

Anti-corruption agencies as debt recovery agents: the unintended consequences of anti-corruption efforts in Nigeria

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November 2019

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Executive summary

The Economic and Financial Crimes Commission (EFCC) was established in 2002 by an Act of the National Assembly of the Federal Republic of Nigeria as the coordinating anti-corruption agency in Nigeria. The statutory powers, coordinative functions and the jurisdiction of the EFCC were discussed in Onyema et al. (2018), in which the authors argued that the effectiveness of the EFCC to discharge its mandate had been called into question locally and internationally over the past decade. This is largely due to the perception by the Nigerian public that the EFCC is a tool of the incumbent government to pursue political goals or a means of settling political scores with opponents.

An emerging concern about the effective functioning of the EFCC is that it now serves as a 'debt collection agency' at the disposal of commercial banks, high net-worth individuals and even the government. This research examines the extent to which this allegation may be true and considers the reasons why these private actors utilise the EFCC for the recovery of contractual debts instead of relying on the courts and other dispute resolution mechanisms. The deeper question examined in this paper is whether these private actors have now captured and use the EFCC for their own purposes.

In analyzing these questions we interrogate the role of the private sector in the entrenchment of political corruption in Nigeria, using relevant legal judgments and interviews with Nigerian lawyers and their clients as supporting evidence.

List of acronyms and abbreviations

ACA	Anti-corruption agencies
CCB	Code of Conduct Bureau
COTRIMCO	Corruption and Financial Cases Trial Monitoring Committee
EFCC	Economic and Financial Crimes Commission
GTB	GT Bank Plc
ISG	Imo State Government
ICPC	Independent Corrupt Practices Commission
LEA	Law enforcement agencies
NPF	Nigerian Police Force
PPPRA	Petroleum Product Pricing Regulatory Agency

1. Introduction

Nigeria's Economic and Financial Crimes Commission (EFCC) was created in 2003 by an Act of the National Assembly in response to the listing of Nigeria as a non-cooperative country by the Financial Action Task Force on Money Laundering (Obuah, 2010). Addressing corruption was a precondition for Nigeria's acceptance into the international community and for the opportunity to participate in international business and to access international financial markets (ibid.). The Commission was established through the Economic and Financial Crimes Commission (Establishment) Act ('the Act') to combat all economic and financial crimes in Nigeria and was empowered to examine and investigate such crimes.¹ The Commission was also given the role of coordinating all relevant anti-corruption agencies (ACAs) in Nigeria and the power to enforce all laws in Nigeria relating to financial and economic crimes.²

The enabling statutes of the primary ACAs – which includes the Code of Conduct Bureau (CCB), the Independent Corrupt Practices Commission (ICPC) and even the EFCC itself – provide for a multi-pronged approach to combating corruption, that is, a preventive approach, an educative approach³ and a prosecutorial approach. However, the emphasis of the agencies has been prosecutorial. This paper recognises the prosecutorial anti-corruption approach and the growing phenomenon where ACAs go beyond their prosecutorial criminal remit by intervening in purely civil or contractual matters relating to the recovery of debt.

The establishment of a centralized anti-corruption agency that combines approaches in one institution for prevention, investigation and education is not a novel idea. The anti-corruption success stories of Singapore and Hong Kong encouraged the establishment of strong, centralised anti-corruption agencies. Many countries adopted the Hong Kong and Singapore models in fighting corruption by setting up a dedicated anti-corruption agency.⁴ However the extent to which the successes experienced in these countries have been replicated is debatable (Gorta, 2003; Choi, 2009; Quah, 2010, 2011).

¹ The Commission was created by the Economic and Financial Crimes Commission (Establishment) Act, 14 December 2002. The Act was repealed by the Economic and Financial Crimes Commission (Establishment) Act, 2004, Cap E1 Laws of the Federation of Nigeria 2004. See Chawki (2009).

² Section 6(c)(n) and (o) of the EFCC Act. See also *Ugo-Ngadi v Federal Republic of Nigeria* (2018) 8 NWLR (Pt 1610).

³ Section 10 of the Corrupt Practices Act Cap C31 Laws of the Federation of Nigeria inter alia empowers the ICPC to (i) examine the practices, systems and procedures of public bodies and advise in respect of practices, systems or procedures that facilitate fraud or corruption; (ii) instruct, advise and assist any officer, agency or parastatal on ways by which fraud or corruption may be eliminated or minimized; (iii) educate the public on and against bribery, corruption and related offences; and (iv) enlist public support in combating corruption. Similarly, Paragraph 14 of the Code of Conduct Standard Operating Procedure mandates the CCB to engage in collaborative anti-corruption policies and foster ways of preventing and educating on corruption in public places. Section 6(p) of the EFCC Act empowers the EFCC to carry out and sustain rigorous public enlightenment campaigns against economic and financial crimes within and outside Nigeria.

⁴ Some of the countries that have adopted a similar model include Latvia, Australia, Botswana and Uganda.

The replication of anti-corruption agencies is relevant to two debates in the Nigerian context. On the issue of legal transplants and replication of approaches, the literature is replete with both the significance of tackling corruption within the cultural and social context of a specific country and the concomitant absence of clear universal solutions (Kapoor and Shamika, 2009; Banuri and Eckel, 2012). On a second issue regarding the choice of strengthening existing institutions versus establishing a single agency, there is little consensus on whether anti-corruption efforts are best served by strengthening existing apparatus such as audit institutions and law enforcement authorities. The thrust of this view is that public administrative reform with strengthened public institutions, including the civil service and judiciary, are more effective at combating corruption than creating a specialised anti-corruption agency.

Determining the effectiveness of an anti-corruption agency is a complicated endeavor for several reasons. First, a large degree of corrupt conduct is under-reported and our primary tools for assessing the level of corruption within a country rely on perception studies. Second, ascribing a causal relationship between the success of an anti-corruption institution with the level of corruption in a country fails to consider the multiple factors that cause and influence the level of corruption within a country. Notwithstanding the absence of a formal study to evaluate the effectiveness of the EFCC, there is a widely held perception that the EFCC has been ineffective in successfully combating corruption in Nigeria and has failed to fully achieve the objectives for which it was established (Mordi, 2016). This perception has been linked to several internal and external factors including political influence, lack of adequate funding, operational challenges and an ineffective judicial system, but it has not been static. Indeed, changes in perceptions about the EFCC are consistent with the typical development cycles of anti-corruption agencies – non-linear development associated with the disruption caused by the volatility of government support.

This paper is not an assessment of the effectiveness of the EFCC in reducing corruption. Rather, it considers the second-generation reforms required to improve governance and reduce incidents of corruption. In this regard, the extent to which state capture acts as a form of corruption that alters the incentives of government institutions is particularly relevant. The focus here is the intersection between the buyers of influence (the private sector) and the sellers of influence (public officials), and the extent to which this interaction distorts the normal functioning of the market. It is imperative to note that one of the developments that heralded the anti-corruption crusade of Nigeria was the establishment of the ICPC in 2000 with its focus on public-sector corruption. The subsequent EFCC Act vested the EFCC with jurisdiction over both public- and private-sector corruption but, at its inception, the prosecution of public-sector corruption was not envisaged as falling within the portfolio of the EFCC due to the prior existence of the ICPC.

However, as we shall see in section 3 of this paper on the institutional framework of the EFCC, the Act gave a wide definition to the term ‘economic and financial crimes’. This vests

the EFCC with power to enforce and/or coordinate the enforcement of all legislations on economic and financial crimes whether committed by government officials or private citizens. The Supreme Court in the case of *Nweke v Federal Republic of Nigeria*⁵ held that the powers of the EFCC are not limited to government activities. Rather, that the jurisdiction of the EFCC applies wherever an economic and financial crime has been committed, whether by government officials or private citizens and hence interaction between EFCC officials and the private sector is inevitable.

As discussed in Onyema et al. (2018), the EFCC suffers from organisational dysfunction such as lack of funding, improper training of personnel and internal corruption which has made it susceptible to external influence, both in terms of political capture and, as this paper shows, private-sector capture.⁶ The susceptibility of the EFCC to capture by private citizens was succinctly highlighted by the Court of Appeal in *Gaul Ihenacho v Nigerian Police*, when it held:

There are usually dire consequences at every turn of event where lawlessness is condoned and perpetrated rather than doing the sacred biddings of the law. The spate of lawlessness and recklessness in the polity cannot be condoned be they the handiwork of private individuals or state government executives whose heads and top officials are expected to know better. Chasing after an adversary and hounding him with state sponsored law enforcement agents paid with the sweat of taxpayers toil rather than keeping to the terms of binding agreements is another form of aberration that must be strictly viewed. (Mr. Gaul Ihenacho & 3 Ors. v. the Nigerian Police Force & 2 Ors_ (2017) 12 NWLR (Pt 1580) 424)

State capture has traditionally been treated as a subset of corruption. It is defined from an institutionalist perspective, as the misuse of public office for private gain through influence over institution-making (Rose-Ackerman, 2008). The concept of state capture as a form of corruption in which firms make private payments to public officials to influence the choice and design of laws, rules and regulations is well established. Similarly established is the distinction between the preceding form of corruption and administrative corruption, wherein private individuals seek to alter the prescribed implementation of laws, rules and regulations through private payments to public officials (Hellman and Kaufmann, 2001).

The type of corruption we focus on in this paper lies at the interstices of both forms of corruption in that private individuals co-opt the machinery of the state to achieve their own private objectives. In this regard, we review the recent phenomenon where the private sector engages the Commission for the settlement of commercial disputes and its use for the recovery of debts by commercial banks. This differs from public-sector corruption in that the private individuals do not seek to influence policy choices or circumvent the implementation

⁵ (2019) 10 NWLR Pt 1679 51 at p.70

⁶ See Onyema et al. (2009) and Ikpeze, Nnamdi (2013)

of policies. Rather, they use the resources of the state to implement their own desired policy ends. This seemingly benign form of state capture raises important political-economy issues that touch upon fundamental aspects of the design of the enforcement system and the interactions between businesses and government institutions.

Section 2 of this paper discusses the political economy of regulatory capture as it relates to the functions and powers of the EFCC. Section 3 addresses the institutional framework for the operation of the EFCC and Section 4 examines how some private actors use the EFCC as a debt-collection agency. Section 5 sets out our recommendations and section 6 our conclusions.

2. The political economy of the EFCC as an anti-corruption agency in a developing economy

The EFCC has often been politically captured, but it has also been an effective anti-corruption agency. In particular, the Commission saw some early successes in tackling money laundering investigations (Gbolahan, 2007; Lawrence, 2009; Onyema et al., 2018). The consolidation of its powers under the EFCC Act as both an investigator and prosecutor made it the key coordinating agency for all financial crimes including money laundering, bribery, fraud, tax evasion, smuggling, oil bunkering and a host of other issues critical for a well-functioning Nigerian economy. But, given its wide-ranging powers, it has also been subject to frequent political interference and political corruption (Lawrence, 2009; Onyema et al., 2018; Congressional Research Service, 2019).

It is certainly a plausible contention that the establishment of the EFCC provided Nigeria with the credibility to, among other things, participate in international financial markets as well as perform better in the influential Corruption Perceptions Index (CPI) devised by Transparency International.⁷ However, while the agency notched up some early effective drives against corruption, its operations in later years have been in line with the performance of most ACAs in developing countries – that is, having an impact that is best described as ‘fair’ (Johnsøn et al., 2012). One of the reasons for the sliding, or at least inconsistent performance of the EFCC, can be ascribed to the fact that when the agency was founded other powerful organisations in the Nigerian political settlement (which we describe as an alignment between the distribution of power and distribution of benefits, as in Khan, 2018) had not yet ‘adjusted’ to its operations. Gradually, however, political incumbents began to co-opt its mandate in line with their own organisational power, which is one reason why individuals have been able to direct the EFCC’s anti-corruption activities towards opposition politicians more effectively than towards their own politicians. This type of corruption is a form of rent-creation and capture through powerful informal patron-client network through which political groups stay in power (Khan, 2006; Khan et al., 2019).

While identifying the more politically motivated instances of political corruption can be difficult, this paper focuses on an aspect of misuse of the EFCC’s mandate that we identify as damaging to the aims of the Commission. A recent trend in the workings of the EFCC has been the conduct of fraud investigations which are a criminal matter, in matters of debt collection which is essentially a civil matter. As we identify later in this paper, one key reason for this is the procedural delays parties have to face in the civil-legal architecture for debt

⁷ See <https://www.transparency.org/research/cpi/overview>

recovery. This can be described as market-restriction-driven corruption (ibid.) as distortions in the contractual ecosystem required for settling commercial disputes compel parties to resort to misuse of the EFCC's mandate. Another reason is linked to large private-sector players like powerful banks who can use their (informal) connections with the EFCC to influence investigations.

One of the most high-profile cases of this nature was a series of litigations and investigation involving Innocent Chukwuma, a leading Nigerian entrepreneur auto assembler and importer; GT Bank (GTB), one of Nigeria's largest banks; and the EFCC. The details of this case are complicated and lengthy and began in the nature of a commercial dispute between GTB and Chukwuma's company Innoson, but at some point the EFCC stepped in to commence investigations into allegations of fraud by the latter. Media reports suggested this was at the behest of GTB (Chiedozie, 2018; Ogunnubi, 2019). The complex nature of the dispute is not just of debt recovery, which is one reason the case has not been highlighted in this paper. However, we examine four not-so-high-profile but relevant cases in section 4 to highlight how the EFCC is being used as an instrument for debt collection, given its vast investigative and prosecutorial mandates.

As mentioned above, the corruption problem we identify is of two types – market-restriction-driven corruption and political corruption. What is important for us to analyse is which of these is relatively easier to address. As laid out in Khan et al. (2019) the first is relatively easier to address in terms of feasibility as instances of market-restriction-driven corruption are usually linked less to powerful political networks and more to individual discretion of officials (though they can also on occasion be linked to political networks). What appears to work here is a 'disincentive' structure in the civil architecture for debt recovery (referred to in Section 3) that discourages agents from being rule-following and those with the reach and ability lodge criminal complaints with investigative agencies like the EFCC and Nigerian Police Force (NPF) to intervene in debt recovery. Through our research, it is also clear that polices targeting this form of corruption will be impactful given that debt collection is a 'function creep' for the EFCC, diverting scarce financial and human resources into areas that are not of the scope and importance to deserve its attention. Function creep is normally used to refer to technologies but, in this case, it occurs as the functioning of the EFCC is completely subverted. This is important when the Nigerian economy has to deal with critical instances of rent-capture like smuggling, oil bunkering, foreign exchange round tripping, etc. In any case, the use of a public body for private purposes can be credibly regarded as wasteful.

On the other hand, political corruption is a structural feature of developing countries and hence is difficult to address. The main reason for this is the existence of a 'rule *by* law' – that is, selective law enforcement over the good governance benchmark of 'rule *of* law', where law enforcement is impartial (Khan, 2018). Of course rules in most countries are enforced on a spectrum of rule of, to rule by, law.

In developed countries the economy by definition is complex and there are many productive organisations with a relative level playing field among powerful organisations. In such a situation transactions have to be impersonal and based on contracts and their enforcement.

Following the rule of law is important as it is the only way to ensure that parties are protected while dealing with an entity they don't know personally. The incentive structure in society among agents is therefore broadly aligned for impartial enforcement.

Developing-country societies are characterised by a few powerful organisations that may not be productive but that use their organisational power to distort laws to capture rents and escape being penalised. This is especially true when politics is defined by informal rent flows and patron–client relations. In fact, organisations break rules in order to accumulate and it is therefore not in their interest to be rule-following. This also works in the context of the EFCC and powerful private players where the ACA's extensive mandate can be misinterpreted by powerful interests for private gains. It is common knowledge among legal and banking professionals that large banks in the country have to maintain good working relationships with the EFCC. How far these extend cannot be credibly open to comment. However, it is reasonable to assume that these links can be asymmetric in nature compared to many other private-sector players.

3. The institutional framework for the operation of the EFCC

At the EFCC's inception it was focused on investigating and prosecuting financial crimes such as fraud, money laundering and public-sector corruption. Advanced fee fraud was also a key target of the EFCC, and it successfully investigated and prosecuted such offences.⁸ One major success for the EFCC was the successful conviction of Nigerians who were involved in defrauding the Brazilian bank Banco Noroeste of over US\$240 million.⁹ The EFCC soon became the foremost ACA ahead of bodies such as the CCB, the NPF, the ICPC, the National Extractive Industry Transparency Initiative, the Nigerian Financial Intelligence Unit and the Public Complaint Commission as it had the backing of the country's first civilian president after the restoration of democracy in 1999, Olusegun Obasanjo. Subsequently, the EFCC became Nigeria's primary ACA responsible for recovering corrupt proceeds from senior government officials and received international support aimed at bolstering the efforts of the government to combat economic and financial crimes.¹⁰

The EFCC's initial activities against corruption appeared to be effective. It filed criminal charges against several politicians between 2004 and 2010,¹¹ which included former governors, ministers,¹² and heads of public agencies.¹³ This was done through the widely drafted powers contained in Section 6 of the EFCC Act to the effect that the EFCC is responsible for the investigation of all financial crimes including advance fee fraud, money laundering, counterfeiting, illegal charge transfers, futures market fraud, fraudulent encashment of negotiable instruments, computer credit card fraud, and contract scams, etc. Furthermore, Section 7 of the EFCC Act empowers the EFCC to investigate whether any person, body or organisation has committed an offence under the EFCC Act or other laws relating to economic and financial crimes. Between 2003 and 2006, the EFCC obtained about 92 convictions (Taiwo Osipitan and Abiodun Odusote, 2014). By the end of 2006, the Commission received over 4,200 petitions on corruption-related cases, of which it investigated 1,200 cases and prosecuted 406 (Obuah 2010a).

⁸ For example, *Fred Chijundu Ajudua v Federal Republic of Nigeria*.

⁹ See <https://www.cbn.gov.ng/419/anejemba.asp>

¹⁰ Ms. Linda Thomas-Greenfield was the Deputy Assistant Secretary of the United States Bureau of African Affairs, Department of State. Her speech is contained in the Report of the Hearing of the United States House of Representatives Committee on International Relation's Subcommittee on Africa, Global Human Right and International Operations, Washington 18 May, 2006, US Government Printing Office No.109-172, 28.

¹¹ Former Governors included Orji Uzor Kalu of Abia State, Chimaroke Nnamani of Enugu State, Lucky Igbenedion of Edo State, James Ibori of Delta State, Gabriel Suswam of Benue State

¹² Former Ministers include Mr Femi Fani Kayode, Mr Babalola Borishade, and Ms Stella Oduah.

¹³ Including two former Inspector Generals of Police Tafa Balogun and Sunday Ehindero, and former managing director of the Nigerian Ports Authority Mr Bode George.

The Corruption and Financial Cases Trial Monitoring Committee (COTRIMCO) was mandated by the then Chief Justice of Nigeria, Justice Walter Onnoghen, with identifying factors responsible for delays in the disposition of corruption and financial crimes cases in Nigeria (Oye, 2018). COTRIMCO monitored corruption and financial crimes cases being prosecuted in the Nigerian courts, reviewed the judgments delivered by the courts and published an interim report in April 2018 ('the Interim Report') on cases prosecuted by ACAs in Nigeria. The report confirmed that 175 cases of the 297 examined were prosecuted by the EFCC, while the ICPC and the NPF prosecuted 13 and 5 cases respectively (Adesomoju, 2019). The Interim Report concluded that the EFCC remains most active of the ACAs in terms of numbers of prosecutions and/or convictions in corruption and financial crime cases (ibid.). This supports our own finding from Onyema et al. (2018), which revealed that between 2010 and 2015 the EFCC had received 36,442 petitions, investigated 15,124 petitions, prosecuted 2,460 petitions and secured 568 corruption convictions.

3.1. The scope of the EFCC's statutory powers

The EFCC's extensive powers were granted in a peculiar manner. Rather than enumerating specific offences, the Commission is conferred with the power to investigate any offence that may be considered an economic or financial crime under any law in Nigeria. Furthermore, the EFCC is permitted to conduct investigations into any property where it appears that the value of the property or lifestyle of the owner of the property may not be justified by the income of the owner. This is a broad remit.

In addition to its general investigative powers, the Commission has a coordination function too. The EFCC is the chief coordinating ACA in Nigeria with the power to coordinate and supervise the enforcement of all economic and financial crimes within the country.¹⁴ Consequently, the Commission is required to liaise with other law enforcement agencies (LEA) and work cooperatively in the enforcement and prevention of economic and financial crimes.¹⁵ Included in this mandate is the responsibility for collaborating with other entities with respect to criminal activities in matters connected to the extradition or deportation of suspects.¹⁶

With respect to the central theme of this paper, that is, the use of the EFCC as a debt-recovery agent, it is important to have a working understanding of what constitutes an 'economic and financial crime' which is distinguishable from default arising from a civil debt obligation. The EFCC Act broadly defines economic and financial crimes to cover:

¹⁴ Section 6(c)(n) and (o) of the EFCC Act. See also *Ugo-Ngadi v Federal Republic of Nigeria* (2018) 8 NWLR (Pt 1610).

¹⁵ EFCC Act (n 3) s 7; Lawrence (n 7) 341.

¹⁶ Section 6(1)(j) of the EFCC Act.

...non-violent criminal and illicit activity committed with the objectives of earning wealth illegally either individually or in a group or organized manner thereby violating existing legislation governing the economic activities of government and its administration and includes any form of fraud, narcotic drug trafficking, money laundering, embezzlement, bribery, looting and any form of corrupt malpractice, illegal arms deal, smuggling, human trafficking and child labor, illegal oil bunkering and illegal mining, tax evasion, foreign exchange malpractice including counterfeiting of currency, theft of intellectual property and piracy, open market abuse, dumping of toxic wastes and prohibited goods, etc. (EFCC Act (n 3) S 46)

Given the laundry-list approach adopted by the drafters of the statute, there is a sense that the intention was to bring any illegal activity that leads to illegitimate wealth accumulation within the purview of the Commission. Indeed, the drafters also contemplated the possibility that there may be future activities not specifically enumerated that could be covered by the statute by using the term 'include' which is a permissive expression in the rule of statutory interpretation.¹⁷ The Act accordingly permits the introduction of any act or omission not expressly mentioned in the definition section so long it is an illegal activity for financial gains which violate existing laws. The use of the permissive expression combined with the legislative phrase 'existing legislation' and section 7(f) of the EFCC Act granting the Commission the power to enforce any other law or regulation on economic and financial crimes suggests that any non-violent act which is prohibited under any law in force performed with the intention to acquire wealth would amount to an economic or financial crime.

The legislator in continuation of the intention to broaden the scope of economic and financial crimes beyond the conducts contained in the above statutory definition and particularly the offences contained in Sections 14 to 18 of the Act drafted the Act such that the jurisdiction of the EFCC shall apply to offences stipulated in the provisions of the Money Laundering Act,¹⁸ the Advance Fee Fraud Act,¹⁹ the Failed Banks Act,²⁰ the Banks and other

¹⁷ The Supreme Court per Chukwunweike Idigbe JSC (as he then was) in *Rabiu v Kano State* (1980) 8 – 11 SC (Reprint) 85 in defining the word 'include' made the following pronouncement 'it has, in my respectful view, quite rightly been said that sometimes, however, the word "include" is used in order to enlarge the meaning of words or phrases occurring in the body of a statute; and when it is so used those or phrases must be construed as comprehending, not only such things they signify according to their natural import, but also those things which the interpretation clause declares that they shall include' (see Lord Watson in *Dilworth v Commissioner of Stamps* (1899) AC. 99 at 105 and 106).

¹⁸ Money Laundering (Prohibition Act) Act 2011 (as amended).

¹⁹ Advance Fee Fraud and Other Related Offences Act, Cap A6, Laws of the Federation of Nigeria 2004.

²⁰ Failed Banks (Recovery of Debts) and Financial Malpractice in Banks Act 1994 (as Amended), Cap F2 Laws of the Federation of Nigeria 2004.

Financial Institutions Act,²¹ and the Miscellaneous Offences Act.²² Hence, the term 'economic and financial crimes' extends to the provisions of any other laws or regulations which prohibit any economic and financial act or omission including but not limited to the Criminal Code Act,²³ and the Penal Code Act.²⁴

3.2. Interaction between criminal and civil disputes

The distinction between civil and criminal law has been a persistent and unwieldy issue in common law jurisdictions. At a high level of abstraction, a civil case involves a dispute between two or more parties on a particular issue. Criminal law on the other hand is concerned with the contravention of specific offences defined by statute. Generally, civil cases are brought by private individuals, while criminal cases are brought by the state in response to the violations of a covered rule (Asein, 2005). The remedies available under civil law are often monetary compensation in the form of damages or, in some instances, equitable relief such as injunctions and specific performance of contractual obligations. Criminal law, on the other hand, focuses on the enforcement of codified criminal statutes, whose infringement is punishable by the state with imprisonment and/or payments of fines (Obilade, 1979). Criminal law is typically enforced by the state, though private enforcement may be permissible in exceptional circumstances mostly by the fiat of the Attorney General of a state, Attorney General of the Federation or by proceedings instigated by a private individual through a mandatory order of a court of competent jurisdiction in the form of mandamus (Okagbue, 1990; Ogowewo, 1995).

In other words, whilst civil law addresses the rights and duties between individuals and with private duties and claims arising from tort, contract or otherwise, criminal law addresses wrongs committed against the public, which wrongs have been proscribed by a statute and the punishment prescribed in the said statute.²⁵ Furthermore, while the object of criminal law is largely retributive/punitive and to a limited extent deterrent, the objective of the civil law regime is largely compensatory in the forms of damages and in other circumstances to prevent civil infractions through injunctions or to compel performance of civil obligations by

²¹ Banks and other Financial Institutions Act, Cap B1, Laws of the Federation of Nigeria 2004. The Commission relied on the broad construction of economic and financial crimes in the prosecution of the managing directors, managers and senior staff of some financial institutions for infractions of the Banks and Other Financial Institutions Act further to report of examinations by the Central Bank of Nigeria and the Nigerian Deposit Insurance Corporation. The EFCC recorded some of the notable prosecutions and convictions on the examinations including the prosecutions of Mrs. Cecilia Ibru, Mr. Patrick Atuche, Mr. Barth Ebong, Mr. Erastus Akingbola of Oceanic bank Plc (subsequently acquired by Ecobank), Bank PHB (later became Keystone Bank), Union Bank and Intercontinental Bank (subsequently acquired by Access Bank) respectively.

²² Miscellaneous Offences Act, Cap M17, Laws of the Federation of Nigeria 2004.

²³ Criminal Code Act, CAP C38, Laws of the Federation of Nigeria 2004.

²⁴ Penal Code Act, CAP P3, Laws of the Federation of Nigeria 2004.

²⁵ Section 36(12) of the Constitution of the Federal Republic of Nigeria 1999 (as amended) ('Constitution'). See also Aoko v Fagbemi CwLR (1961) 2.

an order of specific performance (Obilade, 1979; Asein, 2005). Box 1 briefly describes the judicial hierarchy in Nigeria.

Box 1. Nigeria's judicial hierarchy

The Nigerian judicial system is as contained in the Constitution of the Federal Republic of Nigeria 1999 (as amended). Section 6 of the Constitution enumerates the Superior Courts of Record in the following hierarchy: Supreme Court of Nigeria, Court of Appeal of Nigeria (Court of Appeal), the Sharia Court of Appeal, Customary Court of Appeal, High Court of the States, High Court of the Federal Republic of Nigeria. There are lower courts such as area courts in the north, customary courts and magistrate courts (Inferior Court). Appeals lie from the Inferior Courts to the High Courts or the Sharia Court or Customary Court on matters of sharia law and native law and custom respectively. Matters appealed to the High Courts from the Inferior Courts or matters instituted at first instance are appealable to the Court of Appeal. Every decision of the Court of Appeal is appealable to the apex Nigerian court, the Supreme Court.

It is, however, imperative to note that a set of facts could straddle applicability in both civil law and criminal law. Both the civil and/or the criminal elements of a case can be pursued either simultaneously or in succession under Nigerian law.²⁶ And the mere fact that a civil contract contains an arbitration clause mandating the parties to submit any dispute to arbitration does not prevent the EFCC from investigating elements of economic and financial crimes arising from the transaction.²⁷ Consequently, the EFCC is not precluded from investigating allegations of economic and financial crime in civil transactions as a result of ongoing civil proceedings. This observation is extremely salient as it helps us to consider the question of why it has been easy for interested parties to utilise the EFCC's jurisdiction in matters of debt collection. Our research points to the fact that lawyers, when briefed, search for the criminal nature of the set of facts to bring it within the purview of the EFCC. Where there is an element of an economic and financial crime, they file a petition with the EFCC. However, some lawyers still file petitions with the EFCC even when there is no suggestion of criminality.

A practical illustration is in the facts of the case of *Economic and Financial Crimes Commission v Yanaty Petrochemical Limited Yanaty*.²⁸ This case highlights how the ambiguity between civil and criminal can nudge the EFCC to pursue the criminal nature of the proceedings when a case also has a significant civil element. In this case, Yanaty Petrochemical Ltd (Yanaty) instituted a civil action at the Federal High Court (the first suit)

²⁶ *Veritas Insurance Co. Ltd v Citi Trust Investment Ltd* (1993) 3 NWLR (Pt 281) 349 at 365; *Joseph A Alao v NIDB* (1999) 9 NWLR (Pt.617) 103.

²⁷ *Danfulani v EFCC* (2016) 1 NWLR (Pt 1493)223 at 246.

²⁸ (2017) 3 NWLR (Pt 1552) 171.

against the Petroleum Product Pricing Regulatory Agency (PPPRA), a state-owned organisation responsible for regulating downstream oil prices, challenging its power to unilaterally demand for the extension of the duration of an Advance Payment Guarantee (APG).²⁹ In this case Sterling Bank Plc issued an APG in respect of a fuel subsidy contract between Yanaty and the PPPRA. What follows is a summarised description of the proceedings between the two, the facts of which demonstrate the key issue of concerns in this paper, namely, the consequence of the lack of clarity on key legal principles that can lead to the intervention of the EFCC in matters that can touch on both civil and criminal law. We argue this is a drain on the EFCC's capacity to function as an effective ACA.

Yanaty instituted a suit against the PPPRA seeking an order against the attempt by the latter to extend the duration of the APG because Yanaty's dealings in respect of Nigeria's extensive fuel subsidy programme were under investigation (first suit). Before Yanaty had commenced the first suit the PPPRA had petitioned the EFCC, alleging Yanaty had committed fraud and money laundering with respect to payment of the fuel subsidy. The contention was this needed criminal investigations by law and investigations were ongoing whilst the first suit was pending. Yanaty then instituted another suit (the second suit) against the EFCC, for a declaration that because of the judgment in the first suit – that the PPPRA could not extend the APG on the premise of ongoing criminal investigation – the EFCC could not open any further investigation into the issue. In the second suit the Federal High Court held that the EFCC lacked the power to carry out an investigation into the transactions between PPPRA and Yanaty.

The decision of the Federal High Court in the second suit was reversed by the Court of Appeal. Yanaty, dissatisfied with the judgment of the Court of Appeal, appealed to the Supreme Court which affirmed the decision of the Court of Appeal. The Court of Appeal, in reversing the decision of the Federal High Court, held that a judgment in a civil suit does not preclude the EFCC from investigating an allegation of fraud and money laundering which are economic and financial crimes. The Court of Appeal further held that the EFCC, like any other investigating agency, has wide discretionary power under the enabling law to investigate, close an investigation, re-open an investigation and carry out further investigation in the manner permitted by the law. The Court of Appeal concluded that any order of injunction restraining the EFCC from investigating allegations of economic and financial crimes would amount to unwarranted interference with the exercise of the statutory powers and functions of the Commission. The case is authority for the proposition that a civil suit does not constrain the investigative and prosecutorial powers of the Commission. It is clear that the dispute between the PPPRA and Yanaty started out as a purely commercial dispute over the extension of the duration of an APG.

²⁹ An APG is a guarantee issued by a commercial bank on behalf of its customer in favour of an institution engaging the services of the bank's customer.

Many developed countries including the United Kingdom have developed the concept of parallel proceedings which could have been of huge persuasive effect on the decisions of the Court if Yanaty had canvassed the argument in the Yanaty case. Parallel proceedings occur when two or more investigations or actions, concerning allegations arising from the same (or substantially the same) set of facts, proceed simultaneously or successively against the same or related parties (Hunter, 2003; Loewenson, 2004). Consequently, the Court in its decision paid limited attention to the fact that it was dealing with parallel proceedings. We explain why in subsequent paragraphs in the section.

When one tries to reduce these concerns to legal concepts, there appear to be two avenues for analysis. Typically, the actions (civil and criminal) may be brought by the state or the civil action may be brought by a private plaintiff. The parallel proceedings in the Yanaty case above raise two particular concerns for the private party, that is, the right of a person not to be compelled to give self-incriminating evidence in the course of a proceedings ('self-incrimination')³⁰ and the issue of estoppel. The principle of estoppel prevents a party to an action from disputing against the other party in any subsequent suit, matters which had been adjudicated upon previously by a court of competent jurisdiction involving the same issues and between the same parties. The principle of self-incrimination suggests the constitutional right of a person to remain silent during an investigation and/or trial which is inviolable.³¹ The principle of self-incrimination would be relevant where the party to the civil case seeks to use findings in a prior criminal case as evidence in the subsequent civil case. That is, can a party in a civil case be compelled to produce in evidence the findings in an earlier criminal case which may not be in that party's interest?

Considering the fact that Yanaty had premised the core of their case on the principle of estoppel, the Supreme Court decided that the principle of estoppel was not applicable since the defendants in the first suit and the second suit were different, particularly as the EFCC was not a party to the first suit. In addition, the subject matter of the previous suit (the APG) and the subsequent suit (on fuel subsidies) were different. As such, the Court held that the investigation of the EFCC was well within its statutory powers. The decision of the Courts in Yanaty's case focused on the question of estoppel as raised and argued by Yanaty whilst the issue of the constitutional protection against self-incrimination was never raised and thus not considered by the Courts. The Court did acknowledge that a plaintiff is entitled to rely on a previous judgment related to the present issue. It also recognised that the previous judgment referred to would be conclusive.

The legal principle of parallel proceedings becomes important here in the context of civil and criminal cases in the following way. In criminal cases, there is the presumption of innocence of the charged party. Civil cases are based on balance of probability via the evidence

³⁰ Section 36(11) of the Constitution.

³¹ Section 35(2) and 36(11) of the Constitution. See also *Utteh v State* (1992) 2 NWLR (Pt 223) @ 253, *Ahmed v Nigerian Army* (2011) 1 NWLR (1227).

provided. Hence, someone can engage a party in a civil suit and record their response and evidence. This response can then be used against the party in a criminal case. The opposite can also happen, that is findings in a criminal suit can be used in a civil case. And as our later examples show, this is frequently seen in the case of the EFCC and links closely to its role in debt recovery. In this case a party can lodge a criminal complaint against a second party. In a civil suit the second party would have no obligation to respond, but that is not the case in a criminal suit. Hence, once the second party responds, the EFCC can investigate or start operations against the second party (such as raids etc.) to gather evidence. This evidence can then be used in a civil case such as debt recovery. In this circumstance, it is the failure to inform the party in the civil proceeding that the EFCC was contemplating a criminal investigation and prosecution that requires further analysis. The concern here is that due process would not be followed as the civil suit would enable the EFCC to discover the party's defences to future criminal charges before the criminal trial.

In the context of debt recovery it is simple enough to make a complaint with the EFCC which will then commence criminal investigations. Once this happens the EFCC can be used as an instrument of coercion, without the EFCC playing any willing part in this. Powerful parties can then force the second party to settle the dispute on the threat of the criminal proceeding. This lies at the heart of the issue of using the EFCC's mandate for solving peripheral, and more importantly in many cases, private disputes which have very little to do with the larger issues of governance. If the rules around parallel proceedings were clarified, this principle could be used to stop parties from using the EFCC in this manner.

It can easily be discerned why the Court focused its decision on the issue of estoppel and not the principle of privilege against self-incrimination. Firstly, the issue of estoppel formed the crux of Yanaty's case and the foundation of its argument. Nigeria operates an adversarial judicial system, which means the Court as an impartial arbiter is precluded from making a case or an argument for and on behalf of a party. The judge decides based on the facts and evidence placed before it by the parties and does not engage in any inquiry outside those placed by the parties. Secondly, any Court faced with the prospect of limiting the powers of the EFCC to investigate or prosecute an economic and financial crime would consider this to be an interference with the exercise of the statutory powers of the EFCC. Nonetheless, the Court recognised that it is empowered to, in an appropriate circumstance, grant an order of injunction to protect the existing right of a person from unlawful invasion by another. The Court, however, failed to clarify the remit of the powers of the EFCC and this failure only encourages potential abuse to continue.

4. Debt collection and the role of the Commission

Sometimes a case may initially appear to be of a civil nature or may involve a commercial transaction. But such disputes may also contain ingredients of criminal offences. In this section, we document the phenomenon where parties to a commercial dispute initiate criminal proceedings in what appears to be a purely civil dispute. The incentives for this include the opportunity to pressure the other party into a favourable settlement, using the broader powers available in criminal proceedings, and raising transaction costs for the other party by embroiling them in criminal proceedings. We firstly examine cases where the courts have raised the issue and the contemporary explanation for why the private sector uses the EFCC. Secondly, we examine the policy considerations pertaining to prosecutorial independence and the exercise of prosecutorial discretion.

The Nigerian judicial system is characterised by challenges typical to the judicial systems of most developing economies.³² These include protracted litigation and delays in the resolution of commercial disputes. It has been established that unreasonable delays is one of the prime factors why citizens and private institutions explore the use of LEAs to settle commercial transactions.³³ Litigants who wish to enforce the breach of contractual obligations in the courts, risk delay (resulting in higher cost) in the resolution of their disputes. The delay in the civil justice system becomes compounded where either of the parties appeals the decision of the trial court or where there is further appeal from the Court of Appeal to the Supreme Court. Furthermore, litigation is an expensive venture owing to the payment of the statutory filing fees and most especially costs pertaining to the activities of the attorney. Parties to disputes arising from commercial transactions may weigh the cost of litigation with the monetary value of the judgment at the end of the day more so in view of their opportunity costs.

Consequently, businesses make commercial decisions as to the enforcement mechanism that meets their business objectives in terms of time and returns. Creditors thus consider LEAs, such as the EFCC more efficient and expedient in view of their coercive powers. From our key informant interviews including experienced legal practitioners, it appears that

³² A detail of the challenges inherent in the judicial systems of the developing countries are highlighted by Ofosu-Amaah (2002).

³³ Ariavie concluded that citizen resort to the use of law enforcement agencies to settle commercial transaction in order to avoid tortuous civil litigation process. A similar conclusion was established by Proshare consequent upon their investigation and interview of the officials of commercial banks in Nigeria on the reason for the preference for law enforcement agencies over civil litigation mechanism for debt recovery. It was reported that commercial banks in Nigeria would rather use law enforcement agencies for debt recovery with guarantee that the debt would be recovered within a short time than recourse to recovery agent (solicitors) that would likely not recover the debts within the commercially reasonable time. See Victor Ariavie (n 65); See also (n 67).

creditors have taken a cue of the trend and find the coercive force of LEAs such as the EFCC more effective in pursuing the recovery of debts owed to them. The fear of the EFCC's mandate does not only linger in the minds of those who intend to commit economic crimes. Citizens are also aware that an investigation by the EFCC can end up being a form of harassment.³⁴ This perception (and use) of the EFCC's powers are certainly an unintended consequence of the statute. But it is one policy makers need to be aware.

4.1. Example legal cases

The delays in litigating civil disputes are largely attributable to the actions of litigants themselves and/or their legal representatives. Such actions include requests for adjournments or frivolous preliminary objections. Parties to the disputes arising from commercial transaction may also weigh the cost of litigation with the monetary value of the judgment especially where the value of such compensation is likely to have depreciated due to inflation.³⁵ Due to this protracted nature of litigation and time-consuming practice of litigants in commercial disputes³⁶ and the attendant costs, private citizens often resort to LEAs to settle commercial disputes despite the fact that the LEAs are conferred with criminal and not civil jurisdiction.³⁷ Creditors therefore consider LEAs, such as the EFCC more efficient and expedient in view of their coercive powers. As mentioned earlier it is not uncommon among legal practitioners and litigants for debtors who had evaded service of civil court processes or had employed other delaying strategies to frustrate recovery of debt in civil courts to respond to invitation from law enforcement agencies, particularly the EFCC in the first instance.

In this Section, we will highlight several cases from the Nigerian courts where disputants resorted to the EFCC and other LEAs in the enforcement of civil obligations. These cases are a reflection that not only private sector participants, such as commercial banks, but even the Government and agencies of the Government use the EFCC as a tool for enforcing civil

³⁴ Abiodun Onafuye, 'EFCC: "The fear of Nuhu Ribadu is beginning of wisdom" – Obasanjo' (PM News Sunday 06 March, 2016) <www.pmnewsnigeria.com/2016/03/06/efcc-the-fear-of-nuhu-ribadu-is-beginning-of-wisdom-obasanjo/> accessed 18 June, 2019.

³⁵ Nlerum S. Okogbule 'Access to Justice and Human Right Protection in Nigeria' (2005) 3 International Journal on Human Right <www.sur.conectas.org/en/access-justice-human-rights-protection-nigeria/> accessed 18 June 2019.

³⁶ A detail of the challenges inherent in the judicial systems of the developing countries are highlighted by W. Paatii Ofosu-Amaah. See W. Paatii Ofosu-Amaah, 'Legal and Judicial Reform in Developing Countries: Reflections on World Bank Experience' (2002) 8 (4) Law and Business Review of the Americas 551, 565 – 566.

³⁷ EFCC is now placed on the same footing with the Nigeria Police on the use of the criminal justice system to enforce commercial transaction or recovery of simple debt. See Victor Ariavie, 'The Nigeria Police and Debt Recovery' (The Nation Newspaper 8 July 2018) <www.thenationonline.net/the-nigeria-police-and-debt-recovery/> accessed on 15 June, 2019A similar conclusion was established by Proshare consequent upon their investigation and interview of the officials of commercial banks in Nigeria on the reason for the preference for law enforcement agencies over civil litigation mechanism for debt recovery. It was reported that commercial banks in Nigeria would rather use law enforcement agencies for debt recovery with guarantee that the debt would be recovered within a short time than recourse to recovery agent (solicitors) that would likely not recover the debts within the commercially reasonable time. See Victor Ariavie (n 65); See also (n 67).

contracts when the government and their agencies transact in a commercial capacity and not strictly in their functionality as an organ of the state.

Skye Bank Plc v Emerson Njoku & 2 Ors.³⁸

Skye Bank Plc (now Polaris Bank) granted a credit facility to Nkpola Investment which was guaranteed by Emerson Njoku (the majority shareholder in Nkpola Investment). Nkpola Investment did not repay the facility. Skye Bank complained to the Police and the EFCC (instead of pursuing a civil claim in the courts). The Police arrested and detained Njoku. He then issued three cheques to the Bank in satisfaction of the outstanding sums of the credit facility following which he was released by the Police. Njoku thereafter filed an action against Skye Bank, the Nigerian Police and the EFCC for breaches of his fundamental human rights to personal liberty and personal dignity protected in the Constitution. The High Court held that there was a breach by Njoku (in defaulting on the credit facility) but that the remedy should be a civil suit before the courts and not a criminal matter for prosecution by the Police or EFCC.

On appeal, the Court of Appeal in upholding the decision of the High Court laid the consequence of unlawful interference in civil dispute by law enforcement agencies as follows:

We have deprecated, several times, the tendency of a creditor, resorting to the Police to force his debtor to settle simple debts or bank loan, and the willingness of the Police to do so, using their coercive powers, wrongly, to violate the fundamental rights of the debtor... part that employs the police or any law enforcement agency, to violate the fundamental rights of a citizen should be ready to face the consequences, either alone or with the misguided Agency. The police have no business helping parties to settle or recover debt. We have deprecated resort by aggrieved creditors to the police to arrest their debtors, using one guise of criminal wrong doing or another... law enforcement agency that allows himself to be used by any member of the public, to commit illegality that results in damages and liability to the agency or government should be made to pay such cost or damages, personally, either in part or in whole, if this can serve to warn such officer to act within the rules and scope of his office.³⁹

The Court of Appeal stressed that commercial transactions may be tainted by criminality, thereby making such transactions fall within 'the middle ground' classification which is open for investigation by the law enforcement agencies. Therefore, save in such instances, the law enforcement agencies are precluded from interfering in contractual or commercial disputes.

³⁸ (2016) LPELR-40447.

³⁹ *ibid*, Justice Mbaba 29 – 30 [F] – [A].

Mr. Gaul Ihenacho & 3 Ors. v. the Nigerian Police Force & 2 Ors⁴⁰

Imo State Government (ISG) engaged Compudata International (Nigeria) Limited to provide revenue consultancy services and when a dispute arose Compudata filed a civil suit against the ISG. In response the ISG filed a petition against Compudata, Gaul Ihenacho, the promoter of the company and two other officers of Compudata at the office of the Nigerian Police Force and the EFCC. Consequently, Compudata and Ihenacho filed a fundamental rights action for the protection of their right to personal liberty.⁴¹

The Court of Appeal ruling on the impropriety of filing a petition with the Nigerian Police Force and EFCC in respect of the dispute arising from an alleged civil wrong held as follows:

The question that therefore readily agitates the minds of court is whether the EFCC or any other law enforcement agency can act as a commercial or contractual enforcer of the agreement between the parties and as a result, resort to their usual tactics of arresting, detaining and torturing whoever the perceived defaulting side to the agreement is?

The Court of Appeal stated that the powers of the EFCC and other law enforcement agencies are limited to wrongs which are *ipso facto* criminal violations or wrongs with criminal attributes in a civil transaction.

The mere facts that a few elements of the NPF and also lately the EFCC are usually invited into just about any or every matter under the sun is no justification to get them involved in the resolution of civil disputes.

Finally, the court delineated the scope for criminal and civil law stating that:

Here is a matter in which the contractual agreement entered into by the parties and to which they remained bound until the contrary is decided as provided for the resolution of any dispute between them by arbitration and not to resort to the involvement of law enforcement agencies."⁴²

What this means that in the case of a commercial agreement between parties where the parties have agreed on a means of settling their disputes for instance through arbitration, the parties should resort to the dispute resolution mechanism agreed and not resort to law enforcement agencies.

⁴⁰ (2017) 12 NWLR (Pt 1580) 424.

⁴¹ *ibid*, 426 – 427.

⁴² *Mr. Gaul Ihenacho & 3 Ors. v. the Nigerian Police Force & 2 Ors* (n 82) 461, Justice Oho [A] – [B], [E] – [F]. Underlining ours for emphasis.

Economic and Financial Crimes Commission v. Diamond Bank Plc & 2 Ors⁴³

Petro Continental Nigeria Limited (“Petro-Continental”) was a customer of Diamond Bank Plc (“Diamond Bank”) and obtained a loan from Diamond Bank. The credit facility was secured by floating charges, debentures as well as mortgage on the property of Peter Opara, a promoter of Petro-Continental. Petro-Continental commissioned an audit of the account for the loan which allegedly unearthed excessive interest charged and deducted by Diamond Bank. As a result Petro-Continental demanded a refund and subsequently referred the issue of excessive interest and arbitrary bank charges to the Chartered Institute of Bankers Committee on Ethics and Professionalism (CIBC Committee) for determination by the consensus of the parties. While the complaint of Petro-Continental was pending with the CIBC Committee, Diamond Bank filed a criminal petition against Petro-Continental and Opara with the Financial Malpractice Investigation Unit of the NPF Criminal Investigations Department which resulted in the arrest and detention of Opara.

He was not granted bail until he made a payment of 1 Million Naira and Opara issued a cheque for an additional 1 Million Naira in favour of Diamond Bank. When Petro-Continental and Opara filed a fundamental right action at the court in respect of the arrest of Opara, Diamond Bank filed a petition with the Bank Fraud Unit of the EFCC. Upon an invitation from the EFCC for investigation, Petro-Continental and Opara filed another action at the Federal High Court for enforcement of their fundamental human rights to personal liberty which was declined by the Federal High Court. Petro-Continental and Opara appealed to the Court of Appeal and the Court of Appeal decided in favour of Petro-Continental and Opara that the letter of invitation from the EFCC at the behest of Diamond Bank was unconstitutional and infringes Opara’s fundamental human right. Dissatisfied with the decision of the Court of Appeal, the EFCC appealed to the Supreme Court and the Supreme Court dismissed the appeal of the EFCC.

The Supreme Court of Nigeria held that the power of the Commission did not extend to the category of facts that are clearly civil breaches or wrongs. The Supreme Court stated that:

It is important for me to pause and say here that the powers conferred on the appellant, i.e. the EFCC to receive complaints and prevent and/or fight the Commission (sic) of Financial Crimes in Nigeria pursuant to section 6 (b) of the EFCC Act (supra) does not extend to the investigation and/or resolution of disputes arising or resulting from simple contract or civil transactions as in this case.⁴⁴

The Court refrained from curtailing the powers of the EFCC to investigate but indicated their responsibility to exercise their judgement in the scrutiny of complaints.

⁴³ (2018) 8 NWLR (Pt 1620) 61.

⁴⁴ Economic and Financial Crimes Commission v. Diamond Bank Plc & 2 Ors (n 89) Justice Bage 79 [E] – [F].

The EFCC has an inherent duty to scrutinized all complaints that it receives carefully, no matter how carefully crafted by the complaining party, and be bold enough to counsel such complainants to seek appropriate/lawful means to resolve their disputes. Alas! The EFCC is not a debt recovery agency and should refrain from being used as such.⁴⁵

As mentioned in Section 1 the legal tussle between Innoson and GTB has been one of the most high profile cases in this context. The case began when Innoson obtained credit facilities from GTB to import a consignment of motorcycles but ran into trouble with the Nigerian Customs authorities. After a civil action by Innoson against the Customs authorities the courts ruled in Innoson's favour. Innoson then proceeded to obtain a third-party debt order which directed GTB to pay the Customs authorities from funds held by the Bank for the Customs authorities. GT Bank appealed this order. Separately, Innoson also claimed that GTB had overcharged the company interest that amounted to a large sum and resulted in a suit by GTB against Innoson. And finally separate from this, GTB filed a petition against Innoson and five others alleging criminal conspiracy to commit forgery by falsify shipping documents which were used to obtain a facility from GTB and this resulted in criminal prosecution. However, in February 2016, the police withdrew this charge against Innoson and the others. Subsequently, the EFCC sent an invitation to the promoter of Innoson, Innocent Chukwuma which appears to be in connection with the petition filed by GT Bank. The facts of the investigation by the EFCC are not in the public domain and therefore cannot be analysed in this Paper. Again, the blurred lines between civil and criminal matters are evident here. It is our view that the case was clearly civil in its origin and the EFCC lacked jurisdiction over the dispute.

The recurring pattern in the three decisions discussed above consists of two parts. Firstly, the formalized repetition of the legal principle with respect to the exhaustive statutory power of the EFCC to conduct investigations on any form of economic and financial crimes. Secondly and somewhat contradictorily, the persistent pronouncement of the court that the EFCC is not permitted to act as an arbiter of purely civil disputes.

⁴⁵ *ibid*, [F] – [G].

5. Recommendations

In the light of the analysis above our recommendations are a mix of long and short term. The facts from the cases discussed, and through a study of the EFCC's annual reports, show that EFCC had in most instances interfered in disputes that were clearly contractual and breaches of commercial terms despite reprimands from the Nigerian courts. One conclusion that stands out from the propositions in this research is that the urge to use law enforcement institutions, such as the EFCC and the Nigerian Police, in the resolution of contractual and commercial disputes, is primarily attributable to the lack of trust by litigants in the civil dispute resolution mechanisms provided by the State. The civil judicial system is fraught with delays with heavy cost implications. It is evident that reform is required in the Nigerian judicial system to reduce delay and cost attendant to civil litigation.

The Lagos State Judiciary has been attempting to address the issue of delays and distortions in civil cases, especially in terms of financial claims with a few innovative rules such as the 2012 and 2019 Lagos State High Court (Civil Procedure) Rules.⁴⁶ One of the overarching objectives of the Lagos State High Court (Civil Procedure) Rules 2019 (2019 Rules) is the efficient and prompt resolution of disputes and the promotion of alternative dispute resolution. The 2019 Rules incorporates a Fast Track procedure for civil matters—in respect of an ascertainable sum for a minimum of 100 Million Naira⁴⁷. It is envisaged that civil claims within the Fast Track will be determined within one or two years from the date the claim was commenced. Furthermore, the Rules now incorporate provisions targeted at reducing delays in the resolution of commercial disputes.⁴⁸

The 2019 Rules now also recognise a stricter Pre-Action Protocol whereby parties must explore options of alternative dispute settlement by negotiation, mediation or arbitration before processes for litigation can be validly filed by the aggrieved parties.⁴⁹ Lagos State Judiciary has also introduced a Small Claims Court within the Magistrate Court System in respect of disputes not exceeding Five Million Naira.⁵⁰ The Small Claims Procedures require that commercial disputes must be resolved within 60 days from the commencement of the action.⁵¹ These are commendable steps in restoring the confidence of the public in the civil dispute settlement mechanisms. This is also an effective way of reducing market restricting

⁴⁶ Lagos State Judiciary, *High Court of Lagos State (Civil Procedure) Rules 2019* (Lagos State Printing Corporation, Lagos 2019).

⁴⁷ The Fast Track rule also applies to claims for mortgage and charge on security

⁴⁸ See for example, *ibid*, Order 48 Rule 4 where the penalty for defaulting on the Rules has increased from Naira 200 to Naira 1000..

⁴⁹ Lagos State Judiciary, (Expeditious Disposal of Civil Cases) Practice Direction No 2 of 2019.

⁵⁰ Lagos State Judiciary, *Lagos State Small Claims Practice Directions* (Lagos State Printing Corporation, Lagos 2018)

⁵¹ *ibid*, Article 12.

corruption as the corrupting here occurs mainly due to the distortionary nature (prone to delays and time and resource consuming) of civil proceedings. There is however much to be done.

The above innovations have only been adopted by the Lagos State Judiciary; the other thirty-five states of the Federation of Nigeria and the Federal Capital Territory need to consider adopting similar or better reforms to tackle delays and other weaknesses of the judicial systems. The Federal Judicial System (comprising of the Federal High Court, the National Industrial Court, the Court of Appeal and the Supreme Court) need to also embrace reforms necessary to resolve daunting challenges facing the judiciary.

The financial threshold for the Small Claims Court may be increased to Ten Million Naira and the financial threshold for the Fast Track should be reduced to Fifty Million Naira. This will increase the number of civil disputes that will fall these schemes. Our research suggests that these courts have been very successful in Lagos State. We therefore recommend their adoption in other states of the Federation and the Federal Capital Territory.

In the longer term our recommendations would include a push towards the EFCC publishing its rules on procedures for investigating cases and discontinuing them. The EFCC has internal guidelines and once these are made public, given its mandate as a public body and an ACA, the 'rules of the game' would become clarified forcing legal professionals to at least give deeper consideration before submitting petitions to the EFCC over matters that are obviously civil in nature.

Another recommendation which would ideally have the oversight of the Nigerian Attorney General would be to devise and publish a triaging process in terms of how the agency prioritises cases. Admittedly this would not dramatically reduce political corruption for reasons described in Section 1 but it would help address those instances where the relative power of the concerned private sector players is not very high. The more powerful players would still be able to violate the rules while the smaller players would find them more constraining as their bargaining power would be lower.

It is possible that recourse to a Small Claims Court would find support among smaller entrepreneurs and private sector players who typically do not have the financial and political resources to engage in lengthy legal disputes. The experience of all the legal practitioners we spoke to suggested one area to explore would fall well within the ACE strategy cluster of 'building coalitions' or engage in policy change through collective action (Khan et al, 2019). The fact that the Small Claims Courts are already providing access to speedy legal recourse to players in relevant disputes is one reason why putting pressure on the relevant legal authorities could work in other locations. The incentive to not move the EFCC for those small and medium players with access will be reduced and the precedent set by the Lagos Judiciary can be considered a model for others to emulate relatively easily.

6. Conclusion

This Paper argues that powerful private actors compel the statutory powers of the EFCC in pursuit of purely civil and commercial claims. Four cases were examined in support of this argument.

There are few legal constraints on the discretion afforded to ACAs to investigate and prosecute economic and financial crimes, and especially the EFCC. The few limits that exist stem from other safeguards such as due process considerations and constitutional safeguards. The law establishing the EFCC gives it almost exclusive discretion to decide whether to investigate or prosecute any alleged crime. This is however without prejudice to the constitutional safeguards for the protection of an accused person such as the presumption of innocence, fundamental right to a fair hearing including the principle of law that the prosecutions must prove the crime beyond reasonable doubt for the conviction of an accused⁵².

The EFCC is a key agency driving Nigeria's anti-corruption activities and it has achieved significant successes over the years. However, it has also extended itself as argued above and such extension has stretched its scant resources. Consequently, there is the need to publish some regulatory parameters to guide both the EFCC and the private actors who make recourse to it in the prosecution of their private civil matters, as to the nature of the matters that fall within the core mandate of the EFCC.

⁵² Section 36 of the Constitution of the Federal Republic of Nigeria 1999 (as amended)

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Disclaimer: This publication is an output of a research programme funded by UK aid from the UK Government. The views presented in this paper are those of the author(s) and do not necessarily represent the views of UK Government's official policies.

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