



Confronting the edifice of corruption under section 308 of the 1999 constitution of Nigeria

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Abstract

Section 308 of the 1999 Constitution of the Federal Republic of Nigeria (as amended), shields the President, the Vice-President, the Governor and the Deputy Governor from civil and criminal proceedings, arrest, imprisonment, and court processes. This constitutional provision is termed “immunity clause.” This paper argues that while immunity clause carries with it the legal effect of protecting these officials from litigations that could interfere with their public functions, it has been abused by most, if not all, beneficiaries who brazenly looted public coffers and, unashamedly shielded themselves under the constitutional cover of section 308. It further contends that executive corruption under the guise of immunity clause has not only impeded our nascent democracy but threatened national development. The paper recommends inter alia the amendment of section 308 of the Constitution of Nigeria.

Keywords: section 308 of the 1999 Nigerian constitution, confronting, corruption

1. Introduction

In certain circumstances, public interest requires that an entity, person or classification of people be protected from law suit. Such protection is called immunity^[1]. Immunity is a legal status which the law gives individuals or entities whereby they are protected from liability that otherwise would have been imposed. Kionka^[2] asserts that: “Immunity is a defense to tort liability which is conferred upon an entire group or a class of persons or entities under circumstances where consideration 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 act”. It also refers to an exception from serving in an office, or performing duties which the law generally requires^[3].

As a rule of considerable antiquity^[3], immunity became known to the Nigerian legal system by virtue of Nigeria’s received English Common Law^[4]. Under the English legal system, the common law rule of sovereign immunity was based on two main principles, namely the King could not be impleaded in his own court^[5] and the King could do no wrong^[6]. Consequently, no proceeding could be brought against the King except a fiat was obtained through petition of right^[7]. The hardship that attended this doctrine led to its abolition in England^[8].

After its reception into the Nigerian legal system, the sovereign immunity was preserved by *section 45(1) of the Interpretation Act*^[9]. Not only did the *1960 Constitution of Nigeria* retain it,^[10] the *Republican Constitution of 1963* incorporated the clause therein^[11]. The clause was further maintained by *section 276 of the 1979 Constitution* and *section 320 of the 1989 Constitution*, which finally bequeathed it to *section 308 of the 1999 Constitution of Nigeria* (as amended).

Despite several amendments effected on *Ordinance No. 19 of 1915, Petition Rights Ordinance*, the last which was in 1964^[12], the law that would have by then repealed the immunity clause in Nigeria, the immunity clause has continued to be part of our legal corpus. It was against this

backdrop that *Eso J.S.C.* noted in *RamsomeKuti v. Attorney General of the Federation*^[13]:

The *Petition of Rights Act Cap 149* was amended, but such that the position as it was in pre - 1947 England be retained in Nigeria, leaving this country to be more royal than Royalty itself^[14].

2. Immunity Clause under the 1999 Constitution

Section 308 of the 1999 the Nigerian Constitution, which restricts proceedings or legal actions against the President, the Vice-President, the Governor, and the Deputy-Governor provides in the main 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.
2. The provision 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 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”.

3. Restrictions on Legal Proceedings against President, Vice-President, Governor and Deputy-Governor

The provision of *section 308*, in synopsis, is to the effect

that the President or Vice-President, Governor or Deputy-Governor, is immune from civil and criminal proceedings, arrest or imprisonment in pursuance of a court process or from any court process compelling or requiring his attendance. In *Gani Fawhinmi v. Inspector General of Police* ^[15], Uwaifo, J.S.C., summarized the above provision in this way:

- i) Immunity from civil or criminal proceeding in the capacity of the mentioned officers;
- ii) Immunity from arrest and imprisonment during the period of office in pursuance of court process or otherwise; and
- iii) Immunity against the issuance of a process of any court requiring or compelling their appearance.

Section 308 has received wide judicial and juristic interpretations. However, in the case of *Fawehinmi v. I. G. P* ^[16], the Court of Appeal noted:

The simple and ordinary meaning of *section 308(1)* is that the persons to which the provisions apply should not be made to face civil or criminal proceedings in court.

Civil proceedings mean all claims that may arise out of a contract, tort, declarative or injunctive application in respect of civil claims and any claim upon which the existence or otherwise of a civil right depends ^[17]. Thus, no civil proceedings could be brought against the above named public officers for acts committed before or while in office.

It is worth reiterating that *section 308* does not cover the named officers in respect of election tribunals. This is because the constitution specifically excludes election petitions from civil proceedings ^[18]. A constitutional distinction between election petitions and civil proceedings can better be appreciated when *sections 271 and 285(2) of the 1999 Constitution* which assign jurisdiction of the High Court and Election Tribunal are read together.

Ademola C.J.F. (as he then was) captured this distinction when he in *Onitiri v. Benson* ^[19] noted:

...it is abundantly clear to us from all the jurisdiction of any tribunal to deal with such matters as election petitions, which affect members of legislative assembly is a jurisdiction of a very special nature which does not carry with it the incidents of appeal in an ordinary civil case.

The difference between election petitions and civil proceedings can also be seen in *Electoral Act 2002*, which provides the procedures for election in its *fifth schedule in paragraph 5*. By this provision, it is not of necessity that evidence be stated in the election petition, but such evidence may be ordered by the court or tribunal.

The question may be asked: in the circumstance where a public officer covered by immunity committed an offence prior to his assumption of office, can an action be brought against him while in office? If the person committed the offence before he became President, Vice-President, Governor or Deputy-Governor, the proceeding would go into abeyance. The immunity granted to the incumbent of the relevant office under *section 308(1)(a) of the Constitution* prescribes absolute prohibition on the courts

from entertaining any proceedings, civil or criminal, in respect of any claim or relief against the person to whom that section of the constitution applies during the period he holds office ^[20]. Thus, at the assumption of his office, the proceeding would be postponed.

Similarly, the immunity is such that it cannot be waived. The case of *Tinubu v. I. M. B. Securities Plc* ^[21] is illustrative. In that case, the Respondent in a suit filed before the Appellant assumed the office of the Governor of Lagos State, whereupon he claimed against the Appellant the sum of N2.5million for breach of contract. Relying on *section 308 of the 1999 Constitution*, the Respondent applied that the matter be adjourned sine die, which was opposed by the Appellant. The latter argued that he had decided to waive his immunity under *section 308*. The court held that the Governor cannot waive the immunity granted him under *section 308*. However, relying on *Ake v. Plateau Publishing Corp. Ltd* ^[22] and *Onabanjo v. Concord Press Nigeria Ltd* ^[23], the court held that nothing in *section 308* stops a Governor from suing in his personal capacity, distinguishing this right from the right of appeal that the Appellant had wanted to exercise in that case.

The material effect of the foregoing position is that whereas a person is not allowed to proceed against any of the mentioned elected officers while in office, the latter is at liberty to take up an action against the former. Hagler has described this position of the law as “impunity legalized” ^[24]. In his view, this is against morality and public policy.

3.1 Immunity from Arrest and Detention

Immunity from arrest and detention prescribed in *section 308(1) (b) of the 1999 Constitution* is to the effect that an incumbent President, Vice-President, Governor or Deputy-Governor shall not be arrested or imprisoned during the period of his office in pursuance of a court process or otherwise. In *Fawehinmi v. I. G. P* ^[25], the court noted that:

Suppose it is alleged that a Governor, in the course of driving his personal car, recklessly ran over a man, killing him, he sends the car to a workshop for the repairs of the dented or damaged part or parts. Or that he used a pistol to shoot but which may result in the arrest or imprisonment of the person concerned.

The legal import of *section 308(1) (b)* is that any lawful command or process which has the same effect of any court process is prohibited.

3.2 Exception to the Immunity Clause

There exist situations where the President, Vice-President, Governor or Deputy-Governor is not covered by the immunity clause. First of all, immunity does not extend to an incumbent as a nominal party in a suit against official acts ^[26]. In *Anzaku v. Governor of Nasarawa State* ^[27], an action for wrongful dismissal from employment against the Lafia Local Government Council with the Governor of Nasarawa State as a nominal person was successfully maintained.

While it does not extend to election petitions, *section 308(3)* provides for investigation of these officials by the police. Whereas in *Fawehinmi v. I. G. P* ^[28], the Appeal Court noted that police investigation was not intended by *section 308*, the Supreme Court in the same case, illustrated thus:

Suppose it is alleged that a Governor, in the course of driving his personal car, recklessly ran over a man, killing him, he sends the car to a workshop for the repairs of the dented or damaged part or parts. Or that he used a pistol to shoot a man dead and threw the gun into a nearby bush. Or that he stole public money and kept in a bank or used it to acquire wealth. Now, if the Police became aware, could it be suggested in an open and democratic society like ours that they would be precluded in section 308 from investigating...? The Police clearly have a duty under section 4 of the Police Act to do all they can to investigate and preserve whatever evidence is available. The evidence may be useful for impeachment purpose...for prosecution of the said Governor after he has left office ^[29].

In the same vein, the immunity clause is not available to those officers for acts committed outside Nigeria. The arrest of the former Governor of Bayelsa State, Governor Alamieyeseigha in Britain while he was in office is a case study.

3.3 Consequential Justification for Immunity Clause

Many reasons have been advanced in justification of *section 308*. Eko K. J.S.C ^[30], submitted that the rationale for the provision of *section 308* is to bar any form of inhibition of the office holder covered by *section 308* in the performance of his duty during his tenure in office. Oluyede and Aihe ^[31] argue that immunity clause serves the interest of public policy, fairness and administration of justice. In *Obi v. Mbakwe* ^[32], the Supreme Court reasoned that:

The purpose ... is to prevent the Governor from being diverted of his attention in the performance of his executive function by fear of civil or criminal litigation during his office.

4. The Concept of Corruption

The term "corruption" is amenable to different definitions. Ofoeze ^[33] defines corruption as "any action or inaction of any person, or group deliberately perpetrated to secure advantage for oneself, a relation or group in a manner that detracts from the accepted regulations, morals, and/or ethical standard or code and hence constituting a travesty of justice, equity and fair play". Toyo, on his part, contends that corruption "consists of depravity, venality or peculation in playing a social role ^[34]. Olusoga asserts that it is the gain of money, material/financial resources, contract, employment, status, fame, power or physiological satisfaction through illegal and or immoral practices such as bribery, fraud, and abuse or office robbery ^[35].

5. Section 308 and the Edifice of Corruption in Nigeria

Although corruption is a global phenomenon and exists in both developed and developing countries ^[36], it is not only marked by pervasive presence in Nigeria ^[37] but has impacted negatively on the country's development ^[38]. Historically, corruption in Nigeria existed prior to the advent of colonialism. According to a Colonial Government Report (CGR) of 1947:

The African background and outlook on public morality is very different from that of the present day

Britain. The African in the public service seeks to further his own financial interest ^[39].

Over the years, there have been cases of corruption among top government functionaries in Nigeria. The First Republic, under the leadership of Sir Abubakar Tafawa Balewa, the Prime Minister, and Nnamdi Azikiwe, the President, was marked by appearances of corruption ^[40].

Notwithstanding the necessity of *section 308*, it has been argued that the immunity clause has been abused by most, if not all, beneficiaries who blatantly looted the public coffers and, unabashedly, shielded themselves under *section 308* ^[41]. Thus, the provision has been turned into a legal cover for the executive to plunder the commonwealth of the people ^[42]. *Section 308* has been described as a classical example of Marxist theory, which views law as an effective weapon in the hands of the capitalists for the oppression of the proletariat ^[43].

Despite of the various legislative enactments establishing anti-corruption agencies ^[44] aimed at criminalizing and curbing the menace, corruption has remained the bane of the Nigerian society ^[45]. Under the Obasanjo administration, for instance, of all the contracts awarded for power projects alone totaling about \$16 million, which were not properly executed, none of the beneficiaries of the contract has been indicted ^[46]. Efforts by the legislature to exercise its power of investigation of the award of contract in the power sector by the said administration fizzled out ^[47]. Obasanjo, who confessed that he left prison broke in 1999 before elected as the President of Nigeria ^[48], is said to have left the exalted office after eight years of his tenure in office with questionable wealth ^[49]. In spite the continued war against corruption as well as recovery of past loots, there has never been an attempt to probe any erstwhile president.

Former President Jonathan presided over a regime that has been described as the most corrupt in Nigeria since 1960 ^[50]. According to a recent report by the United Kingdom's Department for International Development, Nigeria lost about \$32 billion to corruption during the six – year administration of ex-President Jonathan ^[51]. Many ministers and top government officials under the Jonathan administration courted corruption as a result as Jonathan's high tolerance to corruption ^[52].

The high level of corruption perpetuated by the executive arm of government at the Federal level is inarguably replicated by many, if not all, executive arm of government at the States ^[53]. The failure to confront the edifice of corruption created by beneficiaries of the immunity clause has the tendency to weaken democratic sustainability and threaten economic growth ^[54].

6. Immunity in United States of America

Article 11, section 4 of the United States of American Constitution provides:

The President, Vice-President and all Civil Officers of United States, shall be removed from office on impeachment for and conviction of treason, bribery or other high crimes and misdemeanors.

The legal inference of the above provision is that unlike the Nigerian Constitution, American Constitution does not recognize or provide for immunity. However, as a common

principle ^[55], supported by other authorities ^[56], the American President has immunity from civil liability for his official acts.

The American President is absolutely immune from civil liability for any acts committed in the discharge of his official duties. In *Clinton v. Jones* ^[57], Paula Jones sued President Clinton alleging illegal sexual advances made to her by the President, and claiming private damages. Clinton contended that as a President of America, he was immune from civil liability arising from events that took place prior to his assumption of office as the President. The court held that the American President is not immune from liability for unofficial acts committed before or while in office ^[58], neither is he immune from court processes.

7. Immunity in Britain

By virtue of the *Crown Proceeding Act 1947*, the doctrine of immunity was abolished in Britain, rendering the Crown liable in tort. The Act has made King or Queen liable in tort. In Britain, neither the Crown nor the Prime Minister is immune from any action.

8. Confronting the Edifice

As a result of the increasing level of corruption and the complexity of its methodology under *section 308 of the 1999 Constitution*, there is urgent need to adopt a more effective legal framework for curbing executive corruption. The edifice of corruption in the guise of immunity should be demolished through amendment of *section 308* or its total repeal. Since the existence of immunity has become a blank cheque for the executive to plunder national wealth, an amendment or total repeal of this section is necessary. This will make the President, Vice-President, Governor or Deputy-Governor to be liable for acts that are completely unrelated with his official duties as it is in the United States, Canada, and Britain.

The use of plea bargain should be supplanted with a more effective penalty. It has been noted that one of the methods applied in the fight against corruption is the use of plea bargain when it comes to administration of punishment ^[59]. By *section 14 (2) of the EFCC Act*, where a person commits an offence punishable under the Act, he may be asked to pay such sums of money the commission thinks fit and not exceeding the maximum to which the person would have been liable if he has been convicted of that offence. This is, however, subject to *section 174 of the 1999 Constitution of Nigeria* (as amended) which empowers the Attorney-General to give effect to the process. The Federal Government relied on plea bargain to secure the conviction of former Governors of Bayelsa and Edo States, Lucy Igbinedion and Diepreye Alamiyeseigha, respectively. Former Minister of the Federal Capital Territory (FCT), Jumoke Akinjide explored plea bargain option over corruption charge involving N650 million ^[60].

It is worth reiterating that mere plea of guilt by an ex-President or ex-Governor as a legal concession and payment of some money in exchange for imprisonment for executive corruption is “not only illegal, it is immoral and nonsensical as it is unsuitable for our culture and present need. What our statute books recognized is that once the law proves an offender guilty, he goes to jail” ^[61]. Thus, plea bargain is a mockery of our nascent democracy ^[62], and therefore should be excise from our laws.

Corruption perpetuated under *section 308* should be given

legal elevation to the status of grand corruption. There should be a distinction between grand corruption and other crimes. Since corruption is a crime based on calculation, and not passion ^[63], it has been suggested that there is need to criminalize it in proportion to its harm in the society ^[64]. For starters, Nigeria can take a clue from Philippines’ *Republic Act* ^[65], which has created crime of plunder and provided penalty of life imprisonment for a public officer who misappropriates public fund above a particular level. Thus, in Nigeria, where executive plunders get light punishment, deterrence is not ensured, and abusers of *section 308* would continue to find crime of corruption worthwhile. Conversely, a more severe punishment would deter them.

Another way of demolishing the edifice of corruption under *section 308* is by utilization of our extant laws on administrative and judicial presumption of corrupt enrichment. *Section 44 (2) of the ICPC Act* provides a window for administrative presumption of corrupt enrichment. By this provision the Chairman of the Commission is empowered, in the interest of the public, to seek explanation from a public officer whom he reasonably believes owns, possesses, controls or holds interest in any property which is excess, having regard to the officer’s present or past emoluments and all other relevant circumstances. This provision should be effectively harnessed to engender conviction where executives are unable to give account of any assets or money in their possession.

In the same vein, judicial presumption under *section 54 of the Act* may be employed by the court to prosecute and bring to book executives or their relatives who are in possession of unexplained assets and money. In addition to administrative and judicial presumptions, creating an offence of illegal enrichment is another method of undermining the abuse of *section 308*. It was an offence of illegal enrichment that *Article 20 of the AU Convention on Preventing and Combating Corruption* envisaged when it provided that:

Subject to its constitution and the fundamental principles of its legal system, each State Part shall consider adopting such legislative and other measures as maybe necessary to establish as a criminal offence, when committed intentionally, illicit enrichment, that is, a significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income ^[66]. In line with the above provision, there is a growing need to create an offence of illicit enrichment or possession of unexplained wealth to deal with executive corruption.

9. Conclusion

This article interrogated the existence and abuse of immunity under *section 308 of the 1999 Constitution of Nigeria* (as amended) by beneficiaries who see it as an incentive to loot the commonwealth of the people. As a grant that is made subject to the doctrine of legality, the law presumes that the persons for whom immunity was made should concentrate on selfless service to the State. Regrettably, they have violated the terms of the grant. Thus, the continued enjoyment of immunity by corrupt government officers questions the reasonableness of immunity.

However, recommendations have been made to confronting the monster of corruption under the section under discussion. Some of these recommendations include

amendment or total repeal of *section 308*, utilization of administrative and judicial presumptions, recognizing and creating offence of illicit enrichment, elevating corruption to grand corruption, i.e. criminalizing corruption in proportion to the harm to the society in relations to punishment, and supplanting plea bargain with a more effective sanction.

10. References

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- shopping spree where she blew millions of dollars at highbrow stores in United States, Britain, Germany, Hong Kong, Italy, UAE, and China, huge sum of money running into millions of dollars in Nigeria and in foreign countries have been trailed to her. See Michael Adariku, “Dasukigate: “How N1.4 billion was allegedly diverted” at www.premiumtimesng.com/news/topnews. Nisi Odebode, “The Presidency lists corrupt cases under Jonathan”. *The Punch*, 8 May, 2018. Samuel Adesanya at www.saharareporters.com. Retrieved 17 June, 2018.
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