The Constitutionality Of Ouster Clauses in AMCON ACT: A Critical Appraisal

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ABSTRACT

It is no gainsaying that ouster clauses/provisions in any statute or regulation tend to rob the court of competent jurisdiction of its constitutional given role to adjudicate on any matter brought before it as it relates to such ouster clause or provision. The emergence of ouster clauses/provisions in some of Nigerian statutes did not only run foul and contrary to the sterling principles of rule of law, separation of power and/or the doctrine of checks and balances among the three arms of government, but also deprives an aggrieved citizen who might have been wronged, injured or whose rights might have been trampled upon without any justification to seek redress in court as a result of ouster clauses/provisions contained therein. Among these statutes which house ouster clauses/provisions is the Asset Management Corporation of Nigeria (AMCON) Act, 2010 (as amended). Hence, it is against this background that this research examines the ouster clauses/provisions in AMCON Act, 2010 (as amended) with a view to x-ray their legality or otherwise and their ripple effects on the rights of the Nigerian citizens to unhindered access to court.

1.0 INTRODUCTION

For any country of the world to practice a true democratic system of government, the three arms/organs of government must co-exist and function in accordance with the tenets of democracy and the constitution of such country[1]. The first arm which is the Legislature shall be saddled with the power of law making, while the Executive and the Judiciary will perform the duties of enforcing the law and adjudicatory functions respectively without one interfering on the powers and functions of the other. Hence, it becomes inimical and breach of the rule of law, checks and balances, liberty, freedom and fundamental rights of citizens when all or two of these functions/powers are concentrated in just one organ of the government[2]. This is particularly so when the adjudicatory functions of the judiciary as an arm of government to hear and determine matters brought before it is being taken away through provisions in statutes that tend to stripe the court off its constitutional roles. This is usually done by promulgating executive military decrees or legislative enactments. The ordinary implication of this is that once an ouster clause is inserted in a law, it runs contrary to the doctrine of separation of powers and checks and balances.

The executive arm of government as policies executor governs according to the legal frameworks as enacted by the legislature, while the judiciary ensures that the executive organ of the government acts within the confines of these legal frameworks through judicial review[3]. In general, it is not in doubt that under both constitutional and administrative law, the courts possess supervisory role/jurisdiction over the actions exercised by the executive arm. Thus, when carrying out judicial

review of administrative actions of the executive arm, the court checkmates and scrutinizes the legality and propriety of any act or decision made by public authorities particularly the executive and/or the legislative arm of government[4]. In jurisdictions which operate a written constitution, the courts also assess the constitutionality of legislation, executive actions and governmental policies. Therefore, part of the role of the judiciary is to ensure that public authorities act lawfully and serve as a check and balance on the government's power.[5]

The rationale behind this doctrine (separation of power) is to promote an egalitarian society and efficiency in governance by precluding the exercise of arbitrary powers by all the arms of government and thus preventing institutional frictions. So, the separation of power among the organs of government is to avoid a tyrannical state of affairs; that is, a situation where just one arm of government makes laws, executes it and at the same time, determines the rights of others under the same law by adjudicating on the existence of the rights of others or otherwise.

Hence, the inclusion of ouster provisions in our various enactments/statutes offends and runs afoul of the doctrine of separation of power, natural justice and the rule of law which in turn inhibits the citizen's right to gain access to the courts to enable them ventilate their grievances within legal confines of the law. It is within this context that this paper examines the extent to which ouster clauses exist and operate under the AMCON Act 2010 (as amended).

2.0 DEFINITION OF OUSTER CLAUSES.

Ouster clauses are provisions in statutes which take away or purport to take away the jurisdiction of a competent court of law. It is considered as one of the impediments to human right protections in Nigeria as it denies citizens the requisite access to justice when the court's jurisdiction is ousted[6]. It does not only deny the court the ability to make any meaningful contribution with respect to a particular matter brought before the court[7], but also prevents the litigants from accessing any judicial assistance as it relates to any wrong done to them. Ouster clause which is sometimes referred to as privative clause is any provisions in a statute that takes away or prevents the court of competent jurisdiction from exercising or performing its constitutionally assigned functions[8]. They are provisions which rub the court off its jurisdiction by rendering a matter brought before it non-justiciable[9]. Ouster provisions in any statute in Nigeria are highly undemocratic and unconstitutional.[10]

Nwabueze in his 1989 Guardian lecture titled; "Our Match to Constitutional Democracy"[11] and his book "Military Rule and Constitutionalism"[12] opined that the legal effect of ouster clauses is that it effectively ousts the power of judicial review, and a clear contradiction with the principles of the rule of law, and separation of governmental powers, and functions as enshrined in the constitution[13]. Ouster clauses are legislative provisions that foreclose the court from exercising its review obligation over specified administrative decisions[14]. Ouster clause is exploited by the legislature to limit the authority of the courts from reviewing or interpreting the law which primarily is the role of the judiciary.

The apex court in Inakoju & Ors[15] v. Adeleke & Ors while conceptualizing ouster clause in any statute stated thus:

> *"Ouster clauses are generally regarded as antitheses to democracy as the judicial system regards them as unusual and unfriendly. When ouster clauses are provided in statutes, the courts invoke Section 6 as barometer to police their constitutionality or constitutionalism..."*

One can then safely conclude from the foregoing that the enactment of ouster clauses or provisions in any statute will hinder the court from performing its constitutional functions thereby limiting the power of the judicial arm in a democratic setting.

3.0 ESTABLISHMENT OF ASSET MANAGEMENT CORPORATION OF NIGERIA (AMCON).

The Asset Management Corporation of Nigeria (AMCON) was set up on the 19th July, 2010 by act of the National Assembly (Asset Management Corporation Act, 2010 – (as amended). It was created to stabilize and revitalize the banking sector by efficiently resolving the non-performing loan crisis of some banks. Though established by the third quarter of 2010, it commenced operation by the fourth quarter. At commencement, it had a share capital of N10 billion evenly contributed by Ministry of Finance and the Central Bank of Nigeria with two offices in Abuja and Lagos with a work force of approximately 205 personnel among which is a 10-man board of directors[16]. The failure of some of these banks between 1977 and earlier 2000 and rise in the non-performing loans include poor collateralization and asset quality, under capitalization, inexperienced personnel, illiquidity, inconsistent regulatory policies, and supervision"[17].

AMCON is established for the purpose of acquiring the Non-Performing loans (NPL) of banks with a view to freeing such banks from the burden of provisioning requirements – substandard, doubtful and lost accounts. The process of acquiring the NPL involves the injection of fresh funds into the banking system thereby alleviating the liquidity and insolvency problems of the affected banks. AMCON is an interventionist initiative employed in the management of delinquent assets in the banking system. It operates as a variant of loan acquisition companies, but has been adjudged to be more effective in the managements of NPL.[18]

The effectiveness of the financial intermediation role of banks in Nigeria is increasingly under threat as a result of soaring credit delinquency. Experience over the years shows that many credit customers of banks default in their repayment obligations. The consequence has been the deterioration in the quality of risk assets and a rise in the level of non-performing loans and advances (NPL) with the attendant increase in the required loan loss provision. These negatively impact directly on the profitability of banks. The increasing ratio of NPL to total credits has been a source of concern to both operators and the regulatory authorities. The steady growth of NPL in the Nigerian banks system, with the attendant consequences on liquidity and solvency as well as the need to take proactive measures to facilitate the implementation of the current restructuring of

the banking system, have made the establishment of an Asset Management Corporation of Nigeria (AMCON) imperative.

Non-performing accounts and the evolving competition in the banking industry as a result of globalization has made it difficult for deposit money banks to play their major role of financing economic activities arising from inadequate capital. Inadequate bank capital has led to a crisis of confidence in the banks to the extent that the original functions which is to support the volume, type and character of a bank's business, to provide for the possibilities of losses that may arise therefrom and to enable the bank to meet a reasonable credit need of the community have been eroded. The losses suffered by banks as occasioned by non-performing accounts led to bank failure especially in the areas of lending. The soundness, safety and profitability of a bank affect the quality of its loan portfolio. Hence, the years 2004 to 2010 were very turbulent, traumatic and revolutionary for the Nigerian banking industry.

In other words, the overconcentration of the banking sector loans to the oil and gas sector was responsible for the 2009 banking crisis. Central bank of Nigeria statistical data for 2009 revealed that the deposit liabilities of all regulated deposit money banks in Nigeria, amounted to N9.15trillion.[19]

During this period, there was high growth of credit to the private sector as loans and advances of the same sector within the period under review amounted to N8.45trillion which is about 92.5% of total deposit liabilities. Within the same period of time, N2.2trillion or 26% of credit risk assets were non-performing. Most of the expanded credit was used to purchase equities in many cases in the stock of domestic commercial banks that were extending the credit. These excessive margin lending and unhedged loans to oil importers overtime became non-performing leading to systemic distress in the banking sector[20]. Evidence of oil sector dominating loan and advances in the banking sector is seen in the two years before crude oil prices began falling in mid-2014. The banks in this period lent an estimated $10 billion to local oil and gas companies to buy assets from the Royal Dutch Shell, Eni and Total as they retreated from the country's onshore industry. Upstream oil and gas make up an average of around 28% of the banking sector loan books. First banks oil and gas debt for instance make up 47% of the total loan books. Also, a breakdown of the top five sectors in which eligible bank assets (EBAs) originated from, the oil and gas sector make up 27.23% of AMCONs total loan portfolio[21]. This was responsible for the banking sector crisis that occurred in 2009 which then became clear that loan diversification in the banking sector is inevitable and an avenue for a developmental state to achieve economic prosperity as well as attain financial system stability.[22]

4.0 EXAMINATION OF THE OUSTER CLAUSES IN THE AMCON ACT.

The extant AMCON Act is the Asset Management Corporation of Nigeria Act of 2010 (as amended)[23]. This amendment came into effect on the 29th day of July, 2019 when the incumbent President of the Federal Republic of Nigeria, Muhammadu Buhari assented to the said Act. It

should be noted that the said amendment is the second in roll as AMCON Act was first amended in 2015. The current AMCON Act as amended in 2019 consist of Sixty-Two (62) sections.

The Act as aforementioned was enacted to be a key stabilizing and re-vitalizing tool aimed at reviving the financial system by efficiently resolving the non-performing loan of the banks in the Nigerian economy[24]. The objectives[25] of AMCON as spelt out in the Act are basically three which are;

(i) Assists eligible financial institutions to efficiently dispose of eligible bank assets in accordance with the provisions of the AMCON Act.

(ii) Efficiently manage and dispose of eligible bank assets acquired by the corporation in accordance with the provisions of the Act.

(iii) Obtain the best achievable financial returns on eligible bank assets or other assets acquired by it.

While some legal luminaries have argued that the enactment of AMCON Act is long overdue, courageous, necessary and expedient in the circumstances of Nigerian economy, it does bother others who are of the firm view that there are some provisions in the Act which are not only draconian, but also on glaring instances of unconstitutionality, disregard for rule of law, breach of fundamental human rights and oust the jurisdiction of the court in some cases.[26]

Suffice to say that the Constitution of the Federal Republic of Nigeria, 1999 (as amended), is the grundnorm and the most supreme law in the country which all other laws of Nigeria, including the said AMCON Act, and by implication, every law must find its legality or otherwise from the Constitution.

This axiomatic fact is supported by the provision of section 1(1) which provides thus:

> *"This Constitution is supreme and its provisions shall have binding force on the authorities and persons throughout the Federal Republic of Nigeria."*

Sub-section 3 of the above mentioned section 1 also provides that:

> *"If any other law is inconsistent with the provisions of this Constitution, this Constitution shall prevail, and that other law shall, to the extent of the inconsistency, be void."*

Examining the provision of section 1 (1) and (3), the Supreme Court in the case of **Madumere & Anor –V- Okwara & Anor**[27] has this to say;

> *"The Constitution is the supreme law of the land and while the validity of the provision of any law is determined by reference to the Constitution, the reverse is not the case. Also, same provision of the Constitution cannot be employed to call in the question of the validity of another provision. The supremacy of the Constitution in Section 1 thereof applies to the constitution as well as each section thereof. It is*

not for this court or any court for that matter to entertain any complaints about section 295 or 240 of the constitution without embarking on the constitutional exercise of the judicial legislation"

The rightful implication of the above decision of the apex court is that the provisions of the Constitution is supreme over and above every other laws and that any law that becomes inconsistent with the provisions of the Constitution shall to the extent of their inconsistency be declared null and void.

The said constitution which provisions are supreme as enunciated in Madumere's case among others equally provides expressly that neither the National Assembly or the House of Assembly is empowered to enact any Act or law as the case may be which will ousts or purports to oust the jurisdiction of a court of competent jurisdiction or a judicial tribunal established by law. For ease of reference, section 4(8) of the Constitution provides thus:

"*...the National Assembly or a House of Assembly shall not enact any law that ousts or purports to oust the jurisdiction of a court of law or of a judicial tribunal established by law.*"

The essence of the above provision is to prevent encroachment and/or usurpation of the power of an arm of the Government by the other. Also, the provision of section 6 of the Constitution empowers and vests the judicial power on the various levels of court.[28] Hence, the court should always be ready and prepared to jealously protect its judicial powers as vested on it by the Constitution and should not be seen to part with such power under the pretense of ouster provisions except as contained in the Constitution itself. This made per Pat Acholonu JSC (as he then was) in **Guardian Newspapers Ltd & Ors v Attorney General of the Federation & Anor**[29]**,** to admonish thus:

"Courts are not frightened of an ouster clause. They respect it but when an ouster clause seeks to make it impossible for the courts to protect the common man and make laws which cannot stand the test of reason or that is an affront to decency and intelligence then a court should be careful not to lend its weight to a law that would make it an enemy of the common man and not the last hope of the common man. In essence that the court below should not have readily washed its hands off the case on the grounds that the court's jurisdiction had been ousted."

Also, in **Miscellaneous Offences Tribunal v. Okoroafor**[30], Ogwuegbu JSC admonished thus:

"*The Courts should not throw in the towel on the mere mention of an ouster provision. The proceedings of the tribunal can be impeached in the High Court of Lagos State as was done in this case, notwithstanding the ouster provision, where the procedure laid down for the commencement and conclusion of proceedings of*

the tribunal was not complied with. There was disobedience by the tribunal to observe the procedural rule. It is for the Court to determine whether this procedural rule as to commencement and conclusion of proceedings is mandatory, in which case disobedience will render void or voidable what has been done, or as directory, in which case disobedience will be treated as an irregularity not affecting the validity of what has been done"

It very glaring that the courts are very stern and unequivocal concerning its sacredness and constitutional role against all odds of restriction occasioned by ouster clauses.

It is however very sad that despite the said decisions of the apex court and the provision of section 4 (8) of the constitution, the National Assembly in this 21st century still enact laws which contain ouster clauses that prevents the court from performing its constitutional roles. One of these laws is the AMCON Act, 2010 (as amended). Some of these ouster provisions in AMCON Act are contained in sections 33A and 34(6) and (7).

The said section 33A states inter alia:

"No action or proceeding shall lie against the corporation or any of its directors or officers by reason only of the acquisition of an eligible bank asset by the Corporation under this Act, and any action or proceeding already existing shall cease and abate except where the eligible bank asset became vested in the Corporation as specified under this Act"

The above section, as well as Section 34 of the Principal Act which seeks to prevent the courts from interfering with the smooth operations of the Corporation under the 2019 new amendment act seems to be the most controversial provisions of all.[31]

The said section 34(6) and (7) is reproduced thus for ease of reference;

"(6) No injunction, preservative or restorative or order, interim, interlocutory, perpetual or like order described shall be granted against the Corporation or its directors or officers in any action, suit or proceeding in relation to the exercise or intended exercise of power by the Corporation under this Act to recover debt owed to the Corporation or otherwise realize an eligible bank asset or any asset or property by which such eligible bank asset is secured and in particular under subsection (1)(a) and section 39 of this Act, and the remedy of any claimant against the Corporation in any such action, suit or proceeding is limited to monetary compensation.

(7) Monetary compensation for the purposes of subsection (6) of this section excludes consequential, aggravated, punitive or exemplary."

The implication of the provision of section 33A above is that the jurisdiction of the court is totally

ousted and the court is therefore prevented from entertaining any law suit which may be filed by an obligor/debtor against the corporation, its directors or officers on the ground that the corporation ought not to have acquired obligor/debtor's loan/portfolio from the Eligible Financial Institution without the obligor/debtor's consent and that no privity of contract exist between the obligor/debtor and the corporation.

On the other hand, the implication of section 34 (6) of the Act is that even a court of competent jurisdiction cannot grant injunction, preservative or restorative order of an interim, interlocutory or perpetual nature or like against the Corporation or its directors or officers in any action, suit or proceeding in relation to the exercise or intended exercise of the Corporation's power under the AMCON Act to recover debt owed to the Corporation or otherwise realize an eligible bank asset or any asset or property by which such eligible bank asset is secured. The only remedy the court may grant in accordance with this section is monetary compensation. To make matter worse, subsection 7 of section 34 of the Act further limits the monetary compensation by excluding any monetary compensation which is consequential, punitive, exemplary and/or aggravated.

It is without any iota of doubt that, this provision has really tied the hands of the court and stopped the court from granting injunctive or restorative orders against the Corporation when the Corporation exercises its powers to attach any eligible bank assets (EBAs) and partially ousted the court's jurisdiction to award the successful party a deserving compensation/orders against the corporation and grant the appropriate reliefs/orders as the justice of the case may warrant.

5.0 LEGALITY OF OUSTER CLAUSES IN AMCON ACT

From the examination and review of the ouster clauses in the AMCON Act, one cannot but agree that ouster clauses as contained in the Act are illegal and inconsistent with the provisions of the Constitution which is the highest law of the land and from which all other laws derive their validity and legality.

Hence, it is the opinion of the writer that these ouster provisions in the AMCON Act are inconsistent with the provision of section 4(8) of the Constitution which does not permit the National Assembly from enacting any ouster provision in any law that may usurp the judicial and adjudicating power granted to the court under section 6 of the Constitution as earlier stated in this research work.

Although, there is no reported appellate judicial pronouncement on the constitutionality or otherwise of the said provisions of sections 33A and 34 (6)and (7) of AMCON Act, it is the opinion of the writer that when the court is faced with the constitutionality of the said provisions vis-à-vis the provisions of section 6 and 4(8) of the constitution, the proper and rightful thing for the court to do having regards to section 1(3) of the Constitution, will be to declare same null and void having being inconsistent with the provision(s) of the Constitution and strike same out.

Some authors have argued that understanding the mischief AMCON Act is meant to cure will aid a better contextualization of some of its draconian provisions. It is their further argument that AMCON proceeds against very powerful and recalcitrant debtors/individuals who are ready to deplore any legal gymnastic and other arsenals to their defense. As such, these rich individuals secure the services of very smart legal representatives who run to the courts to secure injunctions and other prohibitive orders against the attachment of these EBAs by the Corporation.[32]

While supporting the above opinion, Otto *Abasiekong and Oyeyinka Oyewo have this to say;*

> *"...AMCON and its debt recovery partners (AMPs) are in a bind as the debt recovery process has so far proven to be long and arduous. Major challenges facing the recovery process relate to the antics of local lawyers to frustrate the smooth and speedy determination of cases by introducing technicalities that slow done (sic) the judicial process'"*[33]

It is the submission of the writer that the above arguments of these authors are shear sentiments and unfounded in law. While it is conceded that some of the debtors/individuals the corporation may be proceeding against presently may be recalcitrant and evasive, this in the researcher's view cannot be a valid reason for the inclusion of the said ouster clauses as contain in sections 33A and 34 (6) and (7) of AMCON Act.

It is also the submission of the researcher that the National Assembly should do the needful by amending the extant AMCON Act and removing the ouster clauses contain therein and bringing same in conformity with the provision of sections 1(3), 4(8) and 6 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended).

6.0. CONCLUSION

An examination of the ouster clauses in AMCON Act has obviously revealed that the ouster provisions are though few but have far-reaching consequences on the rights to access to court. The implication of this is that it impedes on the powers of the court as granted under section 6 of the Constitution to hear and determine the issues on which it is empowered to adjudicate on.

Considering the effect of ouster clauses and the citizen's right of unhindered access to court, Oputa said thus: *"all citizens of our country have a right to have their substantive legal and constitutional rights recognized and transformed into actual judicial remedies without which their theoretical diminished or be denuded of any real value."*[34]

Hence, it is our view that in the modern day democracy and every democratic setting, ouster clauses lack every trappings of validity as they offend the very core principles of separation of powers and rule of law. Ouster provisions have been shown as a great threat to the ultimate protection of human rights because amplitude of rights without the concurrent means of enforcement when breached is a mockery of the rights so claimed.

Although, ouster provisions have been argued to enhance executive/administrative effectiveness like the provision of section 308 of the constitution, we submit that same in the 21st century has

done little or nothing in achieving such effectiveness. Rather, it has further promoted the regime of impunity, unaccountability and flagrant disobedience and respect for the rule of law on the part of the executive and the legislative arms of government as the provision of section 6 (6) (c) of the Constitution for instance, has ousted the powers of the court to entertain any matter which falls under chapter II of the Constitution thus making it non-justiciable.

It may then be right to conclude that ouster clauses in our regulations particularly AMCON Act in most cases may lead the citizens who have been frustrated and exhausted every possible legal means of seeking redress to resort to self-help in a bid to find a solution irrespective of the hardship this may cause his fellow citizen or the resultant consequent of his bid to resort to self-help. This in the considered view of the researcher will lead our society to a state of anarchy and brutality when life was brutish, nasty and short to borrow the words of Baron Montesquieu.

7.0 RECOMMENDATION

From the adverse effects ouster clauses have on our judicial system, the researcher opines that the following recommendation are appropriate for consideration:

1) Urgent and immediate amendment of AMCON Act in order to exclude the ouster clauses contained therein and bring the Act in conformity with the Constitution.

2) Courts at various levels should not hesitate to strike out from AMCON Act different ouster provisions contained therein, which are inconsistent with the provisions of the Constitution and which are unjustifiable in a democratic society when faced with same.

3) The courts should rather make conscious and concerted efforts aimed at resisting such legislative enactments on the grounds of upholding the rule of law as demonstrated by the Supreme Court during the early years of military incursion other than willingly seceding their powers in submission to those ouster provisions.

4) The Judiciary should be autonomous/independent in terms of finance which is one of the tools the executive arm of government is employing to gain control over it. If the independence of the judiciary is guaranteed and achieved, it will consequently enable it to effectively carry out its duties without fear or favor. This will in my view involve independence in the nomination, appointment, and removal of judges, remuneration and adequate funding of the judiciary.

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16 AMCON was originally said to have been set up to revive the entire economy -- finance/insurance, oil and gas, transportation and storage, construction, information and communication, real estate, general commerce, capital markets, manufacturing and others. According to AMCON, financial sector still accounts for 77% of listed Equities Portfolio Distribution. This of course has been a more reason to find out what significance AMCON has in the financial sector recovery.The AMCON Bill was signed into law on the 9th day of July, 2010 as an Act to establish the Asset Management Corporation of Nigeria for the purpose of efficiently resolving the non-performing loan assets of Banks in Nigeria and for related matters.The former president of Nigeria, Goodluck Jonathan in a brief speech delivered after the signing ceremony declared that AMCON would "help to stimulate the recovery of the financial system from the recent crisis by boosting the liquidity of troubled banks through buying their non-performing loans, helping in the recapitalization of banks in which the CBN was forced to intervene, and increase access to restructuring/ refinancing opportunities for borrowers. At the end of November, 2009, the then CBN Governor Sanusi Lamido Sanusi had sacked the chief executive officers and directors of eight of the Nation's 25 banks for allegedly imperiling the financial health of their organizations. Sanusi had also disclosed that at the time, the rescued banks had an aggregate toxic assets' portfolio in excess of N2 Trillion. The act of the CBN Governor was perceived by many as an interventionist maneuver to stem the hemorrhage that rocked the banking sector then. The AMCON Act could therefore be seen as a child born out of circumstance to ensure the affected banks remained a going concern.
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