

DELINEATING AND ADDRESSING THE IMPACTS OF SECTION 171 OF THE NIGERIAN 1999 CONSTITUTION ON THE SECURITY OF OFFICE OF HEAD OF ANTI-CORRUPTION AGENCIES IN NIGERIA

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Abstract

The paper delineates and addresses the impact of section 171 of the 1999 Constitution of the Federal Republic of Nigeria (1999 CFRN) as amended on the security of office of the heads of anti-corruption agencies (ACAs) and the fight against corruption in Nigeria. One of the key pillars for securing the independence of ACA is securing the tenure of office of the ACAs through appointment and removal procedures. Such protection enables the head to effectively discharge his function without fear or undue influence. To guarantee this, the anti-corruption law usually provides for the procedures for appointment and removal of head of ACA. Where the appointing authority of the head of ACA is the President, a confirmation of the appointment by the Senate is required. The appointment of Mr. Ibrahim Magu under section 171 CFRN after two rejections of confirmation of his appointment by the Senate of the Federal Republic of Nigeria upon recommendations by the President calls for assessment of section 171 CFRN in order to delineate and address the impacts of this section on the security of office of the heads of ACAs in particular and the ACAs in general in Nigeria. Therefore, this paper using content analysis and case study approaches examines the provisions of section 171 of the Constitution, the impact of the section on appointment of heads of ACAs. The paper finds that section 171 is an erosion of the security of office of the ACA and independence of the ACA in Nigeria. In offering the ways forward, the paper recommends among others things, the amendment of section 171 to include the head of ACA among appointments that require the confirmation of the Senate and a clear provision stating that appointment in an acting capacity made by the President should be for a maximum of one year and not renewable. Also, the removal of head of ACA at all times should be subjected to the confirmation of the Senate.

I. Introduction

Corruption is a global challenge and there is no State that is exempted from its scourge. The fight against corruption is of international concern because of its trans-boundary and far reaching effects. Thus, one of the main anti-corruption strategies accepted globally is the establishment of independent and specialized anti-corruption agency (ACA). Nigeria has two specialised anti-corruption agencies: Independent Corrupt Practices and Other Related Offences Commission and Economic and Financial Crimes Commission (EFCC). These ACAs were created by an Act of the National Assembly and established in 2000 and 2004 respectively. In spite of their existence, there is a general belief that their efforts have not succeeded in reducing the high level of corruption in Nigeria. This belief is affirmed by the Transparency International and other rating agencies' reports classifying Nigeria consistently as one of the most corrupt nations in the world.

The effectiveness of any ACA is dependent on the level of dependence and autonomy the agency enjoys. Thus, it is a major requirements of United Nations

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Convention Against Corruption (UNCAC) that a State Party should grant to the ACA or ACAs, ‘the necessary independence, in accordance with the fundamental principles of its legal system, to enable the body or bodies (ACA or ACAs) to carry out its or their functions effectively and free from any undue influence’.¹ This is a fundamental requirement for the effective operation of any ACA because of the true nature of the phenomenon of corruption, which in many respects equals abuse of power.² In other words, a State such as Nigeria experiencing grand and systemic corruption with deficits in good governance and weak law enforcement³ can only make headway in the anti-corruption battle if there are strong and independent ACAs.

The independence of the ACA entails de-politicization of, and ensuring adequate levels of, structural and operational autonomy of the ACAs,⁴ which can be guaranteed where there exist certain fundamental building blocks.⁵ Securing the tenure of office of the head of ACA is one of the key building blocks towards securing the independence of ACA. The appointment and reappointments of the Chairman of EFCC, Magu by the President Buhari after rejections of Magu’s confirmation by the Nigerian Senate calls for the interrogation of section 171 of the 1999 CFRN (as amended) to determine its impact on the security of office of head of ACAs in Nigeria.

It is against the above background that this paper seeks to delineate and address the impact of section 171 of the 1999 CFRN on the security of office of head of anti-corruption agencies in Nigeria. In this endeavour, the paper addresses the following key areas: Anti-Corruption Agency, Appointment and removal of head of ACA, Magu’s confirmation rejections, examination of section 171 of 1999 CFRN, the impacts of section 171 CFRN in the fight against corruption in Nigeria and how to address the impacts.

II. Anti-Corruption Agencies (ACAs)

An ACA relates to a separate, permanent government agency whose primary function is to provide centralized leadership in core areas of anti-corruption activity.

¹ Article 6(2) of UNCAC.

² OECD Anti-Corruption Network for Eastern Europe and Central Asia, *Specialized Anti-Corruption Institutions: Review of Models* (OECD 2008) 24.

³ This is one of the major factors why corruption remains unabated in Nigeria. It makes engaging in corruption rewarding with little risk: there is little or no risk of being apprehended, prosecuted and sentenced.

⁴ Ibid, (n 1).

⁵ Such as financial autonomy, firm legal basis, adequate investigative power, etc.

The core functions of the agency globally include receiving and responding to complaints; intelligence gathering, monitoring, and investigation, prosecutions and administrative orders; research, analysis, and technical assistance; ethics policy guidance, compliance review, and scrutiny of asset declarations; and public information, education and outreach.⁶ ACAs are government agencies set up primarily to combat corruption using the relevant anti-corruption legislations. There is a requirement of both legal and institutional strategies to effectively combat the menace of corruption. The enactment of anti-corruption law and formulation of policies requires ACAs for their implementations. An ACA ‘is a separate, permanent government agency whose primary function is to provide centralized leadership in core areas of anti-corruption activity’.⁷ Therefore States are required to establish an ACA or ACAs.

There are international and regional legislations that provide for the establishment of anti-corruption institution. UNCAC in Article 6 provides that:

1. Each State Party shall, in accordance with the fundamental principles of its legal system, ensure the existence of a body or bodies, as appropriate that prevent corruption by such means as:
 - (a) Implementing the policies referred to in article 5 of this Convention and, where appropriate, overseeing and coordinating the implementation of those policies;
 - (b) Increasing and disseminating knowledge about the prevention of corruption.⁸

Similarly, African Union Convention on Preventing and Combating Corruption (AUCPCC), in Article 5(3) requires States to adopt legislative and other measures to ‘establish, maintain and strengthen independent national anti-corruption authorities or agencies’ and Article 20(5) provides that States Parties are required to ‘ensure that national authorities or agencies are specialized in combating corruption and related offences by, among others, ensuring that the staff are trained and motivated to effectively carry out their duties.’

⁶ See (n3) 4

⁷ Office of Democracy and Governance, *Anticorruption Agencies (ACAs): Anti-corruption Program Brief* (UNSAID, 2006) 5.

⁸ Article 6(1) (a) and (b) of the UNCAC.

Also the Southern African Development Community (SADC) Protocol against Corruption provides that amongst other preventive measures “an obligation to create, maintain and strengthen institutions responsible for implementing mechanisms for preventing, detecting, punishing and eradicating corruption.”⁹ Inter-American Convention against Corruption made a call for “oversight bodies with a view to implementing modern mechanisms for preventing, detecting, punishing and eradicating corrupt acts.”¹⁰ These conventions underscore the international obligation of States to ensure institutional specialisation in the area of corruption. Most of these conventions have either been domesticated or reenacted with little or no variation by State Parties. These conventions require a State Party to establish an ACA where none exists and such a State Party has the option of establishing one or more ACAs and where there is in existence an ACA, to maintain and strengthen the same.

Using the UNCAC requirements as a basis, ACAs are grouped into one of three categories: Preventive anti-corruption agency model under Article 6; Law Enforcement anti-corruption agency model under Article 36; or Prevention and Law Enforcement anti-corruption agency or combined anti-corruption agency model where both Articles 6 and 36 are fused into one agency.¹¹ The research examines them in turn.

- (i) Prevention model: Article 6 provides for the establishment of an institution that prevents corruption.
- (ii) Law enforcement model. Article 36 provides for the establishment of an institution that combats corruption through law enforcement. In States that adopt this model, the ACA has the powers to prosecute corruption cases and act as the lead agency in combating corruption.
- (iii) The combined agency model which is a combination of Articles 6 and 36 (prevention and law enforcement models). Under the combined agency model, the ACA has the power and duty to prevent corruption and combat corruption

⁹ Article 4, SADC, adopted: 14 August 2001; entered into force: 6 July 2005.

¹⁰ Paragraph 9 of Article III, adopted: 29 March 1996; entered into force: 6 March 1997

¹¹ It can also be called a combined anti-corruption agency. OECD Anti-Corruption Network for Eastern Europe and Central Asia, *Specialized Anti-Corruption Institutions: Review of Models* (OECD 2008) 31.

through law enforcement simultaneously. It is always the lead anti-corruption agency in such States regardless of the national strategy.¹²

UNCAC and the AUCPCC lay down international standards and basic benchmarks for creating specialised ACAs in a State.¹³ The main benchmarks include: independence and autonomy, specialised and trained staff, adequate resources and powers.¹⁴ However, these conventions failed to offer a blueprint for setting up and administering a specialised anti-corruption institution. There no single best model or a universal type of an ACA recommended, unlike the provisions relating to the elements of corruption offences that are considerably more precise.¹⁵ Consequently, the issue arising from this provision is whether a separate ACA under UNCAC requires the preventive, investigative and prosecuting functions to be housed in one agency.¹⁶ Thus, many ACA models have evolved over the years but there is no universally accepted ACA model.¹⁷ In some States, a separate ACA is created; some States give the anti-corruption mandate to an office or commission;¹⁸ others create a specialised unit within an established law enforcement agency that deals with corruption related matters.¹⁹

To attain the goals of establishing anti-corruption body or bodies in each State Party, the conventions further requires each State Party to grant the established 'body or bodies the necessary independence, ... to enable the body or bodies to carry out its or their functions effectively and free from any undue influence. This includes securing the tenure of office of the head of the ACA.

¹² Ugbejeh, E. O., 'The Dilemma of Anti-Corruption Agencies in Nigeria' 1 NOUN Journal of Legal Studies, (2014) pp 33.

¹³ OECD Anti-Corruption Network for Eastern Europe and Central Asia, *Specialized Anti-Corruption Institutions: Review of Models* (OECD 2008) 20.

¹⁴ *ibid.*

¹⁵ *ibid.* 24.

¹⁶ Nicholls C, *et al*, *Corruption and Misuse of Public Office* (2nd edn, Oxford University Press 2011) Pg 393. This issue is germane, given the provision of Article 36 of UNCAC that places the same obligation on States Parties as regards law enforcement.

¹⁷ See Heilbrunn, J. R. *Anti-Corruption Commissions: Panacea or Real Medicine to Fight Corruption* (World Bank Institute 2004) and OECD Anti-Corruption Network for Eastern Europe and Central Asia, *Specialized Anti-Corruption Institutions: Review of Models* (OECD 2008) 21.

¹⁸ In Ghana, it is the Commission for Human Rights and Administrative Justice; in Namibia, Papua New Guinea, Vanuatu and the Philippines it is the Office of the Ombudsman; in Uganda, it is the Inspector General of Government; and in South Africa it is the Public Protector.

¹⁹ Example is the Serious Fraud office in England and in Spain it is the *Fiscalía Anticorrupción*

a. The Anti-Corruption Agencies in Nigeria

The two main ACAs in Nigeria are the ICPC and the EFCC. The ACAs were established using the combined model.²⁰ The ICPC was established by the ICPC Act.²¹ One of the duties of the ICPC is to prevent corruption.²² The EFCC Act created the EFCC and empowers the commission, among other duties, to prevent economic and financial crimes established under the Act and any other law or regulation relating to economic and financial crimes.²³ The primary function and duty of ICPC is to prevent corruption and misuse of office especially in the public sector through preventive measures. The aim of EFCC is to prevent all forms of financial crime including corrupt practices through preventive measures. Other relevant agencies in Nigeria that contribute to the prevention of corruption include Bureau of Public Procurement (BPP),²⁴ Code of Conduct Bureau,²⁵ the Fiscal Responsibility Commission (FRC) which is responsible, among other things, for developing and publishing financial reporting standards to be observed in the preparation of financial statements of public entities in Nigeria,²⁶ and Nigeria Extractive Industries Transparency Initiative (NEITI).²⁷ Their mandates include preventing and combating corruption in their different areas of operation.

III. Securing the Office of the Head of ACA via Appointment and Removal Procedures

²⁰ This model allows the combination of two or more anti-corruption pillars in one agency. These pillars are prevention, investigation, prosecution, asset recovery and international cooperation.

²¹ Section 2 of Corrupt Practices and Other Related Offences Act Cap C31, Laws of the Federation of Nigeria 2004.

²² Section 6(a-f) provides for these duties. The investigative duty entails receiving and investigating reports of corrupt offences as created by the Act. Enforcement duty requires the commission in appropriate cases to prosecute the offender(s). The preventive duty is to examine, review and enforce the correction of corruption-prone systems and procedures of public bodies, with a view to eliminating or minimizing corruption in public life. Preventive duty also extends to education and enlightenment of the public on and against corruption with a view to enlisting and fostering public support for the fight against it.

²³ Sections 6 and 42 of the EFCC Act. These other laws include the Banks and Financial Institutions Act 1991, Miscellaneous Offences Act, the Money Laundering Act 1995, the Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Act 1994, the Advance Fee Fraud and Other Fraud Related Offences Act 1995, and the Money Laundering and (Prohibition) Act 2011 (as amended).

²⁴ This commission is created by PPA 2007. The core objectives of BPP include economic efficiency, providing fair competition for all, in other words, a level playing field for all bidders, ensuring that government receives value for money and maintains transparency in public procurement: Section 4 of the Act.

²⁵ The Code of Conduct Bureau and Tribunal Act, formerly Cap 56, LFN 1990, now Cap. C15 LFN 2004.

²⁶ Financial Reporting Council Act.

²⁷ Established by NEITI Act 2007 to implement the provisions of the Act. The main objectives of the NEITI include ensuring due process, transparency and accountability and eliminating all forms of corrupt practices in the extractive industry.

The two areas necessary for securing the office of the head of ACA are appointment and removal requirements and procedures. These are examined below.

a. Appointment of Head of Anti-Corruption Agency

The United Nations Convention against Corruption (UNCAC) and the African Union Convention on Preventing and Combating Corruption (AUCPCC) do not provide for and no consensus exists as to the qualifications needed for appointment of the head of an ACA. Some Jurisdictions require legal qualifications or public service experience while others provide for minimum educational qualifications without restricting appointment to any professional qualifications or public service experience.²⁸ In Nigeria, the ICPC Act requires a retired judge or any person qualified to be a judge of any superior court in Nigeria to be Chairman²⁹ while the EFCC Act requires a retired or serving law enforcement officer with 15 years minimum experience to be Chairman.³⁰

The Chairman of the ACA plays a symbolic role as the head of an anti-corruption institution.³¹ In many ways, the director or Chairman represents a pillar of the national integrity system and the selection process for the head of ACA demands transparency to facilitate the appointment of a person of integrity.³² The appointment of the Chairman by a single political figure, e.g. the President, is not considered a good practice.³³ In Nigeria, the respective Acts place the power of appointment of the Chairman of the ACAs on the President subject to the confirmation by the Senate.³⁴ Whilst these provisions are in principle satisfactory, the effect of section 171(1) of the CFRN undermines their effective application. Section 171(1) of the

²⁸ For instance, in *South African Association of Personal Injury Lawyers v Heath and Ors* (2001) 4 LRC 99, the South African court appointment of a serving judge to head the ACA was held to be a contravention of the principle of separation of power and invalid. However, under similar circumstances, the High Court in Kenya declared the ACA unconstitutional in *Gachiengo and Kahura v Republic* (2000) eKLR; Transparency International, 'Transparency International 1993-2003: Ten Years Fighting Corruption' in John Hatchard (ed.) *Cases and Materials Relating to Corruption* (Issue 4 2003) 3.

²⁹ Section 3(4) of the ICPC Act. It provides that the Chairman of ICPC 'shall be a person who has held or is qualified to hold office as a judge of a superior court of record in Nigeria'.

³⁰ Section 2(1) of the EFCC Act. It provides that the qualification is '(ii) ... a serving or retired member of any government security or law enforcement agency not below the rank of Assistant Commissioner of Police or equivalent; and (iii) Possess not less than 15 years cognate experience'.

³¹ Organisation for Economic Co-operation and Development (OECD) Anti-Corruption Network for Eastern Europe and Central Asia, *Specialized Anti-Corruption Institutions: Review of Models* (OECD 2008).

³² Ibid.

³³ Ibid.

³⁴ Section 3(6) of the ICPC Act and Section 2(3) of the EFCC Act.

Constitution empowers the President to appoint the head of an ACA in an acting capacity, without the requirement of Senate confirmation and without limiting the number of such appointments for an appointee. This has eroded the requirement of confirmation of heads of ACAs and in practice gives the President absolute control over the heads of the ACAs in Nigeria.

b. Removal of Head of Anti-Corruption Agency

It is trite that the fight against grand corruption is a fight against powerful elite, who are organised, powerful and desperate persons in both public and private sectors, determined to kill to retain their ill-gotten wealth and to further their evil acts,³⁵ the access of the ACA to politically and commercially sensitive information about these persons can place the ACA in conflict with their political and economic interests.³⁶ Thus, it is imperative that the head of ACA enjoys security of office by making his or her removal not subject to the whims and caprices of the President, political power or any group but rooted in constitutional procedure. In Nigeria, the EFCC Act offers the President the leverage of sacking the head of the commission and other board members as if they were his temporary servants under probation. The Act provides that:

A member of the Commission may at any time be removed by the President for inability to discharge the functions of his office (whether arising from infirmity of mind or body or any other cause) or for misconduct or if the President is satisfied that it is not in the interest of the Commission or the interest of the public that the member should continue in office.³⁷

The provision gives the President unbridled discretion to remove any member of the commission including the Chairman. Assuming the phrase ‘any other cause’ is to be read *ejusdem generis*, what constitutes ‘misconduct’ is not provided by the Act and what follows: ‘...if the President is satisfied...’ clearly indicates that the draftsmen intended to place the fate of the members and Chairman of the Commission

³⁵ Lumumba, P., ‘Key Note Speech at the Third Corruption Convention’ held at Hotel Africana Ltd, Uganda <<https://www.youtube.co/watch?v=4cbEuwqKKqE>> accessed 9 November 2018.

³⁶ Colin Nicholls C. *et al*, *Corruption and Misuse of Public Office* (2nd edn, Oxford University Press 2011) 396.

³⁷ Section 3(2) EFCC Act. The removal of the Nuhu Ribadu, former Chairman of the EFCC shortly after the exit of the former President Olusegun Obasanjo from office in 2007. His reappointment after the death of Umaru Yar’Adua in May 2010 when President Goodluck Jonathan assumed office and Ribadu was thereafter replaced by Waziri Farida in May 2008 shows the weakness of this provision.

in the hands of the President. The weak security of office of the head of EFCC has led to the removal of three heads of EFCC under unexplained circumstances before the expiration of their tenure of office.

The first was Nuhu Ribadu who was removed immediately after President Olusegun Obasanjo left office. The next was Mrs. Farida Waziri and the most recent was Ibrahim Lamorde, who on 9th November 2015 was forced to proceed on terminal leave ahead of the formal expiration of his tenure in 2016. Although, Ibrahim Lamorde's removal seems justified as there was a petition against him by George Uboh³⁸ to the Senate of the Federal Republic of Nigeria alleging Lamorde's diversion of N1 trillion worth of recovered assets. The Senate through its Committee on Ethics, Privileges and Public Petition commenced investigation and had invited the petitioner before it suspended its investigation. President Muhammadu Buhari wrote through the Ministry of Justice calling for the investigation of the petition. Thereafter, on 2nd November 2015 the Chairman of the Committee, Senator Samuel Anyanwu, announced that the Committee was to resume the investigation on 10th November 2015.³⁹ Surprisingly, on the 9th November 2015 the Committee announced an indefinite suspension of the investigation.⁴⁰ This petition is still pending before the Senate with little or no progress made in the investigation and public hearing.

In another development, a legal practitioner, Leo Ekpenyong, petitioned the President Muhammadu Buhari alleging an unhealthy relationship between the former EFCC Chairman (Lamorde) and the Minority Leader of the Senate, a former Governor of Akwa Ibom State, (Godswill Akpabio). Leo Ekpenyong expressed lack of confidence in Lamorde in investigating his petition against Godswill Akpabio on allegations of monumental graft when Godswill Akpabio was governor of Akwa Ibom State in Nigeria from 2007 to 2015.⁴¹ Lamorde's removal by mere pronouncement of

³⁸ George Uboh is the Chief Executive Officer of Panic Alert Security Systems (PASS), a Non-Governmental Organisation.

³⁹ Jeremiah A., 'Senate to Resume Probe of EFCC Chairman' <<https://www.naij.com/625420-senate-resumes-investigation-lamorde-alleged-corruption.html>> accessed 10 June 2019.

⁴⁰ Jeremiah, A., 'Senate Postpone Indefinitely Lamorde's Probe' <<https://www.naij.com/632339-senate-stops-probe-sacked-efcc-boss.html>> accessed 10 November 2018.

⁴¹ Ibeh N., 'There is a Romance Between EFCC and Akpabio-Lawyer' <<https://www.naij.com/621454-petitioner-speaks-on-sen-akpabios-case-with-efcc.html>> accessed 10 July 2019.

the President also reveals the level of insecurity of tenure of office of members and the Chairman of EFCC.

The provision of the ICPC Act is quite encouraging and provides that:

Notwithstanding the provisions of the section 3(7) of this Act, the Chairman or any member of the Commission may at any time be removed from the office by the President acting on an address supported by two-thirds 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.⁴²

Therefore, there are gaps under the EFCC Act and the Nigerian Constitution that need to be amended to guarantee the security of the tenure of the Chairman and members of the Commission. This will enhance the independence of the Commission.

IV. Section 171 of the 1999 Constitution of Federal Republic of Nigeria

Section 171 of the Constitution empowers the President of the Federal Republic of Nigeria to appoint the head of ACAs in an acting capacity, without the requirement of confirmation by the Senate or any other body, for one year renewable for unlimited times. Section 171 of the CFRN provide that:

‘(1) Power to appoint persons to hold or act in the offices to which this section applies and to remove persons so appointed from any such office shall vest in the President.

(2) The offices to which this section applies are, namely -

(a) Secretary to the Government of the Federation;

(b) Head of the Civil Service of the Federation;

(c) Ambassador, High Commissioner or other Principal Representative of Nigeria abroad;

⁴² Section 3(8) of the ICPC Act. Section 3(7) provides that ‘The Chairman shall hold office for a period of five (5) years and may be reappointed for another five (5) years but shall not be eligible for reappointment thereafter; and the other members of the Commission shall hold office for a period of four (4) years and may be reappointed for another term of four (4) years but shall not be eligible for reappointment thereafter.

(d) Permanent Secretary in any Ministry or Head of any Extra-Ministerial Department of the Government of the Federation howsoever designated; and

(e) any office on the personal staff of the President.

(3) An appointment to the office of the Head of the Civil Service of the Federation shall not be made except from among Permanent Secretaries or equivalent rank in the civil service of the Federation or of a State.

(4) An appointment to the office of Ambassador, High Commissioner or other Principal Representative of Nigeria abroad shall not have effect unless the appointment is confirmed by the Senate.

(5) In exercising his powers of appointment under this section, the President shall have regard to the federal character of Nigeria and the need to promote national unity.

(6) Any appointment made pursuant to paragraphs (a) and (e) of subsection (2) of this section shall be at the pleasure of the President and shall cease when the President ceases to hold office;

Provided that where a person has been appointed from a public service of the Federation or a State, he shall be entitled to return to the public service of the Federation or of the State when the President ceases to hold office’.

From the above provisions, the head of ACA falls within Head of any Extra-Ministerial Department of the Government of the Federation.⁴³ Subsection 6 of section 171 clearly states that the appointment is at the pleasure of the President. This renders the requirement of confirmation by the Senate under the anti-corruption laws (ACLs) aimed at guaranteeing the independence of the ACAs of no effect. Section 171 of the Constitution erodes the independence of the ACAs.

This provision of section 171 was intended as a stop gap measure before the appointment of a substantive head, but it has no express provision on the number of times such appointment in an acting capacity should be made on one person or whether such person can be reappointed or continue in an acting capacity after rejection of confirmation as substantive head by the Senate in line with the

⁴³ Section 171(2) (e).

requirement of section 3(2) of the EFCC Act and section 3(4) of the ICPC Act. This provision of section 171 in effect empowers the President to appoint head of ACA in Nigeria without confirmation by the Senate and even after refusal of confirmation as has been the case of Magu, Chairman of EFCC.

V. Ibrahim Magu's Confirmation Rejection

President Buhari, in line with previous practice and in compliance with section 2(3) of the EFCC Act, which requires confirmation by the Senate of a candidate nominated by the President to be the substantive Chairman of EFCC, forwarded the name of the acting Chairman of the EFCC, Ibrahim Magu for confirmation as the substantive head. The Senate Rule and Procedure requires that every nominee for confirmation must pass through an integrity check by the DSS. The DSS reported that Magu, who had been acting as the Chairman of EFCC, failed this test. The Senate wrote to the President informing him of the report, expecting a replacement. Instead, the President constituted a panel headed by the A-G to consider the allegations. After the panel's inquiries, which report was not made public, Magu was cleared of all allegations. The President resubmitted Magu for the second time, stating that the allegations were unfounded. The Senate, for the second time wrote to the DSS for a security check on Magu. Interestingly, the DSS responded to the Senate that it stands by the earlier report that Magu failed the integrity test. Based on the report and performance of Magu during the confirmation hearing, the request for Magu's confirmation by the President was refused. This case has raised several issues in the fight against corruption in Nigeria.⁴⁴

In one of such instances, the Nigerian Senate summoned the Chairman of the Presidential Advisory Committee against Corruption (PACAC) for expressing a legal opinion on the rejection of Magu as the substantive Chairman of EFCC. Sagay had said that the President does not require Senatorial confirmation under section 171 of the CFRN 1999 (as amended) for Magu to continue as Acting Chairman of EFCC. Section 171 empowers the President to appoint heads of governmental agencies in an acting capacity, without the confirmation of Senate.

⁴⁴ As discussed below it raises the issues of independence of EFCC, the synergy between and among the arms or government and the government agencies, how the constitution undermines the anti-corruption efforts and the issue of political interference in the anti-corruption fight.

There are many theories surrounding Magu's rejection by the Nigerian Senate. The first is on the grounds of his failure of the integrity test carried out by the DSS superintended by the President. The second is on the grounds of incompetence, as found by the Senate; and the last is that the confirmation is sought from those Magu is either investigating or prosecuting for corruption. The last raises the issue of a fair hearing.

The identifiable factors that account for institutional weakness in Nigeria include lack of independence arising from the power of the executive to remove heads of ACAs, the power of the executive to appoint heads of ACAs whether as substantive or in an acting capacity, as demonstrated in Magu's case; lack of financial autonomy of the ACAs; lack or shortage of funds, inadequate human and material resources;⁴⁵ power of the executive to determine financial allocations of ACA in the fiscal year and when such allocations are to be released to ACAs, and the weak recruitment procedure of staff manipulated by political exposed persons (PEPs).⁴⁶ EFCC Act provides for the removal of the Chairman of the EFCC by the President, without the requirement of Senate's confirmation.⁴⁷

VI. Impacts of Section 171 of the Constitution of Federal Republic of Nigeria on the Security of Office of Head of Anti-Corruption Agencies in Nigeria

One of the issues that arose from Magu's case is whether Magu continuation as Acting Chairman of EFCC after his rejection as substantive Chairman by the Senate is legal. The law has no provision barring Magu or any other person from being appointed as Acting Chairman after Senate's rejection of confirmation. This scenario was not anticipated and captured at the time of enacting the Constitution. However, the moral implication and perception of the public in retaining Magu after the Senate's rejection has negative effects on the independence of the EFCC. The combined effect of section 2(3) of the EFCC Act and section 171 of the CFRN 1999 is that the Chairman of the EFCC is subject to the wish of the President who can appoint and dismiss the Chairman without recourse to any authority or body, including the Senate. Giving the sensitive nature of the fight against corruption in Nigeria, the following are the impacts of Magu's appointment under section 171 of

⁴⁵ For instance the CCB is unable to carry out its verification of declared assets mandate due to lack of human and material resources.

⁴⁶ These are building blocks for assessing the independence of ACAs in Nigeria.

⁴⁷ Section 3(2) of EFCC Act.

the CFRN on the security of office of the head of ACA, the independence of ACAs and the fight against corruption in Nigeria.

The first is that it erodes the independence of the ACAs in Nigeria. This will lead to the case of he who pays the piper details the tune. In the absence of security of office of the head of ACA, the appointing officer or person will have undue influence on him.

Secondly, it conveys to the public that the ACAs are under the control of the President. The general believe in the public domain is that the EFCC and its Chairman is under the President's control given the way he was appointed. Thirdly, it erodes public confidence of the impartiality of ACAs in Nigeria. The general believe that the Chairman of ACA is under the control of the President weakens the public confidence on the impartiality and independence of the ACA in discharge of its duties. Another impact of is that it subjects the head of ACA to the authority and control of the President. This ridicules the anti-corruption effort at the international level and questions the government political will and sincerity in fighting corruption. The last but not the least is that it hinders the fight against corruption as many persons, bodies, organisation and States will be discouraged from cooperating with the ACA whose head is appointed under section 171 of the 1999 CFRN.

VII. The Way Forward

To address the impacts of section 171 of the CFRN, the following steps should be taken.

Firstly, the provision of section 171(1), (2) and (6) of 1999 CFRN, which empowers the President to appoint heads of governmental agencies in an acting capacity without the confirmation of Senate for one year should be amended to include the head of ACAs among appointments that require the confirmation of the Senate and a clear provision stating that appointment in an acting capacity made by the President should be for a maximum of one year and not renewable.

Secondly, the weak security of office of the head of EFCC that had led to the removal of three heads of EFCC under unexplained circumstances before the expiration of their tenure of office should be addressed by amending section 3(2) EFCC Act by removing the phrase '...if the President is satisfied...' and the term 'misconduct' should be

clearly defined. Thirdly, the removal of head of ACA should at all times be subjected to the confirmation of the Senate, not merely by the President alone.

VIII. Conclusion

The paper examined the impact of section 171 of the 1999 CFRN as it relates to the independence of ACAs in Nigeria and the security of office of the heads of ACAs in Nigeria. The meaning and forms of ACA was unravelled using international anti-corruption laws -UNCAC. The appointment and removal of head of ACA and section 171 of CFRN was critically examined *vis a vis* the primary anti-corruption laws in Nigeria – EFCC and ICPC Acts. The paper found gaps in section 171 of the CFRN and the fact that the section erodes the independence of ACA and the security of tenure of office of the head of ACA in Nigeria. On the basis of the findings, the paper recommends amendment of the section 171 of CFRN 1999, to include the heads of ACAs among appointments that require the confirmation of the Senate, a clear provision stating that appointment in an acting capacity made by the President should be for a maximum of one year and not renewable, the removal of head of ACA should be subject to confirmation of the Senate and the term ‘misconduct’ should be clearly defined under the EFCC Act.