THE STATUTORY PROTECTION OF WHISTLEBLOWERS UNDER THE NIGERIAN FREEDOM OF INFORMATION ACT—ISSUES, CHALLENGES AND PROSPECTS

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The paper addresses the desirability of protecting whistleblowers from discriminatory and retaliatory actions, particularly in corrupt ridden public sector in Nigeria. The study reveals that there is nexus between Freedom of Information Act and Whistleblowing Law, as both are necessary to guarantee openness and accountability. It notes that the Nigerian Freedom of Information Act does not comprehensively and pungently address whistleblowing. The paper examines the attitudinal factors to whistleblowing. The finding shows that substantial gaps exist in implementation of constitutional declaration of assets by public officers, largely due to absence of law on whistleblowing. The paper recommends enactment of comprehensive Whistleblowers Act in Nigeria to fill the gaps identified in this work and to fulfill Nigeria's international obligations.

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INTRODUCTION

There is hardly an issue more topical today in Nigeria than that of corruption. Accountability and transparency, particularly in the public and political life are at the low ebb. Admittedly, corruption is not the exclusive preserve of Nigeria or developing countries. The arrest and extradition of FIFA officials to the United States in 2015 and enquires into the award of hosting of past and future World cups, shows that corruption is a malaise that pays no credence to race, geography or creed.

However what makes corruption spectacular in Nigeria is its grand impunity and monumental scale. The mind boggling diversion of public funds is being revealed almost on daily basis. Recently, \$15 billion money for procurement of arms to fight insurgents was allegedly shared by politically exposed persons and public officers.¹ The former Chairman of the House of Representatives, Abudul Mumin Jibrin alleged that N40 billion out of N100 billion appropriated for constituency projects in 2016 budget was “padded” by the Speaker and other Principal Officers of the House of Representatives and that he is being victimized for not supporting the impunity. Indeed, corruption, lack of accountability and transparency has continued to arrest development of the country.

Evidently, various laws were specifically enacted to tackle these problems. There are Independent Corrupt Practices and other Related Offences Act (ICPC)², Economic and Financial Crimes Commission Act (EFCC)³, Code of Conduct Bureau and Tribunal Act,⁴ Money Laundering (Prohibition) Act⁵, Public Procurement Act⁶ and Freedom of Information Act⁷, (FOI Act) among others. So the problem is not in paucity of laws but partly due to poor and inadequate system of reporting crimes. This makes the use of whistleblowing in Nigeria imperative. As of now, there is no comprehensive law on whistleblowing in Nigeria. Rather a tacit reference was made to it in the Freedom of Information Act. It is observable that there is nexus between whistle blowing legislation and freedom of information law since both are advocating for right to access information in public records and reporting or disclosing any serious wrong-doing discovered by person who have access to such information.

¹ [Http: //punching.com/arms-scandal-EFCC](http://punching.com/arms-scandal-EFCC) (last visited July 18, 2016).

² No. 5 of 2000 now contained in Cap C31 Laws of the Federation of Nigeria 2014.

³ Cap. E1, Laws of the Federation of Nigeria, 2004.

⁴ Cap. C15, Laws of the Federation of Nigeria, 2004.

⁵ No. 11, 2011 (as amended by 2012 Act).

⁶ Act No. 14, 2007.

⁷ No. 4, 2011.

As a result of high profile corporate frauds, and the dangers it portends for investors, the public and the economy at large, a hordes of companies and corporate bodies in Nigeria have institutionalized corporate governance rules which allows the use of whistleblowing. This is evidently not within the scope of this paper. The paper is narrowed down to the benefits of using whistleblowing in Nigerian public sector.

The central thrust of this paper is to interrogate how the whistleblowers can be integrated into crusade against corruption through the laws, with a view to ensure the promotion of transparency and accountability in public governance. The paper is structured into eight parts. Part one is the introductory segment while part two discusses the scope and concepts relevant to the paper. In part three, the paper reviews the protection of whistleblowers under the Nigerian Freedom of Information Act. Part four examines attitudinal perspectives to whistleblowing in Nigeria while part five discusses significance of whistleblowing to declaration of assets by public officers. Part six draws distinction between whistle blowing and entrapment, while in part seven; suggestions were made on enactment of whistleblowers law in Nigeria. The paper was concluded in part eight.

I. SCOPE AND CLARIFICATION OF CONCEPTS

There is no common legal definition of what constitutes “whistleblowing”. The United Nations Convention against Corruption (UNCAC) describes whistleblower as any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning offences established in accordance with this convention.⁸ The Council of Europe Civil Law Convention on corruption describes whistleblowers as “employees who have reasonable grounds to suspect corruption and who report in good faith their suspicion to responsible persons or authorities”.⁹ The International Labour Organization (ILO) defines it as the reporting by employees of illegal, irregular, dangerous or unethical practices by employers.¹⁰ The Australian Senate Committee opted not to define the term but describe it as circumstances and conditions under which the employees who disclose wrong-doing should be entitled to protection from retaliation.¹¹ Suffice therefore, that a whistleblower is a person who exposes misconducts, the alleged dishonest or illegal activity occurring in an

⁸ UNCAC (2005), Article 33.

⁹ Council of Europe Civil Law Convention on Corruption (1999), Article 9.

¹⁰ International Labour Organization Thesaurus (2005).

¹¹ Lewis D., *Whistleblowing at Work: On What Principles should Legislation Be Based*, 30(2) INDUSTRIAL LAW JOURNAL (June 2001).

organization. The alleged misconduct includes violation of a law, rules, regulations or a direct threat to public interest, such as fraud, health or safety violations and corruption.

The meaning of the word “freedom” has always been a thorny issue in jurisprudence. Freedom is the right to do something without being controlled or restricted by anyone. It is the liability to act and not to act.¹²

“Information” is a transmitted message of human experiences, a signal, stimulus and symbol or set of symbols which has potential for meaning, especially denoting removal of doubt.¹³ Information is the basic foundation for political, social and economic liberty, empowering people with requisite knowledge to appreciate, understand and make up their minds as well as take own decision concerning various political issues such as election, law making and others, in order to foster effective democracy and good governance.

Freedom of information presupposes freedom to have access to information and the freedom to publicize information gotten where necessary. It also includes the legal right to receive and impart information. This was given in Section 39(1)¹⁴ which provides that “every person shall be entitled to freedom of expression, including freedom to hold opinions and to receive and impart ideas and information without interference”. The constitution also requires the media to uphold the responsibility and accountability of the government to the people.¹⁵ The right of access to information is also a human right within the meaning of Article 19 of the Universal Declaration of Human Rights (UDHR) which provides:

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinion without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

Also, Article 9 of the African Charter on Human and Peoples’ Rights provides that “every individual shall have the right to receive information”. The Freedom of Information Act (FOI)¹⁶ was enacted to strengthen and give effect to the provisions of these Human Rights Instruments and to modify any existing laws in Nigeria which restrict access or request for information.

¹² Dias *jurisprudence* 5th edition, para. 23.

¹³ Nurudeen M., *Legal and Human Right Issues in Freedom of Information Act 2011*, 3 HUMAN RIGHTS REVIEW (An International Human Rights Journal published by Ahmadu Bello University, 2012) Zaria para. 1 71.

¹⁴ Constitution of Federal Republic of Nigeria 1999 (as amended).

¹⁵ Section 22, *ibid.*

¹⁶ 2011, No. 4.

II. PROTECTION OF WHISTLEBLOWERS UNDER THE FREEDOM OF INFORMATION ACT

Government and organizations around the World are increasingly accepting the crucial role of whistleblowing as a veritable tool in uncovering and deterring secret or unaddressed wrongdoing and in increasing accountability and strengthening the fight against corruption and mismanagement.

However, Nigeria is yet to enact a statute with specific focus on protection of whistleblowers. This is in spite of Article 33 of the United Nations Convention Against corruption which enjoins signatory countries to take domestic measures to incorporate in their legislation whistle blower protections and other witnesses from unjustified treatment and also to facilitate reporting of corruption to appropriate agencies. Evidently, a number of risks are involved in whistleblowing. A whistleblower could face victimization, discrimination and harassment. He stands the risk of losing his life or job. For fear of reprisals, a whistleblower may keep mute in the face of wanton looting and mismanagement of public funds. It is against this backdrop that the Nigerian FOI Act makes feeble attempt to protect whistleblowing.

Although, the intendment of FOI Act is to encourage public access to public records and information, the Act exempts the law enforcement agents from disclosing the identity of a confidential source.¹⁷ The “source” here refers to person who gives information to law enforcement agents to assist in detection, arrest, investigation and prosecution of offenders. In the case of *Committee for Defence of Human Rights (CDHR) v. EFCC*¹⁸, the CDHR sought an order of mandamus against the EFCC to make available to the applicant, information on the alleged N52 million collected by the leadership of CDHR from an unnamed suspect who was being investigated by the EFCC. In July 2011, the Federal High Court agreed with counsel to CDHR that the EFCC should disclose the source of its information.

We submit that the court was in error in this case as it fails to consider Section 12(1)(a)(iv), especially the interpretation of the word “source”, the required confidentiality whether explicit or implicit, as well as the nature of information entitled to protection under the FOI Act.

We are further fortify in this view because the FOI Act restrict public institution from disclosing identity of person who file complaints to any administrative, investigative, law enforcement or penal agencies on the

¹⁷ Section 12(1)(a) (iv) of FDI Act, *ibid*.

¹⁸ Unreported Suit No FHC/L/CS/784/2011.

commission of any crime.¹⁹ Thus, administrative Agencies which perform judicial or quasi judicial functions like Investigative panel,²⁰ Statutory Tribunals²¹ or Domestic Tribunals²² are not obliged to disclose identity of complainant, even if the petition before them bears his identity.

The provision of section 14 of FOI Act is however subject to two exceptions. The first exception is that public institution shall disclose any information that contains personal information if the individual concerned consents to the disclosure or if the information is publicly available.²³ Another exception is where the public interest arising from disclosure outweighs protection of privacy of individual to whom the information relates.

Attitudes of Nigeria courts to the issue of delicate balancing of public interest and protection of personal information will be apt for discussion here, although the facts of the case did not relate to whistle blowing. In *SERAP v. PPRA*,²⁴ the Socio-Economic Rights and Accountability Project (SERAP) filed a suit against the Petroleum Product Regulatory Agency (PPRA) seeking for information on the details and basis of spending of oil subsidy in 2011. In February 2012, the Federal High Court granted leave to SERAP to seek an order of mandamus compelling the Federal Government to make available to it, documents on spending of received public funds. Similarly, in *SERAP & Anor v. CBN*²⁵, two civil society organizations, Socio-Economic Rights and Accountability Project (SERAP) and Women Advocates Research and Documentation Centre (WARDC) sued the Governor of Central Bank of Nigeria over a request for information relating to the spending of fuel subsidy in 2011, and in particular, the authorization of the sum of N1.26 trillion paid by the CBN²⁶ The court granted the request.

It is thus clear, from judicial pronouncements in Nigeria that while request for information may be granted under the FOI Act, the source of the information is protected in the overriding public interest.

In other jurisdictions with similar FOI Act,²⁷ the Ombudsman is inclined to place public interest over primacy of personal interests. In a case²⁸ before the Onbudsman in United Kingdom, a journalist suspected that

¹⁹ Section 14(1) (e) FOI Act, *ibid*.

²⁰ *Akintemi v. Onwumehile* (1985) INWLR pt 1, at 68.

²¹ *Aiyetan v. NIFOR* (1987) 3 NWLR pt. 59, at 48.

²² *Okezie v. Chairman medical and Dental Practitioners Disciplinary committee* (2010) 26 WRN 140.

²³ Section 14(2) (a) & (b) of FO (Act 10).

²⁴ Unreported suit no FHC/Cs/L/222/2011.

²⁵ Unreported suit no FHC/IKJ/Cs/23/2012.

²⁶ www.thenigeiravoice.com/nvnews.

²⁷ Public Interest Disclosure Act 1998 of United Kingdom (UK).

²⁸ Case No. A6737.

a University Staff member was being paid by the University without performing any duties and he asked the University whether the staff member was receiving salary and for details of her duties. The University refused the request on grounds of withholding her personal information, in order to protect her privacy. It was held on appeal to the Onbudsman that the public interest in the accountability of a public body overrides the staff members' privacy of interests. In a case decided in Ireland,²⁹ the applicant sought access to the total expenses paid to each member of the Direachtas in relation to total travel expenses, telephone and party expenses, secretarial and administrative expenses and all other expenses paid as from April 1998. The office released information on an anonymous basis but argued that the identities of the members and how much each received were personal information which was entitled to exemption. The Irish information commissioner held that the public interest in ensuring accountability for the use of public funds greatly outweighed any right to privacy which the numbers might enjoy in relation to details of their expenses claims. He also held that failure to disclose the information requested has the potential to damage public confidence in the integrity of member of the house.

Another relevant aspect of FOI Act is protection from any civil or criminal liability accorded to whistleblowers who released unauthorized information Section 27(2) of the Act provides:

Nothing contained in the Criminal Code or Official Secrets Act shall prejudicially affect any public officer who, without authorization, discloses to any person, information which is reasonably believes to show:

- (a) A violation of any law, rule or regulation;
- (b) Mismanagement, gross waste of funds, fraud and abuse of authority; or
- (c) A substantial and specific danger to public health or safety notwithstanding that such was not disclosed pursuant to the provisions of this Act.

And sub-Section 3 provides,

No civil or criminal proceedings shall lie against any person receiving the information or further disclosing it.

The significance of Section 27(2) and (3) of FOI Act can considered in the light of Oath of Secrecy which civil servants are expected to subscribe. According to paragraph 04414 of chapter IV of the Federal Government Public Civil Service Rules,³⁰ every Permanent Secretary/Head of Extra Ministerial Department (EMD) is under a duty to ensure that all officers,

²⁹ Case No. 99168 available on line <http://www.ocgovie/en/decision-of-commissioner> (accessed on July 22, 2016).

³⁰ As revised on January 1, 2000.

employees and temporary staff in his Ministry or EMD who have access to classified or restricted papers to have signed an oath of secrecy in the appropriate form before they are granted access to public documents and that the declarations so signed are safely preserved. Under the Official Secrets Act, it is equally an offence for any person to transmit any classified matter to a person to whom he is not authorized on behalf of the government to transmit or obtains, reproduces or retains any classified matter which he is not authorized on behalf of the government to obtain, reproduce or retain.³¹

It is submitted that these provisions notwithstanding, a person who releases unauthorized information while playing the role of whistleblowing enjoys some form of immunity within the ambit of Section 27(2) and (3) of the FOI Act. There is always the perennial problem of delimiting the scope of national interest or state security on one hand and the selfish or personal interest of those in government on the other hand. For example, fraud committed in the course of performing security duties cannot be shielded under the Official Secrets Act. Restriction on the right to free expression can only be justified in the interests of national security if its effect is to protect the corporate existence of the country or its territorial integrity against the use or threat of force, or its capacity to respond to the use or threat of force. The presumption in favour of freedom of expression nay whistleblowing requires government to demonstrate that the expression will actually harm national security. It is not sufficient for the government to simply assert this. This therefore underpin the importance of protecting whistleblowers from damnation and retaliation, even when legitimate national security considerations are involved as in the case of United States of America position and handling of Edward Snowden's case.³² It is therefore submitted that the courts should be able to discern actions which are not coterminous with the security or public interest but are self-serving, so that whistleblowers can be protected in case of unauthorized release of government—held information.

The above analysis of status of whistleblowers under the Nigerian Freedom of Information Act (FOI Act) depict unsatisfactory protection of whistleblowing. The Act did not address variety of channels through which disclosures or wrongdoing could be reported. It is also apt to mention that the Act did not provide comprehensive protection against discriminatory or retaliatory action, particularly with regard to promotion, indirect disciplinary action, training, transfer or access to privileges or benefits attached to public office. It is against this backdrop, that this paper would consider further

³¹ Section 1 of the Official Secrets Act Cap 03 LFN 2004.

³² Notorious American Whistleblower who is currently on political asylum in Russia.

direction and challenges to whistleblowing in Nigeria.

III. ATTITUDINAL PERSPECTIVES TO WHISTLEBLOWING IN NIGERIA

Given the prevailing cultural and attitudinal response to crimes in Nigeria, whistle blowing is likely to face litmus test for it to be successfully implemented. There is low reportability of crime relating to corruption partly due to the peoples' belief that it is a victimless offence, in which both the "giver" and "taker" are criminally responsible for the crime. The offence will be reported only when the "taker" of the bribe fails to effect the illegal deal. Only small fractions of the deals fail to be implemented and are therefore reportable.

Culturally and socially, corruption has become deleterious to, and sometimes downright destructive of the Nigerian ethos, to the extent that its pervasiveness seems to have engendered the feeling, in an ever expanding circle of citizens, tacit wealth, including that obtained by crooked and corrupt means, is all that matters.³³ In this kind of situation, there is likely to be feelings of shame and scandal to engage in whistle blowing. Evidently, this is compounded by the lack-lustre performance of Nigerian Laws on corruption.

There is also the problem of law enforcement Agents whose attitude is to turn a whistleblower to a suspect as well as the inordinate delay in criminal justice system which fuels the plights and perils of litigants. This scenario played out in the case of *Bodurin Baruwa v. The State*.³⁴ On January 20, 1982, Baruwa drew the attention of the police in Lagos to the plight of a fellow citizen who he saw vomiting, smelling of alcohol and not looking very well. By the time a policeman accompanied him to the scene, he had died. Baruwa was arrested together with another suspect. They were jointly charged for murder and consequently convicted on June 24, 1985 and sentenced to death. The processing of papers to the appellate court, hearing of the appeal and delivery of judgement took another 11 years. In 1996, he was discharged and acquitted but the other co-accused died in custody while the appeal was pending. According to the court

How does a person, who was struck with the wrong side of the law, as the appellant was, get compensated in our system under the present state of our criminal justice system? He goes home broken, may be thankful to Almighty God,

³³ A. A. Adeyemi, *Corruption, Governance and Development*, 20—21 (a paper presented at the 44th Annual Conference of the Nigerian Association of Law Teachers hosted by the Faculty of Law, Rivers State University of Science and Technology Port-Harcourt, July 17-21, 2011).

³⁴ 7 N. W. L. R Pt 460, at 302 (1996).

with no hope of redress but with regret that he played the good citizen to his undoing?

It is submitted that the above stated sordid event and its implication are capable of discouraging the blowing of whistle in Nigeria.

The clear and present danger of reprisal for whistleblowing in Nigeria is real than imagined. The suspension of the Governor of Central Bank of Nigeria (CBN) is an example of challenges of Whistleblowing. The CBN governor alleged that US \$20 billion was missing from the Federation Account due to corruption and shady deal by government owned Nigeria National petroleum Company (NNPC). Few weeks after the allegations, he was suspended from office for blowing the whistle on Nigeria missing billions. This is in spite of section 515 of the Criminal Code, which imposes a duty on the people to prevent felony. It is submitted what whistleblowing is a veritable means of discharging this obligation.

IV. WHISTLEBLOWING AND DECLARATION OF ASSETS BY PUBLIC OFFICERS IN NIGERIA

Corruption is a clandestine offence whose direct evidence of commission is hard to get, but can be manifested in the immense and stupendous wealth of a public officer. Hence, the code of conduct³⁵ enjoins public officers to undertake periodic declaration of assets to the Code of Conduct Bureau. The Bureau has the power to receive, maintain the custody of and examine written declaration of assets filed by public officers.³⁶ Presently, declaration of assets is shrouded in secrecy because the Bureau is not obliged to make the declaration public.

Given this state of affairs, some Nigerian Public Officers strive to corner public assets through proxies during state auctions, privatization schemes and award of contracts. Large Chunks of money for projects are shared “virtually as of right”, and in an institutionalized manner, ranging from the minister to civil servants in the ministry concerned. The proximity of some Nigerian public officers to policy formulation and implementation put them at a vantage point to exploit knowledge of impending change in government policies for their benefit. Insider dealing rent seeking initiatives and other forms of primitive accumulation of wealth are rife in Nigeria. Some public officers even exaggerate their assets declaration with a view to conceal assets they intend to acquire in future. The attitude of the court to public officers who live beyond their income is not altogether satisfactory.

³⁵ 5th Schedule to the Constitution of Nigeria 1999 (as amended).

³⁶ Code of Conduct Bureau and Tribunal Act, Cap C15, Laws of Federation of Nigeria (2004).

In *KayodeIdowu v. State*³⁷ Kutigi JSC while delivering judgment of the Supreme Court held:

I am not aware of any law that says people who own properties above their incomes are necessarily suspects who must get their monies or properties from particular unauthorized or illegal sources. Even if the Appellant owned properties above his income, the conclusion that it was his former employer's money that he misappropriated is to me unsupportable. What was required was evidence of all other jobs or works that he did apart from his employment with the company complain herein.

However, the Independent Corrupt Practices and Other Related Offences Act (ICPC) provides for presumption of unjust enrichment against public officers who live beyond their income or who possess, control or hold any interests in any property which is excessive, having regard to their past or present emoluments.³⁸ In order to overcome the challenges of gathering evidence to prove corruption and illicit enrichment, whistle blowing will be an indispensable tool. Members of the Public always have information as to assets laundered in underground economy and off the radar of law enforcement agents. But they can effectively blow this whistle only if they have information as to the actual assets declared by Public Officers to Code of Conduct Bureau.

It is therefore suggested that declaration of assets should be made public through widely circulated Newspapers and official Gazettes. Further, the Bureau can also place these declarations on the website or on the internet. It should also facilitate access to information on declared assets through the use of e-mail.

V. DELIMITING THE CONTOURS OF WHISTLEBLOWING AND ENTRAPMENT IN NIGERIA

Public officers have access to up-to-date information about their workplaces' practices, and are usually the first to access wrongdoings. Similarly members of the public who interacts with public officers in the performance of their official functions may stumble on information concerning misdeeds by public officials. So whistleblowing may come from within and out of public service. However, care must be taken to separate the blowing of whistles from deliberate attempt to lure or incite a person to commit crime. A person who entices or provokes another to an express breach of the law which he would not otherwise have committed and then

³⁷ 11 NWLR pt 354, at 304 (1988).

³⁸ Footnote 2 Section 44(2).

proceeds to use the machinery of the state against him in respect of such an offence is not a whistleblower but an Agent provocateur.

In spite of the lofty ideals of whistleblowing, there is legitimate fear of using the policy to make unfounded and malicious allegations or attempt to trap a person into committing crimes. Therefore, constitutional rights on presumption of innocence³⁹ and privacy⁴⁰ must be respected. A person must have manifested a clear intention to commit a wrong doing or an offence before whistle blowing can come into the picture. It is improper for whistleblower to suggest or incite the commission of a crime. In the Nigerian case of *R. v. Israel David*⁴¹, the accused wanted to sell a boy to a Native Doctor. The Native doctor informed the police about this, and two police officers were detailed to act as prospective buyers. The police negotiated the sale of the boy for \$30. As soon as the accused collected the “marked notes”, the police disclosed their identity and arrested him. The court expressed concern about this nature of evidence. According to Charles J.:

The police officers and the Native Doctor, the latter acting under police instructions, assumed the role of Agent Provocateur and incited the accused to further their alleged conspiracy by attempting to carry it to completion ... it can't be emphasized too strongly that the use of Agent provocateur is one which is fraught with danger to the innocent and to the Rule of Law. A court however is not justified in dismissing out of hand a prosecution based on the evidence of Agent provocateur; as such evidence is not inadmissible. Such evidence is however suspect and it is in my judgment, the duty of the court before which it is admitted to warn itself that it is unsafe to convict unless it is corroborated...⁴²

It is thus clear that entrapment and whistleblowing are not the same thing. Entrapment should not be encouraged in a clime like Nigeria where the digging up of imaginary scam to stain reputation of others and bring them “down” is rife. It is worthy to note that entrapment is unconstitutional in Nigeria as it not only violates the right to be presumed innocent but an affront on the rule of law.

Where a criminal instinct is exhibited by a suspect, it is legitimate to use whistleblowing to unravel the crime and bring him to book. We are fortified in this view with the approach of English Courts⁴³ using the concept of “free will” to distinguish entrapment. In *Williams v. DPP*⁴⁴, the police left

³⁹ Section 36(5) of the Constitution of Nigeria (1999); *Alaba v. State* 9 SCNJ 109 (1993).

⁴⁰ Section 37 of the Constitution, *ibid*.

⁴¹ WNLR 170 (1960).

⁴² *Ibid*, at 174.

⁴³ See *D. P. P. V. marshal* (1988) 3 All E. R. 683, *R. V. Latif and Shatizad* (1966) 2 Cr. App. R. 92.

⁴⁴ 60 Cr. App. R. 209 (1988).

a van unattended and open with dummy cartons of cigarettes on view. Anyone tempted to a pack of cigarettes was promptly arrested. The court accepted that there was an element of trick involved in the use but the appellants “were ... tempted but not persuaded by words or pressure on the part of the police”. The court held that the appellants stole the cigarettes not because of the way the van was parked but because of their own criminal instinct”. Under the Nigerian Evidence Act, evidence obtained improperly or illegally shall be admissible unless the court is of the opinion that the desirability of admitting it is outweighed by the extreme abuse of process.⁴⁵ Thus, where evidence generated by means of whistle blowing has been an abuse of process which amounts to an affront to public conscience and notion of justice, Nigerian courts will use their discretionary powers to exclude it.

VI. A WAY FORWARD FOR WHISTLEBLOWING IN NIGERIA

The usual animosity against whistleblowers in public service or private sector stems from strict rules for employees to comply with their duties of loyalty and confidentiality, which are perceived to have been breached as a result of whistle blowing. The Freedom of Information Act was then enacted to pierce the veil of information and protect people from Official Secrets Act, Criminal Code and similar laws which prevent disclosure of information.

But as shown in this paper, the Nigerian freedom of Information Act only protect employees in the public sector from facing legal actions when they give out information. It does not protect them from administrative actions such as dismissals, suspensions or demotions as a result of making a public disclosure of governmental actions. Time has therefore come for Nigeria to have a comprehensive and dedicated law on whistle blowing. It would be fulfillment of obligations assumed by Nigeria to the International community. At the level of the United Nations, the United Nations Convention Against Corruption⁴⁶ (UNCAC) imposes obligation on each state party (Nigeria inclusive) to incorporate into its domestic legal system appropriate measures to provide protection against any unjustified treatment of any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning offences under the convention.⁴⁷ The African Union Convention on Prevention and Combating Corruption

⁴⁵ Sections 14 and 15 of the Evidence Act 2011 cap. E 14.

⁴⁶ It was adopted on 31st of October, 2003 and it came into force on the 14th of December 2005.

⁴⁷ UNCAC, Art 33.

(AUCC)⁴⁸ imposes similar obligation on state parties to adopt legislative and other measures to protect informants and witnesses in corruption and related offences, including protection of their identities as well as adopt a measure that ensures that citizens report instances of corruption without fear of consequent reprisals.⁴⁹ Apart from this instrument, the African Union (AU) under the Chairperson of Mauritanian President, Mohammed Abdel Aziz signed the Nouakchott declaration in January, 2015 to call on member countries of AU to extend efficient protection to Whistleblowers in the public and private sectors who play a key role in the prevention and detection of corruption, thus defending the public interest and to consider the measures as necessary element of an effective anti-corruption strategy.⁵⁰ Since no Treaty or Convention between Nigeria and other country or Organization shall have the force of law in Nigeria, unless it enacted into law by the National Assembly,⁵¹ we suggest that machinery should be put in motion by the National Assembly to enact Nigeria's version of Whistleblowers' Act.

It is recommended that the proposed Nigeria's Whistleblowers Act should apart from insulating whistleblowers from civil and criminal liabilities, also protects them against recriminations by way of unfair dismissal, termination of employment, suspension or promotion. In addition, the Act should provide a variety of simple and responsive channels through which disclosures or wrong doing may be reported. A complaint system that does not respond flexibly, promptly and effectively to the justifiable concerns of whistleblowers not only provide fertile grounds for the unacceptable practice to persist, but is capable of undermining the public's trust in the service.

While this paper is not advocating for outright imposition of sanctions for misguided reporting, yet the Whistleblowers Act should only protect disclosures made in good faith and on reasonable grounds. Accordingly, protection should be accorded to an individual who makes a disclosure based on his or her honest belief, although it may be erroneous. South African courts, for example, have held that "good faith" is a finding of fact, "the courts has to consider all the evidence cumulatively to decide whether there is good faith or an ulterior motive, or, if there are mixed motives, what

⁴⁸ The AUCC was adopted in Maputo (Angola) on the 11th of July 2003 and it entered into force on 5th of August 2006.

⁴⁹ AUCC, Art. 5 (5) and (6).

⁵⁰ Noyakchott Declaration on Transparency and Sustainable Development in Africa; Signed on 20th January 2015. Arts. 13.

⁵¹ Constitution of the Federal Republic of Nigeria 1999 (as Amended); S. 12(1) *see also* the Case of Abacha v. Fawehinmi (2000) 6 NWLR pt 600 p. 238 at 285.

the dominant motive is”.⁵² It is submitted that individuals who deliberately make false disclosures should not be afforded protection.

It will not be out of place if financial incentives are introduced in the Whistleblowers Act for those who disclose information that is of economic value to the government or any other institutions. In Nigeria, it makes no economic sense to offer financial incentives to whistleblowers who gives information leading to the arrest of wanted criminals or fugitives from law, and exclude incentives from other category informant with information of huge economic importance.

A rethink in this direction will bring meaning to constitutional provision on declaration of assets by public officers, as friends and family members who does not benefit from the ill gotten wealth amassed through public lootings would blow the whistle on such corrupt practices. In the United States, the Dodd-Frank Act authorizes Commodity Futures Trading Commission (CFTC) to make payment to individuals who provide original information which assists in judicial or administrative action, resulting in sanctions exceeding \$1 million. Monetary awards to whistleblower under the Act range from 10% to 30% of the amount recovered. Similarly, in U.S, the False Claims Act allows individuals to sue on behalf of the government in order to recover lost or misspent money, and can receive up to 30% of the amount recovered.⁵³ In a corruption—ridden country like Nigeria, where money and assets are routed through informal or underground economy to make paper trail and tracing difficult for investigators, the use of financial incentives to whistleblowers will go a long way to unmask corrupt public officers.

It is recommended that an independent body be set up in Nigeria to receive and investigate complaints of retaliatory, discriminatory or disciplinary action taken against whistleblowers. In Canada, the Public Sector Integrity Commissioner is established to receive and investigate complaints of wrongdoings and receive reports of reprisal. If there is evidence of infraction of whistleblower's rights, the Public Servants Disclosure Protection Tribunal can order remedies and impose sanction⁵⁴. Establishment of institution to act as watchdog will no doubt facilitate smooth legal regime and implementation of whistleblowing.

⁵² *Tshishonga v. Minister of Justice and Constitutional Development 7 Anor* (JS898/04) (2006) ZALC 104.

⁵³ Also Claims Act, 31 U.S.C. 3729.

⁵⁴ Public Servants Disclosure Protection tribunal, available at <http://www.psdpt-tpfd.gc.ca/hommeng.html> (accessed on August 20, 2016).

CONCLUSION

Secrecy in governmental affairs promotes corruption whilst openness and transparency deters corruption. Encouragement and protection of whistleblowers are necessary in the fight against corruption in Nigeria. Public servants and the general public needs to be sensitized in terms of exposing actual or suspected wrong doing within the public service. This is better done when there is comprehensive whistleblowers' protection law in place to legitimize and structure the mechanisms through which public officers can disclose wrongdoing. If adequately implemented, such law can become one of the effective means of supporting anti-corruption drive as well as detecting and combating corrupt acts and looting in the public sector. The absence of appropriate whistleblowers' law festers corruption and exposes whistleblowers to avoidable risk.