

LIMITS OF THE PRINCIPLE THAT NO ONE IS ABOVE THE LAW

By Ben Nwabueze

The principle stated above is a salutary one, but its application is necessarily limited by inevitable exceptions.

We take, first, the power given by section 89(1)(c) of the Constitution to the Senate or the House of Representatives to “summon any person in Nigeria” to appear before it to address it on the state of the nation and to answer questions relating thereto.

Relying on its power in that behalf, the House of Representatives on January 25, 2018 summoned President Muhammadu Buhari to appear before it.

I immediately decried the summons in a public statement, pointing out that, while the President is not expressly exempted from the power, he is not bound by it, on the ground that the President, as Head of State (section 130(2)) represents or incarnates the Nigerian state, and, as such, does not come within the meaning of the term “any person in Nigeria”.

His position as Head of State constitutes an exemption to section 89(1)(c), but the exception does not mean that he is above the law.

I further advised that, so long as President Buhari remains our Head of State, he must be accorded all the rights, pomp and dignity appertaining to the office, including the right to appear before the National Assembly whenever he chooses to do so, but not under a summons, defined by the dictionary as “a command or order by authority to appear,” and that when he does so appear before the Assembly for any purpose, he is there in state, i.e. as the state – what is called an act of state.

Happily, the National Assembly heeded my advice, and the summons has not been pursued, and may not be issued again.

In more or less the same way as the President, as Head of State, incarnates the Nigerian State, so does the Senate President, as head of the National Assembly, incarnate the legislature i.e. the legislative arm of government, and the Chief Justice of Nigeria, as head of the judiciary, incarnate the Judicature, i.e. the judicial arm of government.

The executive, legislature and judicature compose the Nigerian government. The head of each of the three arms of the government is entitled to, and must be accorded, all the rights, pomp and dignity appertaining to their offices.

An important right attached to the office of President or State Governor, as head of the executive (or chief executive), as he is designated by the Constitution sections 130(2) & 176(2), is

immunity from civil or criminal proceedings while in office, which is granted to him by section 308 of the Constitution.

Whilst, admittedly, the immunity does not avail the CJN, what is more important for present purposes is whether the reason or rationale for the grant of the immunity to the President or State Governor is relevant with respect to the prosecution of the CJN, as head of the judicature, before the Code of Conduct Tribunal or before any Court.

This raises the question as to what is the reason or rationale why the immunity is granted to the President or State Governor, and whether the reason or rationale for the immunity (as distinct from the immunity itself) is relevant or not with respect to the prosecution of the CJN as head of the judicature.

Stating the reason or rationale for the grant of the immunity under section 308, Karibi-Whyte JSC in *Tinubu v. I.M.B. Securities Plc* (2001), 6 NWLR (Pt 740) 670 at page 708 said that the immunity is meant to provide protection for “a public policy principle.” Broadly defined, public policy refers to actions contrary to the interest of the public, or to public good, or public welfare.

The reason or rationale for the immunity based on public policy has two aspects.

One is protection for the office, its integrity and dignity as well as protection of the majesty of the sovereignty of the federal state or State as symbolized or incarnated by the President or State Governor.

To drag an incumbent President or Governor to court and expose him to the process of examination and cross-examination cannot but degrade the office.

The affront to the Federation or State involved in this could be easily perceived if a foreigner temporarily resident in the country were to take the President or Governor to court for, say, a breach of contract, and attempt to discredit him in cross-examination as a liar and a disreputable person.

It should make no difference that the complainant is a national. The interest of the public in the preservation of the integrity of its highest offices should outweigh the inconvenience to the individual of the temporary postponement of his suit against the President or Governor.

Where, however, the President or Governor holds office for life, there may be a real injustice, for the individual would have been deprived permanently of his suit. Even so the principle underlying the protection still demands that it should be maintained, though the situation does illustrate the undesirability of a life presidency.

The other aspect of the public policy principle protected by the immunity is stated as follows by the Supreme Court in *Fawehinmi v. Inspector-General of Police*, (2002) 7 NWLR (Pt 727) pages 699 – 700:

“The main purpose of section 308 of the 1999 Constitution is to allow an incumbent President, Vice-President, Governor or Deputy Governor mentioned in that section a completely free hand and mind in the performance of the duties and responsibilities assigned to the office which he or she holds under the Constitution”.

The Supreme Court’s enunciation of this aspect of the public policy principle protected by the immunity has been expatiated as follows by the Federal High Court Abuja, per Justice Jonah Adah, in the Dariye Case at page 13: “It follows from this decision therefore that the immunization of the relevant public officers by the Constitution against prosecution is to accord them the freedom from the distraction of facing unnecessary inconsequential or composite and complex litigations that could weigh against the performance of their onerous duties and responsibilities under the Constitution”.

Civil or criminal proceedings or proceedings of whatever kind against an incumbent President or Governor before the Code of Conduct Tribunal affront both aspects of the public policy principle protected by the immunity in exactly the same way and to the same degree as civil or criminal proceedings before a court. They equally distract the incumbent from the discharge of the responsibilities of his office. They equally also affront the integrity and dignity of the office, since the procedure used in both cases is more or less the same, and includes ascertainment of facts by means of evidence given on oath or affirmation and the examination and cross-examination of witnesses, the proceedings being required by the Constitution to be conducted in the full view of the public.

Allowing for some differences connected with the function of the offices, as for example protection of the majesty of the sovereignty of the federal state or a State, which is clearly not applicable to the office of the CJN, the reason or rationale, as stated above, is relevant with respect to the prosecution of the CJN before the CCT or any Court.

For this reason, therefore, the prosecution of the CJN is contrary or injurious to public policy, to the interest of the public, to public good or public welfare, and should be discontinued.

If the authorities are unwilling to discontinue the prosecution, then, some way must be found to obviate or minimize the disgrace and degradation which it (i.e. the prosecution) inflicts on the office of the CJN; this may require resort to the power vested in the National Judicial Council (NJC) by the Constitution to discipline judicial officers accused of “misconduct”.

Whatever may be the objections arising from this kind of administrative or procedural process (see the case of *Nganjiwa v. Federal Republic of Nigeria* (2017)); it may serve to save our system of government and the country from the injurious impact of a public prosecution against the CJN, as the head of the judicature.

Disciplinary proceedings before the NJC or before the CCB do not have the same degrading or damaging impact on the office of the CJN as proceedings in a public prosecution in a court of law.

Indeed, both the Constitution and the Code of Conduct Bureau and Tribunal Act have in contemplation an administrative or disciplinary process, rather than a court one, as the primary means for dealing with alleged misconduct against the Code of Conduct by public officers.

For, not only, as stated below, is the CCB the only body authorized by paragraph 3(e) of the Third Schedule to the Constitution to invoke the jurisdiction of the CCT by referring to it a complaint about non-compliance with, or breach of, the provisions of the Code, (neither the Attorney-General nor anyone else can invoke the Tribunal's jurisdiction), not only is the CCB authorised to receive and investigate complaints, but more importantly, it is authorised "to ensure compliance with and where appropriate, enforce the provisions of the Code" – by administrative process of course – Section 3 of the CCB and Tribunal Act.

The Act goes on to provide that "where the person concerned makes a written admission of such breach or non-compliance no reference to the Tribunal shall be necessary".

The matter ends there, and no public prosecution shall be instituted by any one or any authority, including the Attorney-General; this is of course "without prejudice to the penalties that may be imposed by any law where the conduct is also a criminal offence" – paragraph 18(3), Fifth Schedule to the Constitution. This makes it clear that non-compliance with or breach of the Code is not a criminal offence in the ordinary sense of the term.

Since there is an admission by the CJN of non-compliance or breach, why was the matter referred to the CCT, except as a clear case of subversion of the Code of Conduct Bureau and Tribunal Act to satisfy a pre-meditated political design?

Second, the recognition of "the essential co-equality" of the three arms of government, and the mutual respect by each of the rights, dignity and pomp due to the others is epitomized in the principle, the principle of the separation of powers, "that makes one master in his own house," and precludes another organ from imposing its control on the other or others.

"The independence of each organ requires that its proceedings shall be free from the remotest influence, direct or indirect, of either of the other two powers." That is the U.S. Supreme Court expounding the principle of the separation of powers, one of the great pillars of our constitutional democracy.

The disgrace, degradation and embarrassment caused by the arraignment of the Chief Justice of Nigeria, the head of the third arm of government in the country, before the Code of Conduct Tribunal in the way and manner the arraignment was done in this case, is an affront not only to the doctrine of the separation of powers, as well as to the office of CJN and to whole country. To echo the words of President Buhari himself, reacting to the jeering he was given at the joint session of the National Assembly when he was there to present the 2019 budget, "the whole world is watching us."

Yes, the world is watching us as we needlessly subject the head of the third arm of our government to disgrace for a "misconduct" that is, in its nature, only technically a criminal offence.

With regard to the arraignment of the CJN before the CCT, it is misconceived to regard and treat the head of the third arm of our government in the same manner and in all respects as an ordinary citizen is treated, all in the name of the principle that all citizens are equal before the law, and that nobody is above the law.

No exemption from the criminal law is thereby claimed for the CJN, but the way and manner of enforcing the law should accord due respect and decorum for the dignity attached to the office.

There is, third, the question whether the “misconduct” for which the CJN is arraigned before the Code of Conduct Tribunal (CCT) warrants and justifies the humiliation and disgrace meted to him and to the office.

The Charge Sheet dated January 10, 2019 indicts the CJN on a six count charge of “omitting or failure to declare” certain named assets and false declaration of assets in his Assets Declaration Form.

All six counts are, in their nature, what may be described as technical offences in the sense that they involve no grave moral obloquy like fraud, stealing, receiving money or other valuable thing as gratification for performing or not performing an official act in favour of a person, other cases of corruption or corrupt practice truly so-called, homicide or other such heinous acts.

The nature of the offences as offences in a technical sense only, but not a crime in the ordinary sense is well portrayed by the Judicial Committee of the Privy Council in a decision in a Ceylonese appeal in *Kariapper v. Wijesinha* [1967] 3 ALL E.R. 485.

In 1965 some members of the legislative assembly and the local government councils in Ceylon were found guilty of corruption by a commission of enquiry.

The country’s legislature then enacted a law vacating their seats in parliament and in the local government councils and also disqualifying them for seven years from being voters or candidates in any parliamentary or local government elections.

The Privy Council held, relying on a decision of the U.S. Supreme Court in *United States v. Lovett* (1945) 328 U.S. 303, that the penalties imposed by the law were not punishment for the criminal offence of corruption, but only disciplinary sanctions “to keep public life clean for the public good” at page 491.

In the view of the Privy Council, there is a difference between a disciplinary penalty and a punishment for an offence. It quoted in support the following words of Justice Frankfurter in the *United States* case, *United States v. Lovett* (1945) 328 U.S. 303, – “Punishment presupposes an offence, not necessarily an act previously declared criminal, but an act for which retribution is exacted. The fact that governmental authority inflicts harm does not make it punishment.

Figuratively speaking all discomfiting action may be deemed punishment because it deprives of what otherwise would be enjoyed. But there may be reasons other than punitive for such deprivation. A man may be forbidden to practice medicine because he has been convicted of a

felony... or because he is no longer qualified...The deprivation of any rights, civil or political, previously enjoyed, may be punishment, the circumstances attending and the causes of the deprivation determining this fact.”

It is therefore an error for paragraph 18 of the 5th Schedule to have used the words “punishment” and “penalties” interchangeably, as if they meant the same thing.

The decision of the Privy Council in this case shows clearly that the Code of Conduct Tribunal is conceived by the Constitution as a disciplinary body, and that the power given to it by paragraph 18 of the Fifth Schedule are intended, not really to punish, but to discipline and, in the words of the Privy Council, to “keep public life clean for the public good”.

Morover, the character of the CCT as a purely disciplinary body is reflected in the procedure provided in paragraph 3(e) of Third Schedule to the Constitution, for invoking its powers; they can only be invoked by the CCB referring to it a complaint about non-compliance with, or breach of, the provisions of the Code of Conduct.

The CCB is also a disciplinary body authorized, not only to receive and investigate complaints, but also to “ensure compliance with and, where appropriate, enforce the provisions of the Code of Conduct”: paragraph 3(d), Third Schedule; (emphasis supplied).

Accepting the arguments and conclusion above about the character of the CCT as a purely disciplinary body, the Federal High Court Abuja, per Justice Jonah Adah, in the Dariye Case held that:

“The Code of Conduct Tribunal is conceived by the Constitution as a disciplinary body, and that the power given to it by paragraph 18 of the Fifth Schedule are intended, not really to punish, but to discipline and, in the words of the Privy Council, to ‘keep public life clean for the public good’. I am entirely in agreement with this position of Professor Nwabueze (SAN) as the exact intendment of the Constitution relating to the Code of Conduct Tribunal.

This is manifestly clear from the provision of paragraph 18(6).” – at page 15 of his Judgment.

The CCT itself has affirmed that, under the Fifth Schedule to the Constitution, it is a purely disciplinary body, see *Federal Republic of Nigeria v. Dr Orji Uzor Kalu* (judgment delivered on 26 April, 2006).

Disciplinary proceedings before the NJC are, therefore, the appropriate process for handling the case of the CJN. Accordingly, the public prosecution before the CCT should be discontinued.

Fourth. Public prosecution for criminal offences is a very sensitive and volatile function capable of damaging the relations of the country with other countries and even its relations with influential communities and interests within the country.

The exercise of the function is more volatile because of the wide range of officials charged with it – the Police and numerous other law- enforcement agencies.

This makes the control of criminal prosecutions, a critical function of government, necessitating the vesting of the control of the function in a high official of the state by the name of Attorney-General who, as the Chief Law Officer of the Government, is expressly authorized by the Constitution to exercise the control (section 174).

In exercising the control, the Constitution enjoins the Attorney-General to “have regard to the public interest” (section 174(3)).

The public interest consideration demands that, because of the sensitive and explosive nature of criminal prosecutions and its potentiality to impinge on the relations of government with other countries and with influential communities and interests within the country, the Attorney-General may need to take the matter to the highest level of the government. Hence section 174(2) requires him to exercise his power of control by himself personally or through officers of his department delegated by him.

The above constitutional requirement is reflected in the provision of the Code of Conduct Bureau and Tribunal Act that the “prosecutions for all offences referred to in this Act shall be instituted in the name of the Federal Republic of Nigeria by the Attorney-General of the Federation or such officers in the Federal Ministry of Justice as the AGF may authorize to do so.” (Section 24(2) (emphasis supplied)

Without authorization or delegation by the Attorney-General, the power of control given to him by the Constitution cannot be exercised by any officer in his Department – so held by the unanimous decision of all the seven participating justices of the Supreme Court in Attorney-General of Kaduna State v. Hassan (1985) 2 NWLR 983. In his concurring judgment in the cases, Uwais JSC said at pages 513 – 514:

“There can be no doubt that the powers given to the Attorney-General of a State under section 191 of the Constitution belong to him alone and not in common with the officers of the Ministry of Justice. Such Officers can only exercise the powers when they are specifically delegated to them by the Attorney-General.

The delegation usually takes the form of a notice in the Official Gazette. As there was no Attorney-General appointed for Kaduna State at the time material to this case, his powers under section 191 could not have been delegated to the Solicitor- General.”

Amazingly, the decision of the Supreme Court in the Saraki case in 2016 made no reference to the decision of the court in the Hassan case. No attempt was made to give reasons for not following it or why it does not apply in the Saraki case.

With respect to the issue of the public interest in the present case, was the public interest ever taken into account in the decision to arraign the CJN before the CCT? It has been shown above that the prosecution of the CJN in this case is altogether careless and disdainful of the dictates of the public interest.

Did the AGF sign the arraignment papers by himself or authorize an officer in his department to do so, from which the obligation arises on his part to have brought up the matter at the level of the government.

This makes it wholly untenable to say that the President was unaware of the arraignment before it took place. If this is in fact the case, then, the government is not working the way it should.

The constitutional validity of the Law Officers Act 2004 is questionable.

Nwabueze, a professor of constitutional law writes from Lagos