

THE IMPERATIVE OF REMOVING IMMUNITY CLAUSE IN THE CONSTITUTION OF THE FEDERAL REPUBLIC OF NIGERIA 1999*

Abstract

In this paper, the writer critically espoused the need to repeal immunity clause in section 308 of the 1999 Constitution of Nigeria. This paper dealt with the import of such immunity clause in the grundnorm of the country, traced the history of immunity clause, and examined the jurisdictional application of immunity clause and status of the clause in Nigeria. The writer of this paper maintained that there is urgent need to remove the immunity clause in the organic law of Nigeria for it is an anomaly which breeds unaccountability and corruption in governance in Nigeria.

Key words: *Imperative, Removal, Immunity Clause and Constitution*

1. Introduction

The issue of provision of immunity clause in the Constitution of the Federal Republic of Nigeria (CFRN) 1999 which is no less than the *grundnorm* of the country makes the clause immutable, thereby making immunity clause provision not just the law but as well unchallengeable. Interestingly, there are various types of immunity with qualified privileges, namely, absolute immunity, restrictive or qualified immunity, legislative immunity, executive immunity, judicial immunity, diplomatic immunity. This study is however concerned with executive immunity. Thus, no President, Vice President, Governor or Deputy Governor can be sued in his or her personal capacity while in office.¹ This position of the law was demonstrated in *Kalu v EFCC*² where a Court order of 31st day of May 2007 restraining EFCC from arresting, detaining and prosecuting Orji Uzo Kalu the sitting Governor of Abia State was flouted by the EFCC as the Commission went ahead to prosecute Governor Orji Uzo Kalu in his personal capacity. The Governor's Counsel petitioned the President and the Attorney General of the Federation (AG. Fed) who wrote to the EFCC directing the Agency to comply with the court order. However, the EFCC failed to comply with the issued court order and the AG Fed came to the Court on the next adjourned date for the case and took over the case so as to comply with the said court order. This act was applauded as a demonstration of one of the characteristics of rule of law, that is, obedience to the orders of any court by even government authority. Good for supremacy of the rule of law as it appeared, yet it is doubtful whether the Federal Government would have so obeyed a court order were it not for the immunity clause and for the fact that it related to a sitting governor. Thus, this is more to accord with the provisions of the immunity clause than obedience to the rule of law.

The origin of the doctrine of immunity cannot be located or pin pointed. Rather, it may suffice to predicate it on the doctrine of sovereign immunity practiced from time immemorial as a feudal concept of ancient England. It later became a Common Law principle. It was introduced into Nigeria as a colony of Britain. Thus, Nigeria inherited it as one of the Common Wealth countries under the British Crown. The doctrine of immunity presupposes that the "King can do no wrong". This concept of sovereign immunity, put differently, immunity of the leader at the apex, was enunciated to make any direct court action or claims against the Crown

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¹ In accordance with Section (sec) 308 (1) (a) (b) (c) (2) (3)

² Quoted in an article by Debo Adesina in the Guardian Newspaper, (Lagos Guardian Newspapers Ltd. 6th September, 2007) p.2

impossible³ no matter the justification or justice of the case. Street posited that "...so the King, at the apex of the feudal pyramid and subjected to the jurisdiction of no other court was not suable".⁴ Yet Lord Denning M.R. in *Carrier v Union of Post Office Worker*⁵ stated that "To every subject in this land no matter how powerful, I would use Thomas Fuller's words over 300 years ago; "be you never so high, the law is above you."

In Africa, immunity in government is not strange especially to traditional society in the South West and Northern parts of Nigeria. Before the advent of colonization, in the 18th and 19th centuries, kings governed in traditional communities. These kings reigned and ruled absolutely and executively. They exercised rights over life and death of their subjects. They were addressed and still as 'kabiyesi', meaning no one dared or query the acts and deeds of kings. In those days, they were known to commit all forms of atrocities and diabolical acts, but no one dared query them because of their 'divine rights' and immunity in governance, even unto death.

2. The Nature of Immunity Clause and the Nigerian Experience

The doctrine of executive immunity is enshrined in the provisions of section 308 of the 1999 constitution. It may be apt to reproduce the section:

- (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 contained 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 in pursuance of the process of any court or otherwise; and
 - (c) no process of any Court requiring or compelling the appearance of a person to whom this section applies, shall be applied 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 function of the office.⁶

The purpose of this provision is to allow the incumbent president or Head of State or Vice President, Governor or Deputy Governor, a completely free hand and mind to perform his or her duties. Obviously, the immunity clause as discussed in section 308 of the Constitution⁷ aims at ensuring that while in office, the officers protected by the immunity clause are not held liable for their actions in their personal capacity. It is a class immunity targeted to benefit the

³ D.I.O. Ewelukwa, *Proceedings By and Against the State in Nigeria*. (Nigeria Bar Journal 1973) P. 10

⁴ H. Street, *Government Liability: A Comparative Study* (Cambridge, University Press New York 1953) p. 42. [1977]1. Q.B. 761

⁶ This section is same with section 161 of the 1963 Constitution of FRN and section 267 of the 1979 Constitution.

⁷ Of Federal Republic of Nigeria 1999 Cap C22 laws of the Federation of Nigeria LFN 2004.

specified class or for their enjoyment.⁸ By the decision in *Abacha v FRN*,⁹ this immunity does not extend beyond the tenure in office of the officials mentioned therein. Thus, at end of their tenure as held in *Hassan v Babangida Ali & Ors*¹⁰ *Global Excellence Communication Ltd v Duke*¹¹ and *Tinubu v IMB Securities Plc.*¹² the law can take its full course. In *Tinubu v I.M.B. Securities Plc*, Iguh JSC in his lead judgment stated as follows: “In my view, the immunity granted to the incumbent of the relevant office under section 308 (1) (a) of the Constitution prescribes an absolute prohibition on the Courts from entertaining any proceedings, civil or criminal in respect of any claim or relief against a person to whom that section of the Constitution applies during the period he holds such office. No question of waiver of the relevant immunity by the incumbent officer will be entertained by any Court”.

Another critical question here is whether the provisions of section 308 (1) (a) (b) (c) (2) (3) do not amount to ouster clause of the jurisdictions of the courts of law to adjudicate and bring those in executive hierarchy under control of being accountable whilst in such position of authority. It appears that those in this class of authority are above the law to the extent that no court can entertain any question against them in their personal capacity while in office. This seems untenable in a democratic setting or any setting at all. In *Arthur Yates & Co. Pty Ltd. v Vegetable Seeds Committee*¹³ where Herring CJ stated that “It is not the English view of the law that whatever is officially done is law.... On the contrary, the principle of English law is that what is done officially must be done in accordance with the law. That is the true meaning of rule of law”.

The practice in modern societies of making provisions for restriction of legal proceedings against the chief executive of any nation has been said to be a decision mandated by the relevance to the President’s or Governor’s unique office. However, Mowoe¹⁴ criticized the decision in *Duke v Global Excellence Communications*¹⁵ which allowed a president or governor to sue in their personal capacity whilst in office. She opined that¹⁶ “it would appear that such a decision is an unfair interpretation of the constitution and is rather tantamount to reading into the constitution a provision not expressly stated and which the drafters of the constitution may have intentionally excluded because of the conflict it would naturally create”. Can executives sue while in office? In *Onabaijo v Concord Press of Nigeria Ltd Plc*,¹⁷ *Tinubu IMB Securities*, the court went further to state that such immune executive official can challenge a court order made against him (her) in breach of the Constitution as held in *Alemiyesigha v Teiwa*.¹⁸

The Nigerian experience of the immunity clause has been horrendous, traumatic and yields to social anomaly in the sense of mis-governance and underdevelopment. The immunity clause has overwhelmingly continued to serve as conduit pipes for siphoning the nation’s wealth by Nigerian leaders without any fear of litigation or challenge. Igbinedon Asabor¹⁹ opined that it

⁸ B.A. Garner, *Black’s Law Dictionary* (6th Edn., USA, West Publishing Co. Ltd. 1979) p.

⁹ [2014] Legal Soft Electronic Law Report p.2

¹⁰ [2010] 17 NWLR (pt 1223) 547

¹¹ [2007] NWLR (pt 1059) 22

¹² [2001] 16 NWLR (pt 740) 670

¹³ [1945] 7 CLR P. 168

¹⁴ M. Mowoe, *Constitutional law in Nigeria* (Lagos Malthouse Press Ltd 2008) p.165

¹⁵ (2007)1 WRN 63. 85-88

¹⁶ M. Mowoe, *Constitutional Law in Nigeria* 169

¹⁷ [1981] 2 NCIR 355

¹⁸ [2002] 7 NWLR (pt 767) 581

¹⁹ I. Asabor, ‘Immunity in International Law’. *The Vanguard Newspaper* (Nigeria 2 October 2002)17

implicitly underscores the above position when he remarked constitutional immunity serves as protection shield or a legitimate instrument of corruption and money laundering by crooks masquerading as public officials. Added to this is the dubious game of theft and unlawful transfer of the common wealth of the people into personal purses have assumed a proportion so alarming with such frequency that it is outrageous. In reality, the clause has not only created a class of people who are above the law. Diepreye Alamiesigha of Bayelsa State is one of the examples. On Thursday, 15 September 2005, a petition was addressed to the Economic and Financial Crimes Commission (EFCC) by some citizens of Bayelsa State against the Governor, revealing that some members of his family had looted from the Bayelsa State treasury a sum of 1,043,655.79 dollars; 173,365.41 pounds and 556,455,893.34 Naira.²⁰

Furthermore, the case of James Onanefe Ibori drives home this point. Ibori was the Governor of Delta State from 1999-2007. His salary was less than 25,000 Dollars a year. The Former Governor of oil rich Delta State was accused of stealing funds worth Two Hundred and Ninety million pounds by Economic and Financial Crimes Commission. In fact, in 2007, a United Kingdom Court froze assets belonging to Ibori worth \$35m. Ibori could not be tried for all these offences while he was in office because of the immunity clause he enjoyed, and even when he was tried in December 2007, he was cleared by the Federal High Court sitting in Asaba of 170 charges connected to alleged money laundering because of lack of evidence held in *Federal Republic of Nigeria v James Ibori*²¹ It however took the intervention of the United Kingdom Court in May 2010 to arrest him in Dubai and extradite him to the United Kingdom to answer for the alleged corruption charges. Ibori was sentenced to 13 years imprisonment in the United Kingdom Court after pleading guilty to charges of financial misappropriation.²² This made and still makes mockery of our judicial system. It is high time section 308 of the CFRN 1999 was repealed.

Recently,²³ former governor Danjuma Goje of Gombe State was declared wanted by the Economic and Financial Crimes Commission over the alleged mismanagement and diversion of over 52 Billion Naira belonging to the State. Goje suspiciously obtained loans amounting to 37.9 billion Naira from 27 banks. The Commission declared him wanted when he failed to submit himself to the Commission.

3. Exceptions to the Immunity Clause

In *Shugaba v Federal Ministry of Internal Affairs & Ors*²⁴, the Court held that the President could be sued in his official capacity since the immunity enjoyed by the crown was quite different from the immunity applicable in Nigeria provided in Section 267 of the 1979 Constitution. In suing the executive in official capacity, it is necessary that the office or title be named in the suit and not the actual name of the person in office. Also, the word 'nominal' has been defined as that which has existence in name but not actual or substantial existence. 'Nominal parties' are therefore those who joined as parties or defendants merely because the technical rules of pleading require their presence on the record. This is the case where the executive in the person of president, Governors and their Vice and Deputy respectively become mere party (parties) to a suit

²⁰ This Day Newspaper (Nigeria 16 October 2005)1

²¹ (Unreported: Suit No. FCH/ASB/IC/09)

²² The Nation Newspaper (Nigeria 17 April 2012)1

²³ Punch Newspaper, (Nigeria 8 October 2011)1

²⁴ (1981) 1 N.C.L.R. 25

In *President of Nigeria v the Governor of Kano State*,²⁵ the Federal Court of Appeal was faced with a number of issues among which was whether an action can be brought against the President of Nigeria in relation to exercise of his office in any capacity other than as for and on behalf of the government of the Federal Republic of Nigeria and whether the government of a State can bring an action in his personal capacity other than representing his state. The court reassured that since an action cannot be maintained in any capacity other than an official one, both parties were acting in their official capacity as personal representatives. It was also held that the action having been brought by the Governor of Kano State as Chief executive of Kano, it becomes one by the government of Kano State against the President of the federation. It is the substance of an action which determines whether a Governor was sued in his personal or official capacity not mere use of name as no President or Governor can be sued in his personal capacity during the pendency of their tenure as decided in *Abacha v Fawehinmi*²⁶, *Alamiyeseisha v Yelwa*.²⁷ In *Samuel I. Igbe v His Excellency, Professor Ambrose Alli*,²⁸ the plaintiff brought an application to amend the writ of summons and statement of claim in a substantive suit pending before the High Court ‘so as to obviate any possible misconception that the Governor was sued in his personal capacity’. While granting the application, Uwaifo, J. held that “it is the substance of the action which determines whether a Governor is sued in his personal or official capacity, not the mere use of name.

Another exception to the immunity clause is in the area of election petition cases. It has been held that election petitions cases are *sui generis* and can neither be classified as civil or criminal proceedings. It is for this reason that election cases constitute an exception and thus, a Governor, President or their deputies can be sued on the validity of their election results. In *Obi v Chief Samuel Mbakwe*,²⁹ the court held that “election petitions are special proceedings completely divorced and separated from civil proceedings within the context of section 267 of the 1979 Constitution. Consequently, a Governor of a state is not immune by any reason of section 267 of the Constitution from legal proceedings against him in respect of an election petition”.

One of the most often cited cases is that of *Alliance for Democracy v Peter Ayodele Fayose*.³⁰ In this case, the appellant participated in the election of 12th day of April 2003. After the elections, the respondent was elected as winner; the appellant filed a petition in the House of Assembly Tribunal claiming that the 1st respondent was not qualified to contest for the election. During the trial, the appellant issued a *subpoena duces tecum* on the elected governor to appear before a tribunal with notice to produce his credentials and international passport. Former Governor Fayose (1st respondent) filed a notice of preliminary objection on grounds that he was covered by immunity and so the tribunal lacks jurisdiction and was incompetent. The Court of Appeal in rejecting such submission held that immunity does not cover election petitions. In giving rationale for this decision, Mikailu J.C.A said that “in an election petition where the status of the governor is being challenged as in this, then said immunity is also questioned. He has no immunity against being sued and consequently he cannot be immune from being subpoenaed”.

²⁵ (1982)3 N.C.L.R 189

²⁶ [2000]6 NWLR (pt 228)

²⁷ [2002] 7 NWLR (pt 767) 581

²⁸ (1981) 1 N.C.L.R. 129

²⁹ (1984) 15 NSCC 127

³⁰ (2002) All. F.W.L.R. (Pt. 218)74.

4. Jurisprudence of Immunity Clause: Examining the Schools

The essence of immunity clause was aptly noted by the SC in *Abacha v FRN*.³¹ Their Lordships stated that the provisions of section 308 of FRN 1999 was indeed to clearly suspend right of action or right to a judicial relief of an aggrieved party during the tenure of office of officials mentioned therein. Onnoghen, JSC in same matter opined that the purpose of immunity clause is to allow the incumbent free hand to operate 'free from harassment'. The writer opines that this may well be the intendment but in practice yields only embezzlement and money laundry particularly of the executive arm of government, Arguments of some protagonists and antagonists as well as schools of thought on both sides of the divide will be examined.

Protagonists Position

Some Nigerians are of the view that immunity clause ought to be retained if only to prevent anarchy and enhance peaceful environment for administration of the Federation and the State. For instance, late Beko Ransome Kuti, the foremost human right crusader argues that absence of immunity clause in the Constitution would be abused by political detractors of the concerned public office holder. Beko³² opined that he did not know anywhere in the world where immunity is not provided for a serving President and his deputy. This is arguable as Tanzania has tried and is still trying it. Such removal can only make the official accountable and obey the rule of law, instead of trying to catch them after they have left office. In fact the Philippines presently has rejected it.

In like manner, Goddy Uwazurike³³ posits that the immunity clause should be left to remain as it serves the purpose of staving off possible indignities that may be thrown on the way of the affected public officers. He maintains that every dignity must be accorded these officers since they hold their office as trustees of the people; only immunity clause can ensure the dignity. In view of the seemingly negative Nigerian experience of the abuse of the immunity clause, members of the school conclude that the fact of few instances showcasing the abuse of immunity clauses is not sufficient ground to strip other public officials of the immunity granted them. Hence, constitutional immunity prevails over every other consideration.

Positivist School

This school seems to support the protagonists' position. To the positivist school, removing the immunity clause may create more problems than solving the ones already on ground. The reasons for the arguments of the formalist school may be summarized thus:

1. The retention of the immunity clause will maintain or preserve the dignity of the office which was the main reason for the insertion of the immunity clause under Section 308 in the first place.
2. To the positivists, immunity has helped to prevent incessant bye elections which would have arisen as a result of incessant elections which would be necessary to replace office holders who are removed from office if the immunity clause was removed.
3. The immunity clause has to a large extent guaranteed the term of office of executive office holders, as criminal prosecutions against them would have led to convictions, thus creating vacuum in the office from time to time. Political opponents have been prevented from using litigations as instrument of pulling down incumbent officers and thus destabilizing the political system.

³¹ [2014] LPELR SC. 40 (2006)

³² This Day Newspaper, (Nigeria 18 April 2001) 13

³³ Famous Renowned Constitutional Lawyer in Nigeria and was also interviewed by *This Day Newspaper* on the same theme.

4. The retention of immunity will avoid distraction of the office holder from doing what he was elected to do.³⁴
5. The existence of immunity clause in the Constitution can prevent an overzealous President or Governor from using Court proceedings to humiliate out of office his deputy to whom he has fallen out with.

The positivist formalist school argues that the formal enactment of any statute regardless of its moral content determines its validity and commands the obedience of the people subject to it.³⁵ In advancing its case on the constitutional immunity debate, the proponents argue that the reason for the insertion of the clause is the need for the holders of certain political office not to be unnecessarily encumbered by a spate of litigation.

Antagonists Position

The group opposes the views of the proponents for section 308 of CFRN 1999 and other statutory provisions as well as the judicial precedents provisions on immunity of those in authority within Nigeria. The former President of Nigeria, Olusegun Obasanjo, called on delegates during the concluded national political reform conference to delete the immunity clause from the Constitution. To the delegates, the President was almost embarrassingly blunt³⁶: “I believe that it is stupidity to keep the clause. As soon as you are caught committing an offence while in office, you should be charged for that offence at once”. The former Chairman of Economics and Financial Crimes Commission, Alhaji Nuhu Ribadu, remarked that “unless we remove this immunity clause, it will be difficult to address the problem of corruption in Nigeria”.

Members of the moralist group have also argued that the removal of this ‘irresponsible’ clause will act as deterrent; no matter how small the effect”. Alhaji Musa Yar’adua who before his death spoke in front of representatives of multi-national corporations called ‘Partnership against Corruption Initiative’ in Davos, Switzerland upon his emergence as president, said: “One of the raging debates in Nigeria today is the issue of constitutional immunity from prosecution conferred on the president, vice president, governors and deputy Governors. I have confidence that the next constitutional amendment will strip these public officials of the immunity and I am personally in support of that. Nobody in Nigeria deserves the right to be protected by law when looting public funds³⁷. Former Secretary General of Common wealth, Chief Emeka Anyaoku believes that: “When immunity clause is removed, all forms of corruption will drastically reduce in Nigeria. Since the immunity comes from the top, the other people will follow suit. The President and the Governors should not have any immunity from criminal offences. They should only have immunity for civil offences because constant law suits on civil offences will distort the day-to-day running of the country”.

³⁴ A. Kupoloyi., ‘Don’t Remove Immunity Clause’, *Daily Trust Newspaper*, (Nigeria Wednesday, 21 January, 2009) 13, Ohis U., Immunity clause as necessary Evil’ <http://www.chartafrikarticles.com/articles>>accessed on 30 November 2011

³⁵ O. Balogun, ‘African leaders and Constitutional Immunity: The Moral Question’. (Paper presented at the interdisciplinary Conference on ‘Ethics and Africa’, co-sponsored by Jean Blumenfeld Center for Ethics, Georgia State University and philosophy department, University of Cape Town, South Africa, 29-31 May 2006)48.

³⁶ The Daily Newspaper, (Nigeria 31 March 2005)17

³⁷ Yar’adua Canvases Removal of Immunity Clause’ at<<http://www.efenigeria.org>>accessed on 23 November 2011.

Moralist Substantive School

The School of Thought seems to be opposed to provision of any form of immunity clause in line with the antagonist. The moralists perceive of it from the ethical angle. To the members of this school, the provision of Section 308 is antithetical to the doctrine of equality before the law. Immunity clause is seen as a codification of Orwellian maxim that 'all animals are equal but some animals are more equal than others which imports overt discrimination and unaccountability. The arguments by the moralist school are based on the following points:

1. Executive officers have used immunity to the detriment rather to the benefit of the nation; while the Constitution provides protection to them through the immunity clause, the officers have used this as an opportunity to violate some provisions of the Constitution itself.
2. For an offence which an incumbent executive officer cannot be prosecuted, an ordinary citizen will be immediately convicted for such an offence. With this, there is no respect for the rule of law which postulates equality for every man before the law. Though the period of non-prosecution of these public officers is for the period of their offices, the time which the other party would have to wait amounts to 'justice delayed and justice denied'.
3. Very importantly, the heat of passion for acts done fraudulently while in office might have subsided by the time these chief executive and their deputies vacate office or worse still the party aggrieved might even have died and this forecloses the possibility of prosecution held in *Alamiesigha v Yeiwa*.³⁸ On the other hand, the 'pains' and psychological trauma suffered by an aggrieved party to any of these officers would increase by the day since such party will have to wait until the expiration of the office.
4. The defence of immunity has rendered ineffective and impotent the machinery set up by the government through Economic and Financial Crimes Commission (EFCC), Independent Corrupt Practices and other Related Commission (ICPC) and Code of Conduct Bureau, all of which are to sanitize the society of corruption and other vices.

Therefore, many Nigerians have called for the removal of immunity clause as the only way the Nigerian people can benefit from the massive wealth and resources of the nation which are laundered abroad.

The National Judicial Council has also thrown its weight behind removing the immunity clause. The Council led by one-time Chief Justice of Nigeria, Justice Muhammed Uwais canvassed for the withdrawal of immunity from prosecution enjoyed by specified officers in the State. In a memorandum to the sub-committee on supplementary and general provisions of the Joint Assembly Committee on the Review of the 1999 Constitution, Uwais who was represented by the NJC Deputy Chairman, Justice Alfa Belgore recommended that the immunity be limited to civil suits against the public officers in their private capacity. The NJC memorandum also sought that immunity from criminal prosecution including arrest for felonies be abolished.³⁹ The Memorandum further reads:

³⁸ (2000)7 NWLR (Pt.767)581

³⁹ The Punch Newspaper, (Nigeria 16 April 2004) 36

The committee notes that the immunity from criminal prosecution granted to the specific officers of state under section 308 of the constitution is being abused and is capable of being abused in a manner that could endanger the nation and its democratic system of government. This will put the administration of justice into disrepute and make the country a laughing stock in the comity of nations. In this day and age in the world, this will have disastrous consequences for society and its economy....

Enabulele posits⁴⁰ thus:

It is obvious that section 308 is a provision too broad for the purpose for which it is meant. It is in effect an excessive protection of the president and governors as what is sought to be achieved through the section can better be achieved if the immunity is limited to the official transactions of the persons named in the section to the exclusion of every other transaction. Such qualified immunity offers a double barrel advantage. The first is that it would reduce the arbitrariness of such officials, that second, is that it will roll away the stone from the iniquitous tomb to which section 308 has confined people's fundamental right to sue when their rights have been trampled upon by any of the persons named in the section... It is time for the legislature to amend the immunity provision of the constitution to make it applicable only when the officials act of the persons named in the section come into question.

5. Application of Immunity Clause in Some Other Jurisdictions

Immunity clause seems to be a law prevalent in most jurisdictions of the world albeit in varied status. In Uganda, provisions on immunity to government officials are similar to Nigerians situation though differently couched. Parliamentary immunity is specially provided for in section 97 (1) (2) (3) of the Constitution of Uganda.⁴¹ Interestingly, section 98 (4) provide for executive immunity thus: while holding that office, President shall not be liable to proceedings as long as he is in the office. However, civil or criminal proceedings may be instituted against a person after ceasing to be President, in respect of anything done or omitted to be done in his or her personal capacity before or during his term of office of that person; and any period of limitation in respect of any such proceeding shall not be taken to run during the period while that person was pendent. Yet Section 128(4) under independence of the judiciary provides for judicial immunity as follows: "A person exercising judicial power shall not be liable to any action or suit for any act or omission by that person in the exercise of judicial power. The idea of stipulating the immunities of the three arms of government is worthy of emulation as a demonstration of equality of the three arms. In fact, most provisions of the Uganda constitution are development oriented.

In Tanzania, the nature of immunity clause is very instructive. A devise by the former President Julius Nyerere created an arrangement apparently designed to accommodate the two conflicting objects of protecting the rights of individuals against an incumbent president as well as the

⁴⁰ A.O. Enabulele, 'From Immunity to Impunity: A Scandalization of the Rule of Law in Chianu E. (eds.): *Legal Principles and Policies*, note 68. 245 at 256-257

⁴¹ Of the 3rd Amendment (No. 2) Act No. 21 of 2005 (Kaipal (Law Africa Publishing (u) Ltd. Reprint 2010) pp. 48, 49, 69

dignity and integrity of the nation's highest office⁴². Unlike Nigeria where the Presidents and Governors are immune from criminal and civil actions, Tanzania's Constitutions under Section 9 of 1962 and Section 11 of 1965 respectively provides that the President is amenable to civil (though understandably not criminal) action in his personal capacity. This novel procedure designed to protect the dignity and integrity of the office is provided for an action against the President. This requires that at least 30 days written notice of intention to bring an action, accompanied by a complaint which gives information about the nature of the proceedings, the cause of action, the name, description and place of residence of the plaintiff should be served not on the president personally but on the permanent secretary, principal or private secretary to the president or sent by prepaid registered post to the Permanent Secretary at the State House.

Unless the above procedure is complied with, no legal process can be served or executed within the State House or where he is resident or other official residences of the President. However, if a court so requests, the officials shall render all reasonable and necessary assistance to enable service or execution of the writ to be effected. The action has to be instituted in the High Court and not in any other court. These precautionary measures are equivalent to Nigeria's three months Pre-Action Notice which is given most especially to the executive arm of government before any action can be instituted. Assuming the plaintiff has been successful, the only form of relief that may be awarded at the conclusion of the proceeding is a declaration, (no other kind of order, judgment, decree or relief can be given against the President while he is in office). Where the said President fails to satisfy the Court's declaration, within 90 days of vacation of office by the President and on the application of the said Plaintiff, the Court will convert the declaration into positive relief.

Still, no bar is imposed on the right to apply to the court for a President to face an action to personally attend or appear in court or to produce any person or thing. Upon such application, the Court will notify the President. In contrast, the Nigerian President or a Governor cannot be compelled to appear before any Court or Tribunal as is the case in Tanzania. This is a clear demonstration of application of the rule of law, equality before the law and supremacy of the Law. This type of restrictive immunity places caution on anybody whosoever that occupies position of authority especially those laced with immunity.

In the Philippines, immunity clause protection was rejected in order to expose corruption. The former President of Philippines, Joseph Ejercito Estrada, was reported on 4th April 2001⁴³ to the Office of the Ombudsman which handles criminal charges against incumbent and former State officials. Seven criminal charges were leveled against Estrada before the Sandiganbayan which is the country's anti-graft agency. The charges include bribery, misuse of public funds, unexplained wealth, abuse of authority and the very interesting charge of economic plundering; which remains a non bailable offence punishable by death sentence. On 25th April 2001, Estrada was arrested after a warrant to that effect was issued.⁴⁴ The former President appealed against the legitimacy of the arrest. The country's Supreme Court, in a unanimous ruling by 13 Justices rejected this appeal, denying his immunity from criminal charges and paving the way for his arrest and subsequent trial. For Ejercito Estrada, there are no barriers to justice as held in *Soliven v Makaiser*⁴⁵ Therefore, the immunity granted in the Philippines fall within the

⁴² B.O Nwabueze, *Presidentialism in Common Wealth Africa*, (Hurst & Co. London 1977)121

⁴³ Punch Newspaper, (Nigeria 25 April 2001) 17.

⁴⁴ Guardian Newspaper (Nigeria 29 April 2001)6

⁴⁵ (1988) 167 SCRA 393

qualified or restrictive type of immunity, unlike in Nigeria where the immunity is absolute as held in *Hassan v Aliyu*⁴⁶ and *Global Excellence & Ors v Duke*⁴⁷

6. Conclusion

The writer makes bold to state that immunity clause in section 308 of the Constitution of the Federal Republic of Nigeria ought not to be there in the first place. Having been, it must of urgency and necessity be repealed by the National Assembly of Nigeria. In its place, let provisions as operational in the Philippines jurisdiction be enacted and made applicable. This position is the only drastic tool needed for sanity in governance in Nigeria particularly with brazen recklessness in rulership. Civil matters specifically those protected should also be made to answer to any liability. Those occupying the offices so immune must be trained on the act of good governance. Suffice it to state that such posture will stem corruption and guarantee development of the Nigerian State using the nation's enormous wealth for the good of her citizens. In view of the foregoing arguments for and against, the writer suggests the Tanzania and the Philippines models be emulated. It means that the parliament and the judiciary must be up and doing to respectively impeach whenever necessary and give a court order so as to protect the nation as and when necessary.

⁴⁶ [2010] 17 NWLR (pt 1223) 547

⁴⁷ [2007] NWLR (pt 1059)22