

INTERROGATING THE IMMUNITY CLAUSE AND DEMOCRATIC GOVERNANCE IN NIGERIA

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Abstract

This paper interrogates the immunity clause and democratic governance in Nigeria. The 1999 constitution of the Federal Republic of Nigeria make constitutional provisions on immunity for certain categories of elected political-office holders in Nigeria. While the original intention for its inclusion in the constitution was good, politicians have used the clause to the detriment of democracy. For this reason, the constitutional provisions on immunity have become a threat to the consolidation of Nigeria's nascent democracy. The paper interrogate different views in the course of this work, what the immunity stand for, those that argue for and against immunity clause in Nigeria, the possible effect of removing the immunity clause from the constitution. In this way, the paper made it clear that there are lots of justifications for the retention of Immunity Clause in the 1999 Constitution. The retention of Immunity Clause has lots of usefulness within the Nigerian political environment at the moment. Nigerian government and people are not yet politically mature like the government and people of United States where absence of Immunity clause does not undermine executive capacity.

Keywords: Constitution, democracy, governance, immunity clause, Justification, Nigeria, Political.

1. Introduction

The concept of 'immunity' originated from a Latin word 'immunitas' which the ancient Romans used in describing the exemption of an individual from service or duty to the State [1]. Historically, immunity from prosecution was developed to encourage prosecution witnesses to testify without fear of self-incrimination. In the process, two forms of immunity protection were developed – the "use" immunity prohibits witness' compelled testimony and its fruits from being used in any manner in connection with criminal prosecution of the witness [2] or the "transactional", Transactional immunity affords immunity to the witness from prosecution for offense to which his compelled testimony relates [2].

[2] defines immunity as an exemption from a duty, liability or service of process, especially such an exemption granted to a public official. Ex-

emption, as from serving in an office, or performing duties which the law generally requires other citizens to perform e.g. exemption from paying taxes, freedom or exemption from penalty, burden or duty. It goes further thus: 'An immunity is a defence to tort liability which is conferred upon an entire group or class of persons or entities under circumstances where considerations of public policy are thought to require special protection for the person, activity or entity in question at the expense of those injured by its tortuous acts ...'

1.1. Immunity in the Modern Age

Immunity can be conveniently subsumed under three headings: sovereign immunity, diplomatic and consular immunity as well as immunity of other categories of persons such as international organizations and special missions.

1.2. Sovereign Immunity

Sovereign immunity implies that states are free from external control because they have the ability and privilege to run their affairs the way they like. It implies also that the courts of one state may not assume jurisdiction over another state. As [3] argues, dominance, if it exists, is *de facto*, not *de jure*. Even then, no state, however powerful, can exercise *de facto* dominance today without co-operation with other states. An example of this was the 1991 Operation Desert Storm on Iraq by the United States of America – led Allied Forces. Another was the recent operation in Iraq by the coalition forces, led by the U.S.A., Britain, Japan and others.

1.3. Diplomatic and Consular Immunity

States in the international system do establish relationships to facilitate workable mutual co-operation and assistance. As such, they appoint diplomats and consuls and other categories of officers to oversee such bilateral and multilateral relationships. Diplomats oversee exclusively political relationships between and amongst countries. Therefore, their duties include representation, negotiation, and protection of their national interests, the ascertainment of conditions and developments by lawful means and the promotion of friendly relations between and amongst states, (Article 3 of the Vienna Convention on Diplomatic Relations). Consuls-General, Consuls, Vice-Consuls and Consular Agents on the other hand, protect and promote the commercial and economic interests of the sending country in the receiving country. As such, they are responsible for the processing and issuing of passports and visas, assisting nationals of the sending state as well as oversight functions in shipping, treaty implementation and notary's acts [4]; [5].

Diplomatic and consulate staff requires immunity and other privileges to perform their functions effectively in the host country, even though such services are established by mutual consent of both countries. Diplomatic immunity is based on the following major international law: The privileges and immunities that are accorded diplomatic and consulate staff are contained in articles 31

and 32 of the Vienna Conventions on Diplomatic and Consular Relations of 1961 and 1963, respectively [6], [3] and [7] that came into force on April 24th, 1964. [5]. The host state must protect and prevent any attack on their persons, freedom and dignity. They are exempted from paying taxes, custom duties and public service such as conscription into the army and jury service [5].

This work focuses on immunity clause and democratic governance in Nigeria. The work interrogate what is meant by immunity, immunity clause in 199 Nigeria constitution, argument for and against removal of immunity clause in Nigeria constitution, then argument whether removing it will have any effect because of the situation in Nigeria society and finally the reason for retention of immunity clause in Nigeria. This and many questions shall be raise in this work.

1.4. Immunity clause in 1999 Nigeria constitution

The origin of the immunity clause in the Nigerian constitution can be traced to colonialism and Nigeria's affinity to Britain in the immediate post-independence period [8]. Due to Nigeria's colonial background, many of her laws and statutes were taken after her former colonial overlord, the United Kingdom. Nigerian immunity clause was designed to ensure that the political Chief Executive has immunity similar to that enjoyed by the British monarch, such that his actions would not be challengeable in court. It adds, however, that such immunity would be without prejudice to any ministerial duty of answering to the legislature for the advice tendered. The inclusion of the clause in Nigerian constitutions may even be designed to mark out the sphere in which the legislature, rather than the judiciary, might call the executive to order.

A second and arguably more plausible reason for the inclusion of the immunity clause in the Nigerian constitution is the need for the political chief executive to be able to perform his/her duties without inhibition. The purpose of this section is to prevent the Governor from being inhibited in the performance of his executive functions by fear of civil or criminal litigation arising out of

such performance during his tenure of office. The provision should not be extended beyond this purpose.

A third reason for the inclusion of the immunity clause in the Nigerian constitution is the effect of contagion. This is the feeling that if older polities such as the United Kingdom and near contemporaries like India have it in their constitutions, Nigeria could as well include it in hers, especially because it was identified with some merits. The influence of contagion in politics should not be overlooked when one considers its impacts in the making of many coup-de-tats and military regimes in sub-Saharan Africa between the 1950s and the 1980s.

The current 1999 Nigeria constitution guarantees Immunity (section 308Nig1999const) to the highest political leaders of the country on the public policy premise that it will ensure their efficiency in the execution of their political mandate while in office. These officials include the President, the Vice President, the Governors and the Deputy Governors.

Section 308 of the 1999 Constitution of the Federal Republic of Nigeria provides as follows:

(1) Notwithstanding anything to the contrary in this constitution but subject to subsection (2) of this section-

(a) No civil or criminal proceedings shall be instituted or continued against a person to whom this section applies during his period of office;

(b) A person to whom this section applies shall not be arrested or imprisoned during that period either in pursuance of the process of any court or otherwise; and

(c) No process of any court requiring or compelling the appearance of a person to whom this section applies, shall be applied for or issued; Provided that in ascertaining whether any period of limitation has expired for the purposes of any proceedings against a person to whom this section applies, no account shall be taken of this period of office.

(2) The provisions of subsection (1) of this section shall not apply to civil proceedings against a person to whom this section applies in his official capacity or to civil or criminal proceedings in

which such a person is only a nominal party.

(3) This section applies to a person holding the office of president or vice-president, governor or deputy governor; and the reference in this section to "period of office" is a reference to the period during which the person holding such office is required to perform the functions of the office.

According to Prince [9], six legal permutations arise from the above immunity clause, which include:

1. No civil or criminal proceeding can be instituted against any member of the class during his/her period of office;

2. If such action had been instituted (before he/she assumed office), it will stop or cease for the duration of that period of office;

3. No member of the class can be arrested or imprisoned by any court order during his/her period of office;

4. No court can order his/her appearance to answer to any matter during the period in office;

5. If such application is made to compel the appearance of a member of the class, such application shall be denied;

6. The period in office shall not adversely affect any legal matter that would, otherwise, be time barred. In other words, the period of office shall not make the case statute barred.

However, the overall effect of Section 308 of the 1999 Constitution is that the elected officers mentioned in Subsection (3) of the section are protected from arrest, prosecution, imprisonment, civil and criminal proceedings while their tenure lasts. And if there has been a case standing against any of them before being elected into office, such a case shall terminate or at least be put in abeyance during the continuation of their tenure in office.

A sitting state Governor of Nigeria or the President, during the subsistence of his term of office, must have a free hand to act boldly and courageously for public good. In doing so, such Governor or President would not be hindered by fear for self, for repercussion of actions embarked upon, for general public interest of a state or for national interests clearly defined. All legitimate actions undertaken during the pendency of term of

office by a Governor or President must therefore be foreclosed from personal legal liability, hence the concept of immunity.

1.5. Arguments for and Against the Removal of Immunity Clause from the Constitution

Immunity from prosecution is subject to abuses; just as every other law or rule is subject to abuse and adulteration by persons with such disposition to manipulate and corrupt laws and rules for their personal benefit, instead of public benefit. It is the case, therefore, that a governor or president, desirous of subverting public interests and public good for evil and personal gain, could engage in actions that serve personal or parochial interests, which of course amounts to perversions of public and national interest. At the same time, such governor may seek to cloak himself in immunity from prosecution for actions undertaken as a public official.

It is a well-known fact that corruption and abuse of power by past and present members of the executive and other arms of government have retarded development and progress in our country. On the one hand, immunity from prosecution allows freedom of action by those beneficially protected with such immunity protections; conversely, immunity - when abused - could quickly become instruments of impunity of actions and impunity of outcomes, especially in the hands of public officials who seek to formulate and impose fraudulent public policies on Nigerian citizens. Immunity from prosecution could become a dangerous tool in the hands of those who possess a perverse sense of law, ethics, and decency.

Corrupt political leaders will of course make efforts to see that the immunity clause is retained in the Constitution. That is the cloak under which they have hidden for years perpetrating their crimes against the Nigerian people, sneering at and insulting our laws and institutions and collective intelligence. The Immunity Clause is a license for stealing, killing and maiming. The constitutional drafting committee meant well when section 308 was added to the 1999 constitution of Nigeria. But they did not know that the provision contained therein would be abused and used

to the disadvantage of the people by the VIPs. It appears the immunity clause in the Constitution has outlived its uses and needs to be removed.

Citizens who have become worried by the abuse of the clause have postulated that it should have no place in the constitution and its removal will not in any way affect governance negatively. They are always quick to point out that there was no immunity in the First and Second Republics and there were no distractions then. It was even pointed out that there were no frivolous cases in court then. They also argued that the removal of the clause would help to keep the leaders in check. Moreover, the distraction if any that would arise cannot be compared to the grandiose looting that is being perpetrated as a result of the immunity being enjoyed, especially by Governors. The earlier the corrupt politicians are stripped of immunity against prosecution, the better. In a country ridden by corruption, embezzlement, lack of accountability and outright looting, the presence of an immunity clause in the Constitution is like building a shield or military bunker for rogues.

The Nigerian Constitution was prepared by people most of whom were actuated by self-interest and personal ambition. They knew they would run for office, and if they won or rigged their way in, they planned to loot the treasury; so it was in their interest to install for their own protection immunity from prosecution. Today the same ilk of people, with the same species of interest and ambition, dominate the Nigerian political sphere. The removal of this clause will act as a deterrent, no matter how small this effect will be, to others with the aim and intent of going into politics or government to make money. In most cases, a lot of die-hard politicians, who do not have any means of income, except politics, will not be able to make their way into office by crooked means. It is not surprising that not satisfied after eight years as Governors, some of them, under the pretext of still wanting to serve Nigeria, are now Senators or Ministers.

Majority of Nigerians want this clause removed. Many of us believe that its removal will bring a great measure of sanity to governance and will prevent these office-holders from seeing them-

selves as above the law and as mini-gods, who can do and undo, playing with millions of human lives. It will prevent crooks, who have been convicted for all kinds of offences in foreign countries and in Nigeria from even nearing a ballot box to contest. Removal of the immunity clause will also mean that executives will not be able to instigate violence and murder against political opponents. Right now, we know that several state governors are behind militancy, thuggery and murder, and if the immunity clause is removed, even if they are not directly involved in these crimes, they can be hauled in by association.

1.6. Removing Immunity Clause

An analyst is of the opinion that removing the immunity clause will have little or no effect, because we still have the same Nigerians in the system, who will now seek to rely on god-fathers and an inefficient and corrupt judicial system. If the removal of immunity is going to contribute only 2 percent to the fight against corruption, so be it. We cannot just sit there and let these people kill us while we put it in God's hands. If its removal creates fear in their hearts, and they still risk committing crimes against the Nigerian people, at least the fear of God has been put in their hearts, and if caught, they will be dealt with severely, harshly and appropriately by the people.

Normally, in a normal country with well-behaved political leaders, there would not be a problem with retaining such a clause, in fact, strengthening it, but in a corruption-ridden society such as ours, it has proved to be more evil than good. Nigerians know how the clause has been abused by irresponsible politicians, and the consequences on our society. It has caused untold sufferings to Nigerians. Virtually every sector of the economy is comatose. Only corruption and other vices appear to and are actually thriving.

It has also been argued that instead of removing the immunity clause to be able to go after them while they are still in power, we have other checks and balances in the Constitution. The impeachment clause under sections 143 and 188 of the 1999 Constitution as it affects the president and the vice-president; and the governor and his

deputy respectively should be explored. Experience has shown in Nigeria that it is not only protected officers that are corrupt. There have been cases of graft against Local Government Chairmen and other public officers who are not protected by Section 308. These include Directors of parastatals, ministers and so on. If these people who are not protected are as corrupt as the protected ones, then the problem lies somewhere else and probably not with the immunity clause. Politics has beclouded our quest for fighting corruption. In most cases it is just a matter of belonging to the ruling class and you get off the hook of anti-graft agencies.

It is almost certain that if we remove the immunity clause from the constitution, the incumbent governors or the president would use the power of incumbency to fight his cases. How many judges would be courageous enough to hear and determine cases against the president? Which prosecutor would be courageous enough to even institute the case? It is the incumbents that appoint the Attorneys General. If we cannot easily put them away in jail after their tenure have expired and lack executive immunity, how can we put them in jail when they still have the incumbency powers and all the trappings of office?

It is true that a removal of the clause will give an excuse to an officer that is not ready to work as he will continue to let the world know that he wants to perform but some people have taken him to court. We have experienced are still experiencing this. Many governors who were dragged to Election Petition Tribunals immediately after their elections cried out that they were distracted and that they needed to settle down to work. Whereas the Senate President, the Speakers of the House of Representatives and State Houses of Assembly and the Chairmen of the 774 Local Governments recognized by the constitutions (because some states have created additional local government for development purposes) in Nigeria do not have any immunity but there is not a single case of malicious legal action or prosecution against any of them. Any State official that conducts his state functions transparently will not encounter any malicious prosecution because Nige-

rians are not bloodhounds.

1.7. Retention of Immunity Clause in the 1999 Constitution

There are a number of reasons why the Immunity Clause should be retained in Nigeria's Constitution:

The 1999 constitution of the Federal Republic of Nigeria has a constitutional processes by which a President or governor can be dealt with if he or she fail his or her responsibilities; that process is known as impeachment. Many high political office holders have been impeached in Nigeria, it only serve as a lesson to others. If an offence is established against the President or Governor, it can ultimately lead to his /her removal via impeachment. So in essence, incumbent President or Governor must only be removed from office through an impeachment before being subject to the criminal process. The President or a Governor can be swiftly removed from the office for gross misconduct which includes the commission of a crime. Category of impeachable offenses is not limited to abuses of official power. Impeachment process is better suited to the task because it is fast and efficient. It will be done by the representatives of the people because the whole country or the entire state will be involved in the process. In addition, it is faster than a criminal trial and there is no appeal from the verdict of the assembly. Again, once the executive is removed, he can then be prosecuted and his removal will facilitate effective political administration of the state and place the political system on a healthy course. Corroborating this position, [10] asserts that at its most basic level, impeachment is the assertion of power by a legislative body over an individual who cannot be removed by any other way.

Retention of Immunity Clause is highly important because if the President and the Governors are not immune from criminal proceedings, their subjection to the jurisdiction of the courts would be inconsistent with their position as heads of the executive branch. Because of their unique powers to supervise executive branch and assert executive privilege, the constitutional balance generally

should favor the conclusion that a sitting President or Governor may not be subjected to criminal prosecution. This is because the possession of these powers by the President and the Governors renders their prosecution inconsistent with the constitutional structure. Such powers which relate so directly to their status as Commander-in-Chief or Chief security officers, are simply incompatible with the notion that the President or the Governors could be made a defendant in a criminal case and criminal proceedings and execution of potential sentences would improperly interfere with their duties and be inconsistent with their status [11]. Their status as defendants in a criminal case would be repugnant to their office as Chief Executive, which includes the power to appoint judges and oversee prosecutions. In other words, just as a person cannot be judge in his own case, these executives cannot be prosecutors and defendants simultaneously. Most importantly, courts would be unable to subject powerful officials to criminal process and it is doubtful whether it is practical to have a prosecutor who is part of the executive branch prosecute the President or Governor most especially in Nigeria.

More so, the retention of the Immunity Clause in the 1999 Constitution is justified in that prosecution of a sitting President or Governor prior to impeachment would create serious practical difficulties and interruption in political administration. If the Immunity Clause is removed from the 1999 Constitution, it would definitely be difficult to arrive at the point that the President or the Governor could be impeached; could it be while the criminal proceedings are going on against him/her or after his/her trial and conviction? If the public officer is to be presumed innocent until found guilty which must be proved beyond reasonable doubt, then, he/she cannot be removed during the period of criminal proceedings. In view of this, process of his/her removal cannot proceed until a court had resolved a variety of complicated threshold legal questions and hold the chief executive criminally liable. It is also important to note that a criminal trial in court can take several months or years to conclude and the accused has the right of appeal. In this way,

a President or a Governor may complete his term before he is finally convicted. At the same time, the President or the Governor may spend a considerable amount of his time in office meeting with his legal team to prepare a defense to the criminal allegations against him/her. Hence, putting aside the possibility of criminal confinement, the severity of the burden imposed upon the President or the Governors by the initiation of a criminal prosecution and also from the need to respond to such charges through the judicial process would seriously interfere with their ability to carry out their functions [12]. An individual's mental and physical involvement in the preparation of his defense both before and during any criminal trial would be intense; the same applies to either the President or the Governor of a state since they are also human. The process contemplates the defendant's attendance at trial and, indeed, his right to confront witnesses who appear at the trial.

The retention of the Immunity Clause in the 1999 Constitution is justified because its removal does not favor public policy. The President and the State Governors are elected directly through a general election. However, a criminal trial of a sitting President or a Governor will confer upon a single Judge, the power to overturn the wish of the people as demonstrated in the general elections. Allowing criminal proceedings against a sitting executive would aggrandize judicial power and narrow constitutionally defined executive powers. Public policy disfavors prosecution of a sitting executive [13]. Chief among the reasons is the respect for the office as a chief executive and the availability of the impeachment route. It is therefore, submitted that the power to perform this onerous task can be more fittingly done or handled by the representatives of the people, either the state assemblies or the national assembly through an impeachment process.

The president or the Governor should not be removed by the people who did not elect him/her in the first place. One good thing about democracy is that it hands over the removal of a person from an office to the people who elected such a person. For example, the members of the National Assembly or State Houses of Assembly can be re-

called by the people if such members misbehave; same applies to the President or Governor, the people through their representatives, that is, the legislators at the National Assembly or Houses of Assembly can impeach any President or Governor who has been found wanting on the terms of agreement of his being elected. Therefore legislators are elected to their offices not only for the purpose of enacting laws, but also for the purpose of checking the President and his/her Vice or Governor and his/her Deputy. If Immunity Clause is removed, it would mean the people who elected the President or the Governor are taken for fools because after electing the candidate of their choice, the President or the federal government for example can sue a Governor on criminal grounds and send him packing. If such happens, it follows that the power of the people which is the bedrock of democracy is compromised and diminished as the President or the federal government would unavoidably assume the status of a big-brother whipping governors to queue. When the people are alienated, it would be difficult to hold them together; continued centralism in Nigeria may create an ugly situation for our democratic governance.

2. Conclusion

It is clear that there are lots of justifications for the retention of Immunity Clause in the 1999 Constitution. The Immunity Clause retained in the 1999 Constitution has lots of usefulness within the Nigerian political environment at the moment. Nigerian government and people are not yet politically mature like the government and people of United States where absence of Immunity Clause does not undermine executive capacity, Nigeria may need more than half of a century to get there. No doubt, if the Immunity Clause is retained, the executive would perform better than if it is removed and the country would progress.

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