed with the forfeiture of such properties through an interim order of forfeiture pending conviction or a post-conviction order of forfeiture⁴⁴. However, where a person is discharged and acquitted by the court in respect of which the properties were subjected to an interim order of forfeiture, the court has the discretion to either revoke or confirm the interim order of forfeiture⁴⁵. If the court discharged the accused person on technical grounds, then the interim order of forfeiture may be confirmed⁴⁶ but where it is revoked under any circumstances then the properties shall be released to the person⁴⁷.

Another useful tool available to the Commission under the Law is that it allows officers of the Commission to apply for a forfeiture order, post - conviction⁴⁸ for the confiscation and forfeiture of a convicted person's assets and properties, which are products of the convicted crime(s). This provision serves as a deterrent to criminals, who not only must spend their jail term but also loses the benefits of the proceeds of their criminal activities.

³⁸Section 44 of the Lagos Anti-Corruption Law.

³⁹Hassan & Ors v. EFCC & Ors (2013) LPELR-22595(CA).

⁴⁰Section 44(2) and (3) of the Lagos Anti-Corruption Law.

⁴¹Section 47 of the Lagos Anti-Corruption Law.

⁴²Section 71 of the Lagos Anti-Corruption Law.

⁴³Section 44(4) of the Lagos Anti-Corruption Law.

⁴⁴Section 62 and 63 of the Lagos Anti-Corruption Law.

⁴⁵Section 66 of the Lagos Anti-Corruption Law.

⁴⁶Section 66(2) of the Lagos Anti-Corruption Law.

⁴⁷Section 66(3) of the Lagos Anti-Corruption Law.

⁴⁸Section 63 of the Lagos Anti-Corruption Law.

The Commission is also empowered to obtain an ex parte order to issue or instruct a bank examiner or the appropriate regulatory agency – possibly the Central Bank of Nigeria, to issue an order addressed to the manager of a bank or any person in control of the financial institution where the account is believed to be or the head office of the financial institution to freeze any account that it is satisfied to contain monies obtained from the Commission of an offence which the Commission is empowered to enforce under the Law⁴⁹.

The Law also punishes any person who deals with, sells, or dispose of any property or asset which is a subject of attachment or interim order. A convict of this offence will be liable for a term of five (5) years custodial sentence.⁵⁰ Furthermore, any manager or person in control of the head office or branch of a financial institution or bank who fails to pay over to the Commission upon the production of a final order commits an offence and is liable upon conviction to a term not less than one year but not more than three (3) years custodial sentence⁵¹.

The Law provides for the restitution of proceeds of crime that is a subject of final forfeiture order⁵² in favour of the victim(s) of an offence or the state.

The Law makes provision for an order of court revoking or confirming the forfeiture of a forfeited asset of a person who has been discharged or acquitted by court for an offence which he has been charged under the law. Curiously, Section 66 (1) of the Law makes it possible for an order of forfeiture made against a discharged or acquitted person to be confirmed notwithstanding a discharge or acquittal of an accused person. Section 66 (2) of the Law goes further to state that the property of an accused person may be attached where he is discharged by the court on technical grounds⁵³. This is a strange provision of the Law because it could be used to attach the property of an innocent person without regard that s/he has been discharged or acquitted.⁵⁴ A constitutional challenge of the Law's provision anchored on the violation of the right of an accused person to own movable or immovable property is likely to be successful.

Another intriguing provision of the Law is the one⁵⁵ that seeks to limit the exercise of a convict's right of appeal within a period of thirty (30) days from the date of conviction. This provision, if challenged, may be struck out because it is inconsistent with the provision of Section 25(b) of the Court of Appeal Act⁵⁶, which states that that the period of appeal in a criminal matter shall be ninety (90) days. The provision of the law cannot override the provision of Court of Appeal Act, which is a federal and a special statute regulating an appeal in a federal court. A State does not have the legislative competence to make a law regulating an appeal before a federal court –especially when there is an existing federal law that has made provision for such. In particular, Section 4(5) of the Constitution invalidates any law made by a House of Assembly of State that conflicts with a federal legislation validly made by the National Assembly. To this extent, the provision of the Law restricting a convict's right of appeal to 30 days will not likely survive a legal scrutiny before the courts.



⁴⁹Section 67(1) of the Lagos Anti-Corruption Law.

⁵⁰Section 65 (1) of the Lagos Anti-Corruption Law.

⁵¹Section 65 (2) of the Lagos Anti-Corruption Law.

⁵²Section 64 of the Lagos Anti-Corruption Law.

⁵³It is noteworthy that the Law does not define the scope or meaning of the term “technical grounds” and this may lead to the overexpansion of its interpretation by the Commission.

⁵⁴Section 36(5) of the Constitution, states that every person is presumed innocent until found guilty by a court of law. Thus, a person discharged and acquitted by the court is presumed to still be innocent of the crime alleged against such person.

⁵⁵Section 70 of the Lagos Anti-Corruption Law.

⁵⁶Court of Appeal Act, Cap C26, Law of the Federation of Nigeria, 2004.



Conclusion

Based on the provisions of the Law summarised above, it is noteworthy that the Law seeks to provide a strong platform for the fight against corruption in Lagos State. The Law contains salient provisions which equip the Commission with the capacity to obtain information relevant to the investigation and prosecution of financial crimes and corrupt practices in Lagos State. Although the operability of the Law has been subject to some controversies, its application will certainly decentralise the fight against corruption by giving Lagos State more autonomy over the enforcement of offences committed against Lagos State.

A very important concern about this Law is its potential for abuse by the Commission. Thus, the Commission is clothed with ample powers, some of which can be exercised based on a mere suspicion and without proper checks and balances. It is possible that the exercise of powers relating to procedures for the grant and administration of custodial powers such as seizures, attachments, freezing of assets etc will be abused. Therefore, it is recommended that the activities of the Commission are closely monitored, and the provisions of the law that are either unconstitutional or illegal should be amended to ensure that fundamental rights of accused persons are not violated in the course of enforcing the provisions of the law.

Finally, and for compliance purposes, the provisions of the Law must be taken into cognizance by individuals, companies and corporations dealing with Lagos State Government, its agencies, ministries and/or statutory corporations for business or any other purpose requiring the exercise of State power or discretion. At this time, it is not necessary for any of the above-mentioned class of natural or artificial persons to speculate on the legality or otherwise of the Law until any of its provisions or the entire legislation is challenged and declared unconstitutional. In the main, we argued earlier that save for a few provisions highlighted in this newsletter, the Law falls within the legislative competence of the Lagos State House of Assembly and, therefore, constitutionally enacted.