

THE WHITE COLLAR

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The Question of Legislative Immunity

Plato's Ring of Gyges

An ancient fable was once told of a shepherd name Gyges who in his work for the king of his nation discovered a chasm in the ground near where he was pasturing the king's flock. Being a curious man he entered the chasm in the ground to see what was in it and of course he saw many odd things and found a gold ring, which he took. The story continues that he soon discovered that by twisting the ring towards the inside of his hand he could become invisible to those around him and return to their vision by twisting it outward towards the back of his hand. With this newfound *advantage*, the story is told that this humble shepherd soon seduced the queen and with her help killed the king and took over as leader of the nation. The moral of the story thus being that power corrupts and absolute power corrupts absolutely.

The Separation of Powers

We come to the question of Power and its distribution among the three main arms of the Nigerian Government today and soon we begin to see why long before our present power struggles it was said that **"When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty..."**. Baron De Montesquieu French Philosopher and father of the modern day definition of Separation of Powers observed that there are three functions of government (the Legislative, the Executive and the Judiciary) and no two functions should ever be held in the same body or else the very liberty and freedom of the society would be forfeited.

Today, perhaps more than any other time since the beginning of the 4th Nigerian Republic, in the face of the impunity of public officials, the absence of public accountability for the power that they wield, and the seeming absence of justice for the ordinary Nigerian in the Court; the liberty and freedom of Nigerian society is threatened. Elections have come and gone, Nigerians have spoken with their votes but since March 28 and April 11 the status quo has returned, except that now Nigerians have an anticipation for a different way of doing things. There is a palpable sense of expectation, a new awareness that Nigerians are not willing to let go of.

Battling Juggernauts

But instead of the sweeping break with the past, no sooner had the public officials taken their new positions than their battles for advantage began. The on-going power struggle between the Federal Government and the National Assembly is one that continues from the 7th Assembly because we all remember the attempted alteration of Section 9(3) of the 1999 Constitution to remove the requirement for Presidential Assent



in Constitutional Amendments- a move which would in theory have allowed the Legislature unfettered ability to increase its powers.

Immediately the 8th Assembly was inaugurated the Legislature came under scrutiny in the oversight capacity of the Executive and the Judiciary (in the form of the Senate President's Code of Conduct Tribunal Proceedings). Now the Legislature (in form of the Senate) intends to extend its own oversight to the Code of Conduct Bureau, the same office currently scrutinising its leader. And while these oversight functions are important in a *healthy* and *transparent* democratic system- as *Montesquieu* envisaged- when they are tinged with the flavour of reprisal and indeed begin to dominate the entirety of the functions of one or more arms of Government, in our quest for accountability the question must arise "Is this in the interest of Nigerians? Or are we the collateral damage from the imbalance among the three arms?"

Legislative Immunity or Parliamentary Supremacy?

It is in the wake of this that the question of Legislative Immunity- i.e. immunity from criminal and civil prosecution for the Heads of the Legislative Chambers has been raised by reports that a new Constitutional Amendment led by the House of Representatives intends to pursue Immunity for the Heads of the Legislature and Judiciary.

The new push is premised on the basis that the Heads of the Executive arm i.e. the President and Vice-President as well as State Governors and their Deputies, enjoy the privilege and so should the Legislature and the Judiciary. The age old argument for Executive Immunity, itself a controversial issue in a nation beleaguered by the abuse of Executive Office, is put clearly by

Eso J.S.C in **OBI v MBAKWE** (1984) 15 NSCC 139 @ 140 where he declares:

"I think the purpose of Section 267 (now Section 308) of the 1999 Constitution is clear. It is to prevent the Governor from being diverted of his attention in the performance of his executive functions by fear of civil or criminal litigation during his tenure in office".

We therefore can safely assume that the intention in this new drive for Immunity is that the Heads of the Legislature and Judiciary may carry out their functions without their attention being diverted for fear of civil or criminal litigation.

What the proponents of this concept of Immunity do not make clear, however, is that these conceptions of Immunity already exist in a manner to protect those who employ it in the strict performance of their functions. It is no secret for instance that a Judge in the performance of his adjudication of a Court or Tribunal has privilege against criminal prosecution or civil action arising from the proper execution of his function in such proceedings, the common law principle has existed for centuries by way of **Judicial Immunity**.

Specifically regarding the Immunity of Legislators from civil and criminal prosecution in the execution of their functions **section 3 of the Legislative Houses (Powers and Privileges) Act** states:

"No civil or criminal proceedings may be instituted against any member of a Legislative House-

(a) in respect of words spoken before that House or a committee thereof; or

(b) in respect of words written in a report to that House or to any committee thereof or in any petition, bill, resolution, motion or question brought or introduced by him therein."

These provisions clearly cover the entire ambit of the proper execution of the Legislative function and apply not just to the Heads of the legislative

chambers and their deputies but also to every legislator in the proper exercise of their function within those chambers. It is therefore superfluous to include a Constitutional provision to protect the Speaker and Deputy Speaker of the House of Representatives and the Senate President and his Vice to do what section 3 above has already done for more than six decades.

In the 7th Assembly it was canvassed that sections of the Legislative Houses (Powers and Privileges) Act were held inconsistent with the Constitution by a Court of Appeal sitting in Enugu in **HON. MIKE BALONWU AND 5 OTHERS v MR. PETER OBI AND THE ATTORNEY GENERAL OF ANAMBRA STATE** (2007) but in my humble opinion that case does not affect the proper operation of section 3 in the ordinary exercise of Legislative Function.

We see similar protections in both the UK (from whom we inherit the Nigerian law on the subject) and the US, with both nations securing the same protection of legislative immunity within the various chambers of their Legislature. The UK draws it from a well-documented history of civil activism, dating back to one instance when Thomas Haxey a member of the House of Commons in a bid to curb King Richard's spending brought a Petition in Parliament against the King. He was tried for Treason but eventually the King was pressured into releasing Thomas Haxey and the case became the founding case for Freedom of Speech in Parliament. That is until the **Bill of Rights** enshrining that convention was passed in 1689.

Similarly the American Constitution in **Article 1 Section 6 Clause 1** states

"The Senators and Representatives...shall in all Cases, except Treason, Felony, and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same..."

The striking distinction between the protection that already exists in our country and other instructive jurisdictions and that which is now proposed is firstly that it is limited to the Heads of the Legislative Chambers and second it purports to be in the same nature as Executive Immunity. From this distinction it appears that the purpose of this "new" immunity is to give protection for things said and done outside the legislative chambers to the Heads of the legislative chambers and their deputies. And the question that we must ask ourselves, objectively as participants in this democracy is "Why?"

The Thing About Roads Paved With Good Intentions

History is replete with great movements that began with bold and daring intentions that were eventually engulfed by arbitrary abuse and impunity. It is therefore not too farfetched a conjecture to make that while all that can be gleaned is the "appearance" of things, if it looks like a horse and smells like a horse, everyone will think... it is a horse.

And except for those rare few men and women with an *"adamantine"* temperament to persevere in justice and endure in *good* even in the face of tempting power and under great pressure to favour themselves with that power, that show of an excellent character trait we emulate from the divine that is *saintly*, apart from this must we not conclude that accountability and more of it for the use of power, not less, is the preserve of what is good and right in society and especially ours? Is there any accountability to be hoped for with this new proposed power?

In the end does *Gyges* our humble protagonist turned kingslayer lend his lesson to us in this quest? Do these battles between these three arms of Government remind us of the grass, when elephants fight? We must salute those men and women with true hearts of service, carrying out their functions quietly and without notice, but if these tales leaves us feeling worn out and feeling neglected then perhaps we should remind our leaders in the Legislature, and the Executive that four years has started running, and rather than the tug of war in the quest to gain advantage, they ought to start to make a difference with the time they have.

INCLUSION MATTERS: ACCESS AND EMPOWERMENT FOR PEOPLE OF ALL ABILITIES CONTINUED FROM PAGE 10

d) Tax of employers with disabilities should be retained by the organisation as an incentive to help in implementing their disability friendly policies and programmes.

e) Persons with disabilities should be placed in internship programmes with employers for 2-6 months period and receive stipends from government during such programmes.

Concluding Remarks

The thrust of this presentation is that over the years, it has been the sole responsibility of governments to provide for persons with disabilities. It is now clear that governments alone cannot do this. Consequently, we must involve the private sector either by way of a PPP or corporate social responsibility.

At the federal level, there is a National Policy on PPP, published by the Infrastructure Concession Regulatory Commission (ICRC). States are urged to have similar laws that provide the legal and

regulatory framework for PPP transactions.

We are not saying that governments, as state parties to the Convention should abdicate their roles. We are not saying that the Discrimination Against Persons with Disabilities (Prohibition) Bill 2011 should not be passed. What we are saying is that in addition to the obligations on the state under the Convention and the law, the provisions of the needs of persons with disabilities should be a collaborative effort involving the private organisations, businesses, schools, and communities. The level of awareness should be raised that there has been movement from segregation to integration and from exclusion to inclusion. By so doing, the abilities of all will be appreciated.

While the Discrimination Against Persons with Disabilities (Prohibition) Bill 2011 is laudable, we urge the National Assembly to transform sections 14 and 17 of the 1999 Constitution, as amended, under Item 60 of the Exclusive Legislative List

to justiciable provisions.

If the design, construction, operation, financing and maintenance of our roads, churches, schools, building, offices, among others, take into account the special needs of persons with disabilities, there will be access to all persons with abilities. Furthermore if our labour laws and policies take into account the special needs of persons with disabilities, such persons will be empowered. The Ministry of Labour and Productivity should liaise with the National Bureau of Statistics to ensure that we have accurate statistical data on persons with disabilities.

Remember, we are all either temporarily or permanently impaired. Remember, that there is ability in disability.

Being the Keynote Address delivered by Professor Paul Obo Idornigie, SAN, PhD, FCIS, MCI Arb(UK) at the International Day for Persons with Disabilities: Benin City, Edo state: 3rd December, 2015.