



Research Paper

Immunity clause and white collar crimes in Nigeria: a call for the withdrawal of immunity clause.

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ABSTRACT: *This paper argues that the immunity clause in the Nigerian constitution abates white collar crimes by the political elites. This is because laws are made to be applicable to the generality of the society. Yet, some laws are also made from the same source to exclude certain groups from being charged to court or punished when they commit offences in the name of immunity. This is exactly the case based on the Section 308 of the Nigerian 1999 constitution that conferred executive power on the president at the federal level and governors at the state level. The said law also granted to the officers named in the section 308, an absolute power and complete exemption from persecution or punishment from all criminal and civil claims throughout their tenure in the office.*

This paper, through content analysis maintains that immunity clause in the Nigeria constitution is biased as it indicates that laws are not uniformly applicable to the generality of the society. In fact, this paper's secondary data confirmed, immunity clause is bias and encourages white collar crimes and mismanagement of public funds in Nigeria instead of providing uninterrupted administration for good governance as its intent to be. As such, it has no advantages to democratic governance in Nigeria. Based on that, this paper concludes that the immunity clause be removed to allow justice to take its course so as to enable law to maintain the saying that "nobody is above the law."

Keywords: Immunity, Clause, Constitution, Nigeria, Crime, Politic

I. INTRODUCTION

A crime is some conduct (an act or omission) which, when it leads to a certain state of affairs, is treated in that jurisdiction as being capable of leading to prosecution and punishment Williams (1955: 107)? This understanding of 'crime' will form the bedrock of the concept definition in this article. Crime has many definitions or explanations. Hence, crime definitions are linked to society, the individual and time. Some scholars such as Belkin & Korukhov (1986), and Dambazau, (1999) are also of the views that crime varies from society to society, time and individuals. This means, what is considered as a crime in one society may not be in another. So also what was considered as a crime in the 1940s may not be a crime in 2001.

Wayne Morrison (2004) notes that crime operates as a core concept in modern society. Morrison maintains that it seems like a common sense category, but this is only a superficial appearance...because it is clear that there has been a great deal of variation in history and across different jurisdictions as to what has been defined as a crime. As crime varies from period to regions, it differs in both nature and penalty. Hence, somebody may commit a crime and be punished, the same crime may be committed by another person but go unpunished. This could be attributed to various factors or dimensions.

Although, most democratic societies assume all citizens are equal before the law, sometimes this is a mere legal idealistic rather than realistic. Often, some State's personals are exempted from persecution or legal trial even when they commit heinous crime. Such group may be protected by a special *clause* in the said State or country. This is a common practice in Nigeria. In fact, according to a *clause* under the Nigerian 1999 constitution, the following individuals; the President and his deputy, State governors and their deputies are protected by "immunity". That is to say, these individuals cannot be persecuted or legally trialled, while they are holding public offices. Therefore, this article examines the manipulation of immunity clause by the Nigerian political elites in the perpetuation of economic crime.

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II. BACKGROUND OF THE STUDY

In Nigeria, section 308 of the Nigerian 1999 constitutions, covered some group of ruling elites where it was stated that, the President and all governors of states are immune from an arrest, imprisonment, civil or criminal proceedings throughout the tenure of their offices. However, to what extent would the immunity clause abate crimes by those it covered in Nigeria? To answer the above research question, it is imperative to examine the content of the Nigeria constitutions section 308 of the 1999 constitution. The content of immunity clause under the Nigeria constitutions section 308 of the Nigerian 1999 constitution reads as follows:

1. Notwithstanding anything to the contrary in this constitution, but subject to Subsection (2) of this section.
 - a. No civil or criminal proceeding shall be instituted or continue against a person to whom this section applies during his period of office;
 - b. A person to whom this section is applied 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 or issued;
 - d. Provided that in ascertaining whether any period of limitation has expired for the purpose of any proceedings against a person whom this section is applied, no account shall be taken of his period of office.
2. The provision of subsection (1) of this section shall not apply to a civil proceeding 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 the president, Governors 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 function of the office.

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

In addition, the Nigeria courts have reinforced the above provision in *IMB securities PLC V Bola Tinubu* (2001). 45 WRN1; where the court held that the defendant who has then a state governor was immune from legal proceedings. On the contrary, this section does not prevent these officers from suing other people; see *Jonathan V Jones Abori & Anor* suit No.FCT/CU/505/07 (Kahinde, 2013).

However, at the immunity clause above indicate, there seems to be biasness, this is because the said political officers as mentioned in section 308 of the 1999 constitution, are immune from suit but they can sue. This immunity, not only provides opportunities for undue power, but also gives room for victimization of innocent people.

III. METHODOLOGY

This paper is purely based on content analysis. The study utilized secondary data. The data were collected from the website of the Nigeria Economic and Financial Crimes Commission (EFCC) and some mainstream but private newspapers in Nigeria. These include, *The Punch*, *Guardian*, *niaji.com*, *Vanguard* newspapers, etc. The choice of these newspapers is based on their years of publication, detail analysis of economic and socio-political matters. More importantly, these newsprints have a very high level of impartiality in their publications. To a certain level of accuracy, we can say, most of the writers in these newsprints are investigative journalists. Besides, it would be a near impossible to directly collect data from the Nigerian elites given their position and social status. The EFCC on the other hand is the State agency, tasked to arrest and persecutes fraudsters and high level white collar criminals in Nigeria. This is imperative as the EFCC's mission code reads in part; "to rid Nigeria of Economic and Financial Crimes and to effectively coordinate the domestic effort of the global fight against money laundering..."

IV. THE NOTION OF LAW AND CRIME

During the Mid-20th century, various scholars noted that crime is not an objective phenomenon and that the way in which certain behaviour is responded by the society can be understood as more of the reflection of how society is structured than an indication of any biological or genetic problems with those individuals regarded as criminals (Nathalie & Steven, 2004). This view was also supported by (James & Richard, 1998) where they stated that, crime is that behaviour condemned by the society; it occurs despite the rewards and punishment that have been developed to enforce the condemnation. While, (Tappan, 1964) looks at crime in a

more legal perspective where he said that, crime is an act or omission in violation of criminal law, committed without defence or justification, and sanction by the state as a felony or misdemeanour.

Contrarily, the conflict theories, believed that capitalist society creates social and economic environments that facilitate crime. As such crime is the creation of the political elites as they define what crime is. Furthermore, Karl Marx argued, if one critically analysed the secret behind the definition and creation of law one would understand that its true purpose is to maintain power and to have control over society in an effort to keep the ruling elites in authority. This can also be understood in the work of Pavlich(2011). Pavlich argues that law is portrayed in a way that makes it seem for a society, yet to everyone in society. Pavlich went further to state that If we delve deeper into the content of law, one can see that its (Law) real essence is to maintain power and control over society in order to keep the “Capitalist” as Karl Marx call them in authority. While, Williams, Mankof, Pearce, & Sinder (2000) in their own views stated that, crime and law are not an objective phenomenon; these critical feminists, race, and aboriginal literatures reveals the dichotomy between how law is enacted and the way they are enforced are often biased in nature. As Williams, et- al (2000) concluded that something is wrong with the enforcement of law and the definition of crime. And this is more when such enforcement of law and the definition of crime apply to certain members of the society or crimes such as the white collar crime.

V. WHITE COLLAR CRIME AND THE NIGERIAN IMMUNITY CLAUSE

From the 1910 to 1920s, the turned-down white collar as we know it today, has been around since the 1800s. But it was not commonly used to discriminate by occupations and social status until around the early 20th century. White collar belongs to the rank of office and professional workers whose job generally do not involve manual labour or the wearing of uniform or work clothes. Therefore white collar refers to the employee whose job entails largely or entirely, mental or clerical work, such as an office. The term white collar work used to characterize non- manual workers, but it refers to an employee or profession whose work is knowledge intensive, non-routine and in structured (Forrest, 2012). Scholar like Sutherland, in his 1940 work titled: “Understanding White Collar Crime: Definition, Extent and Consequences”, introduced the concepts of “white collar crime”. His work draws the attention of the society and other scholars to the crimes committed by the upper class and corporate elite, thereby changing the perception that crime or criminality is more common among the lower class (see also James & Richard, 1998). Marshall & Richard (1973), however divided white collar crime into two groups: Corporate crime and Occupational crime. Where they gave more emphasis on the corporate crime, hence they refer to it, as an illegal behaviour being committed by employees of a corporation to benefit the corporation, company or the business. However, they defined occupational crimes as a violation of legal codes in the course of activity in legitimate occupation.

Although, there is no set definition of white collar crime, the term is used to characterize a number of nonviolent crimes of dishonesty. The crimes are committed by professional or entrepreneurs under the veil of legitimate business activities (Brenner, 2011). Brenner further explained that white collar crime includes embezzlement, false statement, obstruction of justice, bribery, federal perjury, cheating, and fraud by commercial offences committed by administrative or managerial employees, a business person’s professional or public officials, etc. While, the National Check Fraud Centre, broaden the definition to cover such crimes as the bank fraud, cellular phone fraud, extortion forgery, money laundering and blackmail. The above definitions by James & Richard, 1998; Brenner, 2011 is significant in explaining the white collar in relation to the immunity clause in the Nigerian 1999 constitution.

In fact, Sanusi (2003) observed, with the extensive liberalization of the Nigerian economy between 1986 and 1990s, through the structural adjustment program (SAP), there was the need to protect the state or individuals from financial crimes mainly, the “white collar” types. Thus, by 1994, the Nigeria national assembly passed into law the white collar crime act. Others were; fee fraud and other fraud related offences Act alongside with the money laundering Act of 1995. In an effort to tackle the financial crimes such as the money laundering, the decree of 1991 as amended in 2002 was promulgated by the Central Bank of Nigeria (CBN) and other regulators in collaborations with the National Assembly and with a threat of Financial Act Task Force to blacklist or name country who failed to comply with the Financial Act Task Force (FATF) which enforced the amendment (see Sanusi, 2003). However, Sanusi argued that; despite the laws as introduced by Nigerian government series of the Act, amendment to fight money laundering, which is one of the white collar crimes, the law could not stop or eradicate money laundering as there were no cases that were successfully prosecuted.

This is because he argued, the Act failed to take account of the practice of eradicating the mandatory reporting requirement of the customers of financial institutions, coupled with the failure to implement some of the provisions as covered in the Act. Sanusi notes, that the failure was because most individuals implicated in such crimes are protected by the so-called immunity clause in the Nigeria constitution.

VI. ABUSE OF IMMUNITY CLAUSE IN NIGERIA

After a protracted military regime, Chief Olusegun Obasanjo was democratically elected and sworn in as the president of Nigeria on the 29th May 1999. Since then, Nigerians have been governed by democratically elected officials. The political system in Nigeria is modelled after the USA constitutional presidential system. This means Nigerians go to the poll every four years since 1999. The last election was conducted in 2015. The 36 states' (administrative divisions) governors share sovereignty with the president of the Federal Government of Nigeria. The president and all the 36 governors command a high respect and power in political and socio-economic decision of respective states. However, most Nigerians have argued that this immunity enjoyed by these political elites in Nigeria is being abused, and encourage these so called special class or elites to continue to loot the country's economy. For example, a Nigeria online Portal—naija.com, writes;

Nigerians have grown increasingly concerned over the misconduct of some officials and the fact that they often escape justice. The majority supports the idea of subjecting government officials, including the top ones and the incumbent presidents, and their deputies, to trial for criminal offences. 225 of the country's 360 federal constituencies voted for a partial removal of the immunity clause for this to happen (naija.com 2016).

Even though, Sanusi (2003) notes that the immunity clause was made in order to enable the political office holders to have uninterrupted administration such that will allow them to work for their subjects. The writer argues that the immunity clause had encouraged many states' governors to engage in white collar crimes, especially money laundering. For instance the Vanguard newspaper in its August 1st, 2016 editorial pointed that; Years after leaving office, many former governors suspected to have looted the resources of their states are yet to face criminal prosecution... ironically, many of the suspects left office as early as 2003, while the rest ended their tenure and lost immunity from prosecution between 2007 and 2015 but were never questioned by any of the law enforcement agencies in Nigeria.

The agitation for the removal of this immunity clause in the Nigerian constitution becomes very imperative as evidence of treasure looting in Nigeria has become daily occurrences. Besides, criminal charges were never brought against the perpetrators even with concrete evidences of wrong doing. For instance, in 2007, the former governor of Bayelsa state, Chief Diepreye Alamiesigha, was charged in London (but not in Nigeria) with the case of money laundering, he was accused of hiding 1.8 million pounds, 3.2 million dollars and 2.7 million Euros in his London house and two British accounts (Dave, 2012). But he was pardoned by the then president despite the glaring evidence of crime established by the Scotland Yard (the British police detectives).

Another similar example is the former Governor of Plateau state Joshua Dariye. He was also arrested in London (but not in Nigeria) on the 20th of January 2004 with lots of embezzled money. He was accused of embezzling \$9 Million from the public funds (Simon, 2015). This led to his impeachment in 2006 by the Plateau state house of Assembly. The impeachment was possible because of his differences with the then President and the ruling party. He, however, found ways to remain in the corridor of power. He contested and won the senate seat for Plateau central constituency while still facing 23 count charges on money laundering (Nnodiri, 2015). But he is still a free man.

Another former governor from Enugu state Mr. Chimaroke Nnamani, was also accused of money laundering on 105 count charges. He was first arraigned in 2007 before the court of laundering 5 Billion Naira which contravened the provision of Act, 2004 and EFCC Act, 2004 for money laundering prohibition (Ezeamalu, 2013). But like the rest of them, nothing came out of the court case even though he was tried after his tenure as governor. What is more, no cash or properties were recovered from or his associates.

More worrisome, is the fact that this pattern of white collar crime (embezzlement and money laundering) had continued even among the recent governors that left office in 2015. In fact, recently, the governor of Adamawa states Murtala Nyako and his son Abdul Aziz were also ordered to be remanded on the 8th July 2015 by a federal court judge. This is possible because the current Nigerian President, Buhari won the election on the promises that he will eradicate all forms of corruption. This is equally possible because the Economic and Financial Crime Committee (EFCC) has been reformed. Thus, Nyako was remanded over 37 count charges related to corruption and money laundering amounting to 15 Billion Naira which was laundered from Adamawa state treasury (Ibeh, 2015).

Although recent data from the EFCC and some news portals in Nigeria indicate that some of the ex-governors and their associates are currently facing various charges in the court (See examples below), so far none has been successfully persecuted or face any form of punishment. Examples of such indictment are;

The Chief Judge of the Federal High Court, Justice Ibrahimauta, has returned the corruption case file of a former governor of Benue State, Gabriel Suswam, to Justice A.R. Mohammed and ordered him to continue presiding over the case. Suswam is being prosecuted by the Economic and Financial Crimes Commission, EFCC, along with his Commissioner of Finance, Okolobia Okpanachi, on a nine-count charge bordering on conspiracy, abuse of office and diversion of state funds to the tune of N3.1 billion. (EFCC 2016)

Economic and Financial Crimes Commission, EFCC, on Wednesday, August 3, 2016, arraigned an associate of Governor Ayodele Fayose of Ekiti State, Abiodun Agbele, before Justice Nnamdi Dimgba of the

Federal High Court sitting in Maitama, Abuja on an 11-count charge bordering on money laundering to the tune of N1, 219,000,000 (One Billion, Two Hundred and Nineteen Million Naira) (EFCC 2016)

Outside, financial abuse, often the ruling class misuses the immunity clause for other selfish interest, especially to witch-hunt the oppositions or even the lower class. The President of Nigeria is a President-at-Large, which means that the entire country is his constituency, and that may explain why some governors could be arrested while abroad and others not. In fact, there are indications that those governors with a cordial relationship or of the same political affiliation or ideologies with a seating President receive special protection both within and outside the country. All these factors, immunity and slow proceeding of the Nigeria judicial system have continued to ensure elite criminals in Nigeria have nothing to worry about persecution from the law.

Above are some of the glaring facts on how the immunity clause in the Nigerian constitution has aided many governors, their deputies and a number of Nigerians' ex-presidents and their deputies. Indeed, the aftermath of their action has left the country in economic disarray. The ex-director of EFCC Mr. El-Rufai, summed the consequences of economic looting by those covered by the immunity as follows:

“Nigerians’ current travails sadden me, that there was no denying the fact that Nigerians were contending with multi-faceted challenges, which were the outcome of the looting of the nation’s resources in the past years” (Punch newspaper 2016)

VII. CONCLUSION

‘Immunity’ as a notion, originated from a Latin word ‘immunitas’. The ancient Romans used the concept to describe the exemption of an individual from service or duty to the State (Silverstein, 1999:19). The basis for the enactment of such clause in the Nigeria constitution is to shield the federal and state executive from any hindrance or interference from performing their duties to the nation. However, as Momoh (2005) argues clause is inconsistent with the ideal of democracy and should, therefore, be removed from the constitution. He argues;

The provision constitutes a rude and reckless assault on, and a violation of the independence and powers of the judiciary. He supports this argument with the aid of two trite points in law. First is that a constitutional provision in its right and proper place and content takes precedence on, and is superior to a contrary provision in a wrong and improper place and context. He maintains that the judiciary has powers to adjudicate over any criminal and civil matters dealing with fundamental human rights. Thus, a governor who might have committed murder is not covered by the immunity clause.

As glaring as Momo’s argument is, unfortunately there are instances where the judiciary connive with a corrupt seating or ex-governors and protect them from persecution. It is factual to argue here that the ‘clause’ is a huge hindrance, however, even when the ‘clause’ is no longer applicable to the individual(s), the judiciary and its institution in Nigeria usual turn blind eye and protect these individuals. Hence, in the case of Nigeria, laws are made and interpret to suit the ruling class and their interest.

Besides, the clause prohibits an essential ingredient of democracy, which is check and balances on all the three branches of government—the Executive, Legislative and the Judiciary branches. More importantly, it encourages Kleptocracy. And in the case of Nigeria, it has taken an extreme dimension. In fact, the few examples detailed above are like a drop of water in the sea. Therefore, looking at the data collected from various sources and base on the existing cases that involved the upper class in Nigeria, the ‘clause’ has done more harm than good.

This paper concludes that, the immunity clause which is supposed to give the upper class breathing space so as to enable them to discharge their duties and obligation to their subjects, ends up encouraging the same elites to freely engage in white collar crimes especially embezzlement and money launderings. This also means that the definition of crime by the upper/ ruling class is also a manipulation as the crimes committed by the upper class are far more harmful on both the economy and the Nigerian society yet they are hardly prosecuted or labelled as criminals due to the immunity they enjoyed. Thus, it is very obvious the correlation between capitalist society and the facilitation of crime as the conflict theory argued.

Therefore, the immunity clause empowers the ruling class to defile the rule of law. As such the powers of the ruling class are obscure. Consequently, the ruling class in Nigeria continues to protect their power and authority against questioning by the members of the society (see also Pavlich, 2011). Hence, the introduction of laws to enable them check and have total control of the lower class and cover the political elites from being checked by the other class resulting in inequality in the application of law.

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