A COMPARATIVE ANALYSIS OF IMMUNITY CLAUSES IN NIGERIA, UNITED STATE OF AMERICA, AND AUSTRALIA: SHOULD THEY BE RETAINED OR REPEALED?[1] * * *

Abstract

This research paper provides a comparative analysis of immunity clauses in Nigeria, the United State of America, and Australia. Immunity clauses are provisions in statutes or constitutions that exempt certain individuals or entities from legal liability. The paper examines the historical development, scope, and application of immunity clauses in each jurisdiction, highlighting the similarities and differences. The research reveals that while Nigeria's immunity clause for its potential to shield public officials from accountability, the US and Australia have more limited and nuanced approaches to immunity. It is a right peculiar to some individual or body, an exception from some general duty or burden, a personal benefit granted by law contrary to the general rule. It is recognized even by the International Court of Justice. Section 308 of the Constitution of Federal Republic of Nigeria 1999 (as amended) prohibits in clear terms, the commencement of civil and criminal proceedings against The President, Vice President, Governors and Deputy-Governors in their personal capacities; the Nigerian style of immunity is absolute in the sense that the beneficiaries of this constitutional immunity are excluded from both civil and criminal proceedings in personal capacities while in office. It is "Ratione Personnel". Immunity clause was accepted in the constitution for the purpose of protecting the dignity of the offices of those exempted, not the necessarily the individual office holder as such, so as to check a floodgate of law suits, some of which might be frivolous, that may impair government functions and cause unnecessary political distraction. It was meant to provide the incumbent a free hand and mind to perform the duties and responsibilities of his office without distractions from litigation. The "immunity Clause" has generated a serious national debate as to its retention or removal from our Constitution. This paper using the doctrinal approach, critiqued the provision of immunity clause in the Constitution, examines its pros and cons and recommends ways of curing the defect so as to promote the rule of law which is characterized by the doctrine of equality before the law under which every citizen of a country, no matter how highly placed is subject to the authority of the same law. It was recommended that the immunity clause should not be expunged from the Constitution but rather be qualified and retained. It should also not be extended to any other arm of government.

Keywords: Comparative, Immunity Clauses, Nigeria, United state of America, Australia, Retained or Repealed.

1.Introduction

Executive immunity otherwise called the "immunity clause" was provided for under the Constitution of the Federal Republic of Nigeria 1999 (as amended)[2] (the Constitution) by section 308[3]. Immunity can be

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2. Constitution of the Federal Republic of Nigeria 1999 (as amended).

3. *Ibid*

defined as exemption from performing duties which the law generally requires other citizens to perform, or exemption from a penalty or burden that the law generally places on other citizens. It means freedom from duty or penalty, an exception from any charge, duty, tax or imposition. The origin of the immunity clause in the Nigerian Constitution can be traced to Nigeria's affinity to Britain in the immediate post-independence period. Due to Nigeria's colonial background, many of her laws and statutes simply mirror those of her former colonial overlord, the United Kingdom[4].

Section 308 of the Constitution protects persons holding the office of President, Vice-President, Governor or Deputy Governor. The experience so far since Nigeria returned to democratic rule shows that all has not been well with our democratic experience, especially as it affects the immunity of chief executives from judicial proceedings. Therefore, the debate about removing the Immunity Clause from the Constitution has been on for a number of years. Within this time, there have been situations that call to question the relevance of the immunity clause in the Constitution as same has been abused and misused and appears to be totally out of tune with the aspirations of the Nigerian people. Section 308 of the Constitution, shields the President, Vice President, Governors and their Deputies from all civil and criminal proceedings against their persons for the duration of their time in office. This means that they can only be tried either at the expiration of their terms in office, or if they are impeached by the National or State Assembly, according to the laid-down guidelines in section 143 of Constitution for the President and Vice-President; and section 188 for Governors and their Deputies.

The immunity clause is meant to protect the dignity of the office and not the individual office holder as such. The purpose the clause was meant to serve has however been hijacked and largely turned into an engine of fraud. The intention for its inclusion in the Constitution was good but politicians have bastardized the privilege, and willfully undermined the wisdom behind the grant of immunity to the detriment of Nigerians. The immunity clause is an open-ended protection as it gives a bold latitude to its beneficiaries with impunity to commit crime against the state and the people. The idea that the clause serves as a check on frivolous law suits is good, but the claim that institution of criminal proceeding against those in position of authority would interfere with their constitutional duties and invariably distract them from the business of governance is the bane of it. The loophole created by this constitutional lapse has an incentive which continues to recruit criminal gangs whose mantra is "steal now and settle your way later"[5].

There are different types of immunity. It could be absolute or qualified. Absolute immunity is a complete exemption from civil or criminal liability afforded to officials in their personal capacity while performing their duties in office. Qualified immunity on the other hand is immunity from civil liability that is conditioned or limited, for instance by a requirement of good faith or due care. Under the Nigerian law, this extends to immunity for an official act exemplified by those enjoyed by Nigerian judges and lawmakers, whereas criminal acts and acts not falling within their official mandates are liable to court processes. Immunity benefits different government officials or exists at different levels. Thus, legislative immunity is enjoyed by lawmakers, executive immunity is enjoyed by elected officials of the executive branch of government, judicial immunity is granted to judges, diplomatic immunity is enjoyed by a sovereign government, while constitutional immunity is one contained in the Constitution[6].

4. O E Olugbenga. The significance of the immunity clause for democratic consolidation in Nigeria. https://www.umes.edu >African Journal of Criminology and Justice Studies (AJCJS) Vol. 6, #s 1 & 2. Accessed 20 June, 2024 9:27am

5. M Okeke, U G. Ojukwu and D O Nnamani The Implications of immunity Clause and the Pollution of Excellency for Democratic Consolidation in Nigeria https: www.researchgate.net International Journal of Academic Management Science Research (IJAMSR). Accessed 20 June, 2024 10:40am.

6. *Ibid*

If immunity clause is accepted in the Constitution to check frivolous law suits that may impair government functions and cause unnecessary political distraction, then by the same token, the clause should be reviewed to check the new wave of stealing it tends to encourage. The clause should not cover fraud, corruption and vindictive tendencies in government and any incumbent executive engaged in graft should be arrested, charged and tried like every other citizen.

2.Legal Framework

The 1999 Constitution is the supreme law of the land and, by virtue of section 1, has a binding force on all authorities and persons throughout the federation. Section 308 provides for Restriction on Legal Proceedings or executive immunity 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 on 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:*

Provided that in ascertaining whether any period of limitation has expired for the purposes of any proceedings against a person to whom this section applies, no account shall be taken of his period of office.

(2) The provisions 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 the 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. (Emphasis mine)

The person holding the office does not even have the right to waive the immunity because any such waiver is ineffective as the immunity is not that of the person holding the office but of that particular office he represents during the tenure of the office. If a civil or criminal proceeding was instituted against any person before he/she became federal, state or local government chief executive, the action will abate automatically. This implies that the category of persons conferred with immunity under section 308 cannot be subjected to any criminal process for any act or omission done while in office and even for acts previously committed, which remain pending. This is very unfortunate, especially for those executive officials who had pending criminal matters before elevation into the exalted offices covered by immunity. Laws should flow from the purview of equality, fairness and justice. The immunity clause enshrined in the Nigerian Constitution does not rest on any ideals of equality, fairness and justice. In fact, the President, Vice President, Governors and their Deputies are sacred cows in the Nigerian polity, as their immunity appears to subsist both during their tenure in office and afterwards in respect of anything done while in office. This wide latitude of immunity is a temptation for even the most sanctimonious of people given the high level of societal decadence. No person should be made above the law without exception, including the Head of State; otherwise, the rule of man rather than the rule of law shall prevail to the detriment of society[7]. What is worse is that no President has ever been prosecuted in Nigeria for offences committed while in office no matter the evidence of any allegation against any of them. In this regard, the

7. *Ibid.*

Republic of South Africa is a worthy example where today, former President Zuma is currently in prison for graft committed while in office.

Paragraph (c) of section 308(1) further exempts the category of executives covered by the immunity clause from being compelled through any court processes to appear in court for any reason whatsoever, and prohibits any application to issue such processes. Perhaps, the reason for this provision is to prevent situations where the court may issue processes that are rendered nugatory by virtue of the fact that they are issued against a person that may disregard them without any consequences. Subsection (1) of section 308 also contains a proviso, which shows that the period of limitation for any proceeding shall not take cognizance of their period in office; though, this does not change the fact that they are restricted from legal proceedings of any kind at this period. This implies that persons covered by the immunity cannot be tried or compelled to attend court on any issue whatsoever during their terms of office but after serving their terms in respect of any issue that happened during their term of office.

That a sitting Governor or President cannot be prosecuted for crimes committed against the state simply puts such individuals above the law. This is a particularly detrimental provision because it completely exonerates executive officials from any wrongdoing committed in office whether for public or private interest. No doubt, this emboldens politicians vying for the offices covered by immunity to dastardly plunder the commonwealth of the people knowing that they will be exempted from application of the full weight of the law on them. Despite this provision, it is argued that persons to whom the section applies may be investigated in their dealings while in office, and if found liable for any criminal offences ultra vires their official functions, may be prosecuted after their terms of office. Again, the disadvantage of this argument is that time, money, and human resources spent investigating such officials may well be dissipated on an unfruitful venture because the length of time during which they may not be prosecuted may be used to compromise the investigation or conceal evidence of any wrongdoing. It is regressive to give a wrongdoer time and opportunity to do more evil on the pretext that he will be distracted from his duties. The logic behind this principle is lame, false and outdated; it is a principle that can never push a responsible democracy forward. Interestingly, subsection (2) of section 308 tends to limit the application of the immunity clause. It provides thus; "The provisions 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".

A good case in point is Fawehinmi v. I.G.P.[8] where Chief Gani Fawehinmi sought an order of mandamus against the Inspector General of Police at the Federal High Court to compel him to investigate the allegations of crime against Bola Ahmed Tinubu, the then sitting Governor of Lagos State. The trial court dismissed the originating summons, and Chief Gani appealed to the Court of Appeal. At the Court of Appeal, the court held, inter alia that under section 4 of the Police Act, the police have a duty to detect crime. Implicit in that duty is the duty to investigate complaints of the commission of crimes, and that does not hold or protect the persons covered under section 308(3) from the police investigation. But what section 308(1)(b) of the 1999 Constitution means is that a person to whom the section applies shall not for any reason whatsoever be arrested or imprisoned in pursuance of the process of a court, tribunal or any other body which under the law has the power to issue a process which may result in a person concerned being arrested or imprisoned.

On further appeal to the Supreme Court, the decision of the Court of Appeal was upheld. The court held that the police could investigate public office holders but that they cannot arrest or imprison them pursuant to the provision. Though this interpretation was novel at that point, the court ought to have taken

8. Fawehinmi v. I.G.P. (2002) LPELR – 1258 (SC)

cognizance of the fact that the matter was already in court before Bola Ahmed Tinubu was sworn in as Governor. However, despite the decision, which was supposed to transform the operation of security agencies in relation to persons covered by executive immunity, it is doubted whether it achieved the desired objective of chronicling the past and current offences committed by those enjoying executive immunity while they serve their terms in office for the purpose of calling them to account after they exit office. No wonder, nothing more was heard of the police investigation of Bola Ahmed Tinubu after the Supreme Court decision, even after he left office in 2007. It is suggested that persons with pending matters in court (which puts their character in question) ought to be investigated and restrained from taking responsible roles covered by the immunity clause until such matters come to finality because it is better to delay than fast track them to power. This can be taken care of at the party level as well by ensuring that no person who has a pending criminal matter is allowed to vie for office till the case has been determined one way or the other.

Section 308(3) (CFRN, 1999) captures the period in office of those shielded by this immunity clause which is usually a 4-year term. The section enumerates those covered by the clause and defines the period of office as representing when a person holding such office is required to perform the functions of the office.

3. Reasons For Inserting the Immunity Clause in The Constitution

There is no doubt that the benefits of the Immunity Clause outweigh the defects. The defects, are traceable to the inability of those empowered with law enforcement obligations to make the Constitution live up to its true purpose as the supreme law of the land. The retention of the Immunity Clause in the Constitution is justified in that prosecution of a sitting President or Governor prior to impeachment would create serious practical difficulties and interruption in political administration. If the immunity clause is removed from the Constitution, it would be difficult to determine the point at which the President or the Governor could be impeached, whether while the criminal proceedings are going on against him/her or after his/her trial and conviction? If the he/she is to be presumed innocent until found guilty which must be proved beyond reasonable doubt, then, he/she cannot be removed during the pendency of criminal proceedings. In view of this, the process of his/her removal cannot proceed until a court has found the chief executive criminally liable. It is important to note that a criminal trial in court can take several months or years to conclude and the accused has the right of appeal. In this way, a President or a Governor may complete his term before he is finally convicted. It is thus logical in law for these public officers not to be prosecuted or imprisoned while in office and prior to their impeachment. Some of the reasons for inserting this provision into the constitution in the first place includes:

1. The immunity clause is meant to protect the dignity of the office of the President or Vice-President, Governor or Deputy Governor. To drag an incumbent to court and expose him to the process of examination or cross- examination would degrade the office[9].
2. Immunity clause is accepted in the Constitution to check frivolous law suits that may impair government functions and cause unnecessary political distraction and provide the incumbent a free hand and mind to perform the duties and responsibilities of his office without distraction from litigation. See Obih Vs. Mbakwe[10], where the apex court held that the purpose of this section is to prevent the Governor from being inhibited in the performance of his executive functions by fear of civil or criminal litigation arising out of such performance during his tenure of office. The provision should not be extended beyond this purpose".

9. S Fabamise. Constitutional Immunity Clause And The Fight Against Corruption In Nigeria https://www.ajol.info> Journal of Sustainable Development Law and Policy. Accessed 22 June, 2024 4:12pm

10. Obih Vs. Mbakwe10 (1984) LPELR – 446 (SC)

3. A third reason for the inclusion of the immunity clause in the Nigerian constitution is the effect of contagion. This is the feeling that if older polities such as the United Kingdom and near contemporaries like India have it in their Constitutions, Nigeria could as well include it in hers, especially because it was identified with some merits[11].
4. Arrest and trial of those protected under the section, would paralyze activities in the affected states or at the federal level, as the case may be[12].
5. There is already a constitutional process by which a President or Governor can be dealt with if he or she errs; that process is known as impeachment. If an offence is established against the President or Governor, it can ultimately lead to his /her removal via impeachment before being subject to the criminal process. Impeachment is faster than a criminal trial and there is no appeal from the verdict of the assembly. Once the executive is removed, he can then be prosecuted and his removal will facilitate effective political administration of the state and place the political system on a healthy course[13]. This solution has also been bastardized in Nigeria by the many sham, unconstitutional impeachments that have been politically engineered through bribery of assembly members by money doling Governors against their Deputies.
6. If the President and Governors are not immune from criminal proceedings, their subjection to the jurisdiction of the courts would be inconsistent with their position as heads of the executive branch. This is because the possession of executive power renders their prosecution inconsistent with the constitutional structure. Their status as defendants in a criminal case would be repugnant to their office as chief executives, which includes the power to appoint judges and oversee prosecutions. In other words, just as a person cannot be judge in his own case, these executives cannot be prosecutors and defendants simultaneously. Courts would be unable to subject powerful officials to criminal process and it is doubtful whether it is practical to have a prosecutor who is part of the executive branch prosecute the President or Governor[14] before a judge appointed by and financially dependent on the same executive.

4.Challenges Engendered by the Immunity Clause

1. Electoral Malpractice: Election is one of the cardinal principles of democratic process. Free, fair and credible elections are central to the consolidation of democracy. However, elections in Nigeria have been characterized by irregularities and malpractices which magnitude increases in every election. The institutions of state such as the police and the military, political thugs and the electoral body collude to manipulate the electoral process in favour of certain candidates. The sole purpose is to entrench themselves in power so as to be given the cover provided by the immunity clause while they violate their oath of office.
2. Poverty is another factor that constitutes grave challenges to democratic consolidation in the Nigeria. This causes some impoverished law enforcement agents to take what they can when they can and turn a blind eye. With assembly members who are better off financially, their own case boils down to greed and lack of patriotism which makes them dead to democracy entrenching activities. They are rather seeking their own bite on the apple by themselves desiring immunity just like the executive.

11. O E Olugbenga. The significance of the immunity clause for democratic consolidation in Nigeria. https://www.umes.edu >African Journal of Criminology and Justice Studies (AJCJS) Vol. 6, #s 1 & 2. Accessed 22 June, 2024 9:27am

12. F N. Ukoh & R A. Ngwoke. Immunity Clause under the 1999 Constitution of Nigeria: A Dire Need for Reform. https://www.ccsenet.org> Journal of Politics and Law. Accessed 22 June, 2024 2:13pm

13. M Okeke, U G. Ojukwu and D O Nnamani The Implications of immunity Clause and the Pollution of Excellency for Democratic Consolidation in Nigeria https:www.researchgate.net International Journal of Academic Management Science Research (IJAMSR). Accessed 22 June, 2024 10:40am.

14. *Ibid*

3. Corruption - It has been argued that the war on graft has been difficult to win because the act is perpetrated by policy makers themselves. Corruption distorts governance and provides perverse incentives for dysfunctional behavior as well as diminishes the quality of citizens life by diverting funds for social service into private pockets.
4. Incumbency factor gives the incumbent an undue advantage over other participants in the electoral process through the means of manipulating the entire electoral process. The manipulation can take different forms ranging from compilation of voter's register, the appointment of electoral officers, members of electoral tribunal to protect stolen mandates, use of state instrument of coercion and apparatus to intimidate opposition parties and denial of access to state owned media houses to ensure they regain or elongate their tenure against popular will as well as the use of state funds for campaign.
5. Lack of viable Opposition Parties – Since the inception of this republic, there has been no viable and credible opposition party capable of checkmating the ruling party. Opposition parties are vital in every functional and people oriented democratic government. This is because they checkmate the excess of government or its agencies by highlighting constitutional rules and appropriate principle and practice in democratic governance, pushing for the right things to be done till the people involved actually do it.

5.Executive Immunity In Other Jurisdictions.

The bases for this are to compare the Nigerian perspective with these different jurisdictions so as to be able to suggest better ways of incorporating executive immunity in the Nigerian Constitution in order to promote the rule of law, integrity and probity in governance. The considered jurisdictions do not practice absolute immunity rather what they have is restrictive immunity as a way of accelerating governance, which Nigeria can emulate[15].

5.1 United States of America

In the United States of America which, like Nigeria, operates a constitutional democracy of the executive presidential type, the Constitution does not grant immunity to political office holders. Article II Subsection 4 of the U.S. constitution provides that the President, Vice-President and all civil officers of state, shall be removed from office on impeachment for, and conviction of treason, bribery, or other high crimes and misdemeanors. Article III Subsection 2 recommends such officers for trial by jury, not by ordinary courts[16]. Executive immunity in the United States of America is not absolute in criminal matters. In Nixon v. Fitzgerald[17], it was decided that the President has absolute immunity from liability for civil damages arising from any official action taken while in office[18] and therefore free from legal liability in civil matters, but, he does not have absolute immunity for criminal charges. He can be charged for criminal offences during his term of office whether the act committed is official or non-official. In Jones v. Clinton[19], the United States Supreme Court established that a sitting President of the United States has no immunity from civil law litigation, in federal court, against him or her, for acts done before taking office and unrelated to the office[20]. It was restated that the President enjoys absolute immunity on civil

15. F N. Ukoh & R A. Ngwoke. Immunity Clause under the 1999 Constitution of Nigeria: A Dire Need for Reform. https://www.ccsenet.org> Journal of Politics and Law. Accessed 23 June, 20242:13pm

16. O E Olugbenga. The significance of the immunity clause for democratic consolidation in Nigeria. https://www.umes.edu >African Journal of Criminology and Justice Studies (AJCJS) Vol. 6, #s 1 & 2. Accessed 23 June, 2024 9:27am

17. Nixon v. Fitzgerald, 457 U.S. 731 (1982) https://supreme.justia.com>federal

18. Nixon v. Fitzgerald, 457 U.S. 731 (1982) https://supreme.justia.com>federal

19. Jones v. Clinton, 520 U.S 681 (1997) https://en.m.wikipedia.org>wiki accessed 23 June, 2024 1:32pm

20. https://en.m.wikipedia.org>wiki accessed 23 June, 2024 1:32pm

matters alone. The immunity does not include wrongs committed before assuming office as President. Thus, the president is liable in civil proceedings for wrongs committed before assuming office even while already in office[21]. However, the President does not have immunity at all for acts that are completely unconnected with his official duties. The American President is also not immune from court processes. The President could be subpoenaed to produce relevant documents in criminal matters.

Since a constitution is as good as its operators want it to be, the situation has worked to the advantage of the American system due to the sincerity of its operators. Therefore, several holders of high political offices in American history, including Presidents, have faced the consequences of breaching these provisions of the Constitution and betraying the public trust reposed in them. Among these were Presidents Andrew Johnson, Richard Nixon, Bill Clinton and most recently Donald Trump. While Johnson was impeached for abuse of power in 1868, Nixon was investigated for misuse of power and obstruction of justice in the investigation of the famous Watergate scandal. He resigned in 1968 before he could be impeached. Clinton was investigated and found guilty of an improper relationship with Monica Lewinsky, a White House intern. He was impeached in 1998[22]. Donald Trump was impeached twice once while in office for abuse of power and obstruction of congress and the second time after he left office for inciting insurrection. However, in America, impeachment does not amount to removal.

5.2 Australia

Australia is a federation; its Constitution can be considered as an amalgam of that of the United Kingdom and the United States. Immunity in Australia is not automatic and thus, it is largely implied or implicit. The Prime Minister is a member of the parliament and his immunity or privileges are as provided for other parliamentarians. It is a parliamentary system of Government with parliamentary immunity unlike Nigeria that operates executive immunity. More so, it deals with protecting parliamentarians from opinions made in the House of Parliament. In sum, the courts uphold parliamentary immunities, which protect parliamentarians and the citizens. They also uphold parliamentary powers, especially the power to punish contempt. In contrast, the Nigerian Constitution does not hold the executive President and his Vice, the Governors and their Deputies accountable for contempt for whatever reasons. Rather her style of immunity protects the executive heads by virtue of their office. No court in Nigeria can lawfully find these Nigerian leaders culpable or liable except when they serve out their term. While the Prime Minister of Australia enjoys few privileges by virtue of his office such as; accommodation, certain free travels or transport and salary, in Nigeria, immunity is centered not only on the enrichment of these leaders but is a tool to oppress the citizens. Similarly, while the crux for immunity of the Executive President and Vice President and all state governors including their deputies in Nigeria is to protect them from distractions from their official functions, the same reason is adduced by the Australian parliament for the punishment of contempt, yet the approach by both countries are at par[23].

6.Recommendations

There have been calls for the total removal of the immunity clause from the Constitution. We should not act on the impulse of the moment and abrogate a constitutional framework that is imbued with the right ingredients to serve the worthy national purpose of growing our democracy and simultaneously ensuring

21. F N. Ukoh & R A. Ngwoke. Immunity Clause under the 1999 Constitution of Nigeria: A Dire Need for Reform. https://www.ccsenet.org> Journal of Politics and Law. Accessed 23 June, 2024 2:13pm

22. O E Olugbenga. The significance of the immunity clause for democratic consolidation in Nigeria. https://www.umes.edu >African Journal of Criminology and Justice Studies (AJCJS) Vol. 6, #s 1 & 2. Accessed 23 June, 2024 9:27am

23. F N. Ukoh & R A. Ngwoke. Immunity Clause under the 1999 Constitution of Nigeria: A Dire Need for Reform. https://www.ccsenet.org> Journal of Politics and Law. Accessed 23 June, 2024 2:13pm

stability in the political system[24]. A review of the provisions of section 308 to take care of the loopholes that political office holders have exploited to commit political and financial crimes against the Nigerian people and State in the past will be in order. There is therefore the need to strike a workable balance on the one hand, between granting unqualified, open-ended protection to political office-holders to commit crimes against the state and the people with impunity and, on the other, exposing government to the destabilizing machinations of bad losers at elections, who may wish to truncate the smooth process of governance whenever they fail to win elections. Re-inventing the immunity clause in this creative way has several potential advantages such as –

1. it will check the excesses and profligacy of political office holders;
2. it will protect government against frivolous and destabilizing machinations of political opponents in order to ensure governmental stability and advance development and
3. it is a means of safeguarding the interests, freedoms and liberties of the citizenry against a government bent on taking vengeance on its perceived 'enemies'[25].
4. It is necessary to give minimum protection to sitting governments to shield them from the knack of losing parties in Nigerian elections to attempt to shoot down the administration of the winning party by re-considering the circumstances, terms and conditions under which the immunity clause should apply so also not to put a sitting Governor or President above the law by not prosecuting them for crimes committed against the state.
5. Seriously observing the time bar in the immunity clause and actually enforcing same at the end of the protected period by actually prosecuting erring executives once their tenure of office is over. Therefore, section 308 should be strengthened in order to serve the intended purpose, and not be diluted by any means[26].
6. It is proposed that the practice of absolute executive immunity (in criminal and civil proceedings) is obsolete for any progressive democratic government and therefore, the immunity clause as enshrined in the Constitution should be reviewed to curtail the excesses of these categories of leaders[27].
7. It is a travesty that allegations of corrupt enrichment can be made, but cannot be investigated and proved against incumbent executive political office-holders. The investigation of the activities of the incumbent office holders should continue as it does not conflict with the provisions of the section and they can be made to answer to these investigations as soon as they leave office. When punishment is put on a latter day and there is no punishment at the point of abusing an office, it encourages graft in government. The constitution should not be used to shield the misdemeanor of those who became distracted by their own inordinate desire. If the executive wants no indictment, or criminal proceedings instituted against it, the political office holder must then strive to refrain from such things that may compromise the law and abuse his or her office.
8. The process of removal from office of protected officers as provided for in the Constitution by sections 143 and 188 should be used in proven cases of breach of trust, corruption or mismanagement. The officer concerned can then face charges as soon as they are lawfully removed from office as the immunity will abate immediately once they are removed[28].
9. In view of the events of the recent past where the DSS became the Agency of government fighting corruption, the argument that the immunity clause should be totally expunged from the Constitution cannot be supported. If executive immunity is removed, given the excessive control wielded by the

24. *Ibid.*

25. O E Olugbenga. The significance of the immunity clause for democratic consolidation in Nigeria. https://www.umes.edu >African Journal of Criminology and Justice Studies (AJCJS) Vol. 6, #s 1 & 2. Accessed 23 June, 2024 9:27am

26. F N. Ukoh & R A. Ngwoke. Immunity Clause under the 1999 Constitution of Nigeria: A Dire Need for Reform. https://www.ccsenet.org> Journal of Politics and Law. Accessed 24 June, 2024 2:13pm

27. Ibid.

28. S Fabamise. Constitutional Immunity Clause And The Fight Against Corruption In Nigeria https://www.ajol.info> Journal of Sustainable Development Law and Policy. Accessed 24 June 4:12pm

President over prosecution machinery like the Police, EFCC, the ICPC, Code of Conduct Bureau, the DSS and other agencies, the Governors can suffer intense harassment from the President due to political differences that he may have with them[29].

7.Conclusion

This paper is a critique of the constitutional provision of executive immunity under the Constitution. We explained the origin and meaning of this clause in Nigeria and other jurisdictions. We believe that there is a need for reform of the provision, and we have substantiated this fact by comparing other jurisdictions where we showed that political representatives holding the exalted offices of president, head of state or prime minister do not enjoy absolute immunity for all wrongs committed before or during their terms of office. Immunity clauses in Nigeria, the United State of America and Australia have been a subject of debate among legal scholars and practitioners. While these clauses provide protection to government officials and institutions from legal liability, their application and scope differ significantly across the three countries.

In Nigeria, immunity clauses are enshrined in the constitution, granting absolute immunity to the President, Vice President, Governors, and their deputies from civil and criminal proceedings. This has been criticized for perpetuating impunity and abuse of power. In contrast, the United State has a more nuanced approach, with sovereign immunity applying to Federal Government entities, but not individual officials. The Federal Tort Claims Act provides exceptions for wrongful acts, allowing victims to seek redress. Australia's approach is more restrictive, with immunity only to applying to specific circumstances, such as judicial and legislative acts. The country's common law tradition also allows for more flexibility interpreting immunity clauses. It is our view that the immunity clause contained in section 308 of the Nigerian Constitution be restricted to only civil matters, such as breach of contract, land matters or torts. Criminal matters pertaining to forgery, impersonation, fraud, murder, embezzlement, terrorism, kidnapping, cybercrime, rape and money laundering must be investigated and pursued against those holding executive power, whether committed before or during the pendency of their term of office. Governance should rest on the ideals of equality, fairness and justice. Nigeria, like Australia, and the United States must hold her leaders answerable for crimes and wrongs committed as executive heads of government. The clause should not cover fraud, corruption and vindictive tendencies in government since the legislative intent for providing constitutional immunity clauses in most commonwealth jurisdictions is to protect the dignity and integrity of the holder of an elective office in a nascent democracy. Removing the immunity clause could open a floodgate of frivolous litigations against elected officers especially from "professional litigants" with the sole aim and objective of distracting the officer from the very serious business of governance[30]. The immunity clause should therefore be modified and retained. On their part, the judiciary must remain independent, create a balance between good governance and protection of citizen rights, and hold perpetrators of embezzled public funds to justice and accountable to the people. There should be no immunity for the judiciary. Constitutional immunity should not be extended to the legislative arm of government because such immunity does not avail the third arm of government. More importantly, all the members of the legislature are equal upon being elected.

29. *Ibid*

30. *Ibid*