

IMMUNITY CLAUSE IN THE NIGERIAN CONSTITUTION: A CALL FOR A PARADIGM SHIFT*

Abstract

This paper interrogates the Constitution of the Federal Republic of Nigeria 1999 (as amended) section 308, which notwithstanding their obvious corrupt activities, grants immunity from civil and criminal prosecutions to the incumbent President, Vice President, Governors and Deputy Governors. The paper employs doctrinal search method and contends that absolute immunity in section 308 of the constitution has become a legal engine of financial crimes. It recommends qualified immunity or its total abrogation from the Constitution as a primary route to tackling all forms of corruption, treason, murder and other heinous crimes in Nigeria. The paper concludes that a legal provision that protects a public officer from prosecution while in office for being corrupt or involved in capital offences is anti-people and would produce a retrogressive society.

Keywords: Attorney, Constitution, Corruption, Immunity and Nigeria

1. Introduction

Nigeria is a federation made up of thirty six States and a Federal Capital Territory.¹ The Federation maintains a special account known as ‘The Federation Account’ into which all revenue collected by the Government of the Federation are paid into except the proceeds from the personal income tax of the personnel of the Armed Forces of the Federation, the Nigerian Police Force, the Ministry or Department of government charged with the responsibility for Foreign Affairs and the residents of the Federal Capital Territory, Abuja.² Any amount standing to the credit of the Federation Account is distributed among the Federal and State Governments and the Local Government Councils in each States on such terms and in such manner as may be prescribed by an Act of the National Assembly.³ The State Governors regularly on monthly basis receive the federal allocation for their respective states. This is in addition to the internally generated revenue of each state which depends on each state’s capacity and level of economic activities. The President, Vice President, Governors and their Deputies superintend the allocation of these public funds to various ministries, departments and agencies as well as their expenditures, management or mismanagement.

In Nigeria, financial crime is an open deep cut of significant proportion by successive governments, non governmental institutions, private citizens, foreign nationals etc. The *raison d’ etre* for *coup d’ tat* or election campaigns in Nigeria is pervasive corruption⁴ against the incumbent yet each regime whether military or civilian allegedly exhibited more corrupt practices than the ousted government. Incontrovertibly therefore, both the military rulers and their civilian cohorts are culpable.⁵ That said, many cases of alleged corrupt practices involve almost every sector of the government of the country to *wit*: the executive, the legislature, the judiciary, the security agencies, public and private institutions, religious leaders, etc. The list is long, obvious and need not detain us further. Instances abound to illustrate the assertion that corruption in Nigeria is pervasive, corrosive and legendary. First, fifteen billion naira cash was hauled from a private apartment in Ikoyi Lagos and the then Director General of National Intelligence Agency (NIA) Mr Ayo Oke was allegedly linked to the fraudulent concealment.⁶ Second, President Muhammadu Buhari confirmed recovery of ₦59.9 billion and another \$666.676 within his first two years in office.⁷ Third, the former Governor of Taraba State, Rev.⁸ Jolly Nyame was prosecuted by Economic and Financial Crime Commission⁹ over alleged ₦1.64 billion fraud committed while serving as the

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¹ *Constitution of the Federal Republic of Nigeria, 1999 (as amended)* ss 2 (2), 3 (1)

² *Ibid.* s 162 (1)

³ *Ibid.* s 162 (3)

⁴ I. M. Adaba, ‘Leadership, Corruption and Governance in Nigeria’ *University of Nigeria Journal of Political Economy*, vol. 6, No 1 & 2, 2013, 16

⁵ *Ibid*

⁶ Soni David ‘Osborne ₦15bn Cash: Pressure Mounts on Presidency, Osinbajo Over Oke’ *Vanguard*, vol. 25, No 63295, Tuesday May 23, 2017, 8

⁷ *Ibid* 9

⁸ Reverend is a title bestowed on clergies. It appears that the former Governor and now ex-convict is a religious leader even before he assumed office of trust.

⁹ EFCC means Economic and Financial Crimes Commission established by EFCC Act cap. EII, LFN 2010 with the statutory power to investigate and prosecute financial crimes in Nigeria.

Governor of Taraba State. He was convicted by a competent court and sentenced accordingly. The conviction was affirmed by the Nigerian Supreme Court.

Again, the former Governor of Delta State, Mr James Ibori was charged to court on 170 count charge¹⁰ bordering on money laundering, committed while in office as the Governor of Delta State. On the 28th day of July 2009, the accused person filed a Motion on Notice and sought to quash all the 170 counts and an order discharging and acquitting him on the grounds that no *prima facie* case was made out against him and that the charges were incompetent as they constituted affairs of Delta State which the Federal Government of Nigeria and the Economic and Financial Crime Commission (EFCC) were incompetent to investigate and prosecute. The trial judge on 17th December 2009 quashed all the 170 count charge, discharged and acquitted the accused person.¹¹ Although the Court of Appeal reversed the decision describing it as a travesty of justice, and an exercise of a crooked cord of discretion, it must be emphasized that the same James Ibori was convicted of same money laundering and other financial crimes of ₦12.4 billion in the Southwark Crown Court in London.¹² Oddly enough, Mr Ibori returned to Nigeria to a tumultuous welcome after serving five years jail term in London.¹³ Similarly, the acting chairman of EFCC, Mr Mustapha Ibrahim Magu remains in his position till date after 'having failed twice to get the nod of the Senate due to his indictment for corruption in a report by the Directorate of State Services (DSS).'¹⁴

On the other hand is the direct effect of corruption in Nigeria. This can be seen in the excruciating level of poverty, insecurity, violence and conflicts, industrial disharmony etc in the country. A Senior Advocate of Nigeria and Human Rights Activist, Femi Falana lamented that the paradox of poverty in the midst of plenty calls for urgent investigations into the fundamentals of our crisis of underdevelopment.¹⁵ The UNICEF has also cautioned that an estimated 500,000 Nigerian children aged five years and below are at the risk of death over debilitating condition of Severe Acute Malnutrition resulting from insufficient nutrients for their development.¹⁶ Corruption in Nigeria has provoked a cesspool of violence that has abandoned her citizens in a state of penury, insecurity, irregular elections and migrations, brain drain, infrastructural decay, homelessness and hopelessness. The situation is pensive and tense. It is such that the Nigerian economy and the poverty of her citizens have grown concomitantly, although the latter is now on the increase much more than the former. Thus, influential politicians and wealthy businessmen live in influence and opulence just as crippled beggars and child labour victims crawl through traffics and motor parks begging and hawking. Consequently, this work questions the continued retention of immunity clause in favour of the federal and state chief executives and their deputies in the constitution in the face of their involvement in monumental corrupt activities while in office.

This paper engages the fundamental of Nigeria's underdevelopment and traces same primarily to *section 308 of the Constitution* which protects Federal and State Chief Executives and their Deputies from criminal prosecution even when they engage in carefree looting of the commonwealth of their people. In the main, the paper attempts to accomplish two objectives. First, to interrogate the constitutional roles of the Attorney General and the Minister of Justice particularly on the question as to who does the Attorney General represent in Nigeria – the President or the public? The paper examines an excellent hitherto unexplored issue of the propriety or otherwise of the control of the Attorney General by the President. Second is to examine the immunity clause provision in the Constitution in favour of the Federal and State Chief Executives and their Deputies in order to showcase its relevance or otherwise in the development of Nigeria. The writers made recommendations to advance Nigeria's political and economic development and drew conclusion. But before going on, it is important to know that immunity simply means exemption from either civil or criminal liability by the state. According to the *Black's Law Dictionary*, 9th Edition, page 817, immunity means 'any exemption from a duty, liability or service of process, especially such an exemption granted to a public official or governmental unit.' In the same vein, *Oxford Advanced Learner's Dictionary*, New 9th Edition, page 786, defines immunity as 'protection against particular laws that is given to politicians.'

2. The Fundamental of Nigerian Underdevelopment

This part of the work investigates rather briefly the fundamental single cause of underdevelopment of Nigeria after twenty years of the country's fourth Republic (1999-2019). According to *Black's Law Dictionary*,

¹⁰ FHC/ASB/1C/2009

¹¹ *FRN v. Ibori and ors* (2014) 13 NWLR (pt. 1423) 168

¹² M.A.O Aluko, 'The Institutionalization of Corruption and the Impact on Political Culture and Behaviour in Nigeria' (2002) *Nordic Journal of African Studies*, (11), (3), 393-401 cited in A. Oladiran 'Corruption and the Quest for Good Governance in Nigeria' (2014) *Afro Asian Journal of Social Science*, (v), (3) 5

¹³ Soni David, *op. cit.*, 12

¹⁴ *Ibid* 18

¹⁵ Femi Falana (SAN) 'Politics, Leadership and Accountability: The Role of the People' note 6, 46

¹⁶ C. Obinna 'UNICEF Tasks FG on 500,000 Underfed Children' *Vanguard*, vol. 25, No 63295, Tuesday, May 23, 2017, 40

underdeveloped country refers to developing country.¹⁷ It defined developing country as a country ‘that is not as economically or politically advanced as the main industrial powers.’¹⁸ It means poor and backward country and is mostly located in Africa, Asia, Eastern Europe, The Middle East and South America.¹⁹ To develop means to grow, mature, progress, expand²⁰ vice versa. Nigeria is one of the poor third world countries.²¹ The bane of Nigeria’s development is corruption particularly among the chief executives of the federation and of various states respectively and their cronies. According to *Black’s Law Dictionary*, corruption refers to ‘depravity, pervasion, or taint...the impairment of a public official’s duties by bribery’.²² Corruption includes bribery and other related offences.²³ It is an act of corruption for a public official to demand or accept, either directly or indirectly through a third party, any object of pecuniary value such as a gift, offer, a promise or an advantage of any nature, whether for himself or for another person, in exchange for an act or omission in the discharge of his duties.²⁴ It is also a corrupt act for a public official to divert any assets, whether movable or immovable, deeds or security belonging to the state, agency or an individual given to the public official by virtue of his position and for the needs of the state for safe-keeping and for other purposes.²⁵ Corruption includes bribery, embezzlement, and stealing of public funds, falsification of official records, nepotism, unauthorized virements by movements of funds from one vote to another, concealment of corruption, examination malpractices, sexual harassment in whatever guise, contract manipulation.²⁶ Although the definition is public sector specific, corruption equally obtains in private sector of the economy.

Corruption and its attendant consequences negate the national ethics of Nigeria as enshrined in *section 23 of the Constitution*. The said section makes discipline, integrity, dignity of labour, social justice, religious tolerance, self reliance and patriotism the national ethics of Nigeria. In order to combat corruption in Nigeria, several measures including national, regional and global legal framework, policies and programmes have been advanced at various fronts and times. Nationally, Nigerian state is anchored on the principles of democracy and social justice.²⁷ Thus, the security and welfare of the citizens are the primary purpose of the government.²⁸ Broadly, security encompasses economic and social security. Most former Governors in Nigeria are either standing criminal trial for alleged financial crimes committed while in office as Governors or have already been convicted. Few examples will suffice for the purpose of this work. On May 11, 2017 the *Sahara Reporters* reported that 14 former State Governors in Nigeria were being prosecuted in different courts over various allegations of money laundering, embezzlement, misappropriation of public funds among other sundry criminal allegations.²⁹ Some of the ex-governors reported to be on trial are: Mr Alao Akala (Oyo State), Mr Sule Lamido (Jigawa State), Mr Murtala Nyako (Adamawa State), Mr Saminu Turaki (Jigawa State), Mr Joshua Dariye (Plateau State), Mr Danjuma Koje (Gombe State), Mr Jolly Nyame (Taraba State), Mr Chimaraoke Nnamani (Enugu State).³⁰ It is noteworthy to state that the immediate past Governor of Imo State, Mr Rochas Okorocha in less than five months he left office as Governor was placed under investigations by the EFCC.³¹ The operatives of the EFCC marked certain properties traced to the ex-Governor Rochas Okorocha and his cronies to be sealed as according to the agency, ‘the failure of those to whom they were traced to, to honour the EFCC’s invitation for interrogation.’³² In the same vein, James Bala Ngilari, former Governor of Adamawa State who served for seven months only was tried, convicted and sentenced to five years in prison for awarding a contract for the procurement of 25 vehicles at a cost of 167 Million naira without following due process.³³

¹⁷ B. A. Garner (ed.), *Black’s Law Dictionary*, (7th ed., West Group, 1999), 1527.

¹⁸*ibid.* 461

¹⁹*ibid*

²⁰ Geddes & Grosset, *English Thesaurus*, New Ed., 1997, 61

²¹ A. Alaye, ‘Dependency and Underdevelopment of Nigerian Economy’ *Global Journal of Politics and Law Research*, vol. 7, N0 1, 2019, 9

²² B. A. Garner (ed.) *Black’s Law Dictionary*, (9th Edn Thomson Reuters, 2009), 397

²³ *Corrupt Practices and Other Related Offences Act*, Cap C 3 1 LFN 2010, s 2

²⁴ *Economy Community for West African States Protocol on the Fight Against Corruption*, article 6 (1) (a)

²⁵*Ibid*, article (6) (e)

²⁶ E. Nta, An Address Presented During the 22nd Annual International Conference on African Literature and English Language (ICATEL) on Corruption and National Security at the University of Calabar, 9th May 2013, 2

²⁷ CFRN 1999 (as amended), s 14 (1)

²⁸*Ibid* s 14 (2) (b)

²⁹ ‘Leaders or Dealers: Former Nigerian Governors Undergoing Trial for Corruption’. *Saharareporters.com/2017/05/11/leaders-or-dealers-former-nigerian-gov*. Accessed 3rd September 2019.

³⁰*Ibid*

³¹ <https://www.africanews.com/2019/07/25/Nigeria-anti-graft-body-seizes>. Accessed 03/09/2019

³²*ibid*

³³<https://www.reuters.com/article/us-nigeria-corruption/former-nigerian>. Accessed 03/09/2019

Again, the immediate past governor of Ekiti State, Mr Ayodele Fayose is standing trial for allegedly receiving and keeping 1.2 Billion naira and 15 Million naira stolen from the Office of the National Security Adviser (ONSA) through the former Minister of State for Defence, Mr Musiliu Obanikoro.³⁴ Recently, the former Governor of Abia State and current Chief Whip of the Nigerian Senate, Senator Orji Uzor Kalu was on Thursday, 5th day of December 2019, convicted for diverting over seven billion naira public fund while he held sway as the Governor of Abia State and sentenced to twelve years imprisonment.³⁵ These are criminal cases involving former governors that enjoyed immunity from prosecution while in office and allegedly perpetuating the criminal acts at the same time. For emphasis, *section 162 (1) (3) of the Constitution of the Federal Republic of Nigeria 1999 (as amended)* which is in *parimateria* with *section 149 (1) (2) of the Constitution of the Federal Republic of Nigeria, 1979* provides:

(1) The Federation shall maintain a special account to be called ‘The Federation Account’ into which shall be paid all revenues collected by the Government of the Federation, except the proceeds from the personal income tax of the personnel of the Armed Forces of the Federation, the Nigeria Police Force, the Ministry or department of government charged with the responsibility for Foreign Affairs and the residents of the Federal Capital Territory, Abuja.

(3) Any amount standing to the credit of the Federation Account shall be distributed among the Federal and State Governments and the Local Councils in each State on such terms and in such manner as may be prescribed by the National Assembly.

In *Attorney General of Bendel State v Attorney General of the Federation & ors*³⁶ the Supreme Court Per Uwais JSC (as he then was) held while interpreting *section 149 of the 1979 Constitution of the Federal Republic of Nigeria* which is in *pari materia* with *section 162 (1) of the 1999 CFRN* that:

It is settled that it is the duty of a trustee to keep a proper account of the trust he administers. And the beneficiary has a right to call upon the trustee for accurate information as to the state of the trust. Consequently, it is imperative for the Federal Government to render accurate and regular account to the beneficiaries of all monies paid into the Federation Account when requested to do so.³⁷

Similarly, in *Attorney General of Cross River State v Attorney General of the Federation & ors*³⁸, the apex court further held: that ‘... by virtue of s. 162 (1) of the CFRN 1999, that the Federal Government holds the position of a trustee in respect of all monies paid into the Federation Account on behalf of the state from which the revenue was generated’.

Analogically, both the Federal and State Governments are trustees for Nigerians. They are accountable to the people while in office and even thereafter. Where this trust relationship is breached arising from conspiracy, criminal breach of trust, embezzlement, and indeed by other various corrupt activities, the law ought not to be lax in the prosecution of the suspect even while in office. The Federal and State Chief Executives and their Deputies are employees of the people and should ensure that anything entrusted to them are utilized according to the dictate of their offices.³⁹ To do otherwise and still be constitutionally protected from prosecution while in office is totally inimical to the development of the country.

3. Constitutional Roles of the Attorney General and Minister of Justice in Nigeria⁴⁰

For historical significance, it needs to be stated that the first draft of the *Judiciary Act of 1789* provided for the appointment of the Attorney General by the US Supreme Court.⁴¹ The Act which established the Office of the Attorney General for the United States of America provided thus:

And there shall ... be appointed a meet (sic) person learned in law, to act as the Attorney General for the United States who shall be sworn or affirmed to a faithful execution of his

³⁴ L. Olabiyi ‘EFCC Counsel’s absence stalls Fayose’s Trial’ Daily Sun, vol. 15, No 4188, Wednesday May 15, 2019, 4.

³⁵ *Vanguard*, Vol. 26, No 63957, Monday, December 9, 2019, 9

³⁶ (1983) NSCC vol. 14, 181 at p. 192

³⁷ See also *AGF v AG Abia State v ors* (2002) 6 NWLR (pt 764) 542 (p. 24)

³⁸ (2005) 1 CNQLR 1

³⁹ *Audu & anor v Hyella Marja Gideon & anor* (2015) 12 NWLR (pt. 1474)495

⁴⁰ This segment is restricted to the Office of the Attorney General of the Federation and Minister of Justice to the exclusion of the Attorney General of the State and Commissioner for Justice of various states because of the centrality of the former in the fight against corruption in Nigeria.

⁴¹ S. L. Bloch ‘The Early Role of the Attorney General in Our Constitutional Scheme: In the Beginning there was Pragmatism’ Duke L. J. (1989)

579 <https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=2213&CC>. Accessed on 27/8/2019.

office; whose duty it shall be to prosecute and conduct all suits in the Supreme Court in which the United States of America shall be concerned, and to give his advice and opinion upon questions of law when required by the President of the United States of America, or when requested by the heads of any departments, and shall receive such compensation for his services as shall by law be provided.⁴²

The Act set out two principal duties of the Attorney General, namely, to prosecute and conduct all suits in the Supreme Court that concerned the United States and to give advice on questions of law upon the request of the President or the heads of government departments. Importantly, the Attorney General was not then subjected to presidential control.

In Nigeria, the Attorney General of the Federation is the Chief Law Officer of the Federation and a Minister of the Government of the Federation.⁴³ At this point, it is to be noted that neither Minister of Justice nor Ministry of Justice (either of the Federation or of the State) is, strictly speaking, a creation of the Nigerian Constitution. What the Constitution established is the Office of the Attorney General who shall be the Chief Law Officer of the Federation as well as Minister of the Government of the Federation.⁴⁴ The particular Ministry where the Attorney General may be placed as a minister is not specified in the Constitution. Hence, Ministry of Justice is not specifically established by the Constitution. It is only a matter of long practice, convention and convenience that the Attorney General usually functions as the Minister of Justice. For a person to be qualified to hold the office of the Attorney General of the Federation, he must be qualified to practice as a legal practitioner in Nigeria and must have been so qualified for not less than ten years.⁴⁵ Section 174 of the Constitution clearly stipulates the constitutional powers of the Attorney General of the Federation in the following terms:

- (1) The Attorney General of the Federation shall have power-
 - (a) To institute and undertake criminal proceedings against any person before any court of law in Nigeria, other than a court-martial, in respect of any offence created by or under any Act of the National Assembly;
 - (b) To take over and continue any criminal proceedings that may have been instituted by any other authority or person; and
 - (c) To discontinue at any stage before judgement is delivered any such criminal proceedings instituted or undertaken by him or any other authority or person.
- (2) The powers conferred upon the Attorney General of the Federation under subsection (1) of this section may be exercised by him in person or through officers in his department.
- (3) In exercising his powers under this section, the Attorney General of the Federation shall have regard to the public interest, the interest of justice and the need to prevent abuse of legal process.

The Attorney General, in the exercise of his constitutional powers ‘shall have regard to the public interest, the interest of justice and the need to prevent abuse of legal process.’⁴⁶ This depicts that the primary consideration of the Attorney General in the exercise of his powers is public interest. Public interest means ‘[T]he general welfare of the public that warrants recognition and protection.’⁴⁷ It is submitted that the requirements of public interest, the interest of justice and the need to prevent abuse of legal process are indicators that the Attorney General ought not to be subject to the control and directive of the President who generally has the interest of his political party men and women to serve while in office. The Attorney General should be made to be subject to the control and limitations of public law rather than being at the pleasure of the President. Implicitly canvassing against the control of the Attorney General of the Federation by the President, Shehu Sani, a former Senator of the Federal Republic of Nigeria lamented thus: ‘When it comes to fighting corruption in the National Assembly and the Judiciary and in the larger society, the President uses insecticide, but when it comes to fighting corruption within the Presidency, they use deodorants.’⁴⁸ Hence, the Attorney General who is at the centre stage in the fight against corruption in the country needs to be intrinsically and extrinsically extricated from the influence and control of the President.

⁴² *The Judiciary Act, 1789, s. 35*

⁴³ *Constitution of the Federal Republic of Nigeria 1999, (as amended), s. 150 (1)*

⁴⁴ *Ibid.*

⁴⁵ *Ibid* s.150 (2)

⁴⁶ *Ibid.* s 174 (3)

⁴⁷ B.A. Garner (ed.), *Op. Cit.* 1244

⁴⁸ R. Musser, ‘Overcoming Nigeria’s Crippling Threat of Corruption’ <https://www.cipe.org/blog/2019/02/14/overcoming-nigeria-cripple> accessed 28/8/2019

4. A Critique of Section 308 of 1999 Constitution of Nigeria

Section 308 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) provides:

(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 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.

Section 308 of the 1999 Nigerian Constitution grants immunity from civil and /or criminal prosecution to the President, Vice President, Governor and Deputy Governor during the period of their offices⁴⁹ however monumental and glaring their corrupt activities except in respect of election petition matters.⁵⁰ The immunity provision equally covers the Senate President and the Speaker of the State House of Assembly whenever and within the period any of them holds, in acting capacity, the Office of the President or Governor respectively.⁵¹ This argument is valid because the immunity provision applies to a person holding the office of the President, Vice President, Governor or Deputy Governor who is required to perform the functions of the office.⁵² In acting capacity, the President of the Senate or the Speaker of the State House of Assembly is required to perform the functions respectively of the Office of the President or the Governor of the State as the case may be.

Immunity is genuinely intended to afford the named public office holders peaceful tenure of office and thereby avoid harassment on personal matters other than matters of state importance.⁵³ The immunity cannot be waived even by the beneficiary⁵⁴ although the beneficiary may be investigated while in office.⁵⁵ Unfortunately, the protected public officers have been involved in monumental care-free looting of their state treasuries.⁵⁶ The immunity clause has been defended on the grounds that it enables the concerned public functionaries to work without distractions through court processes or arrests; and that the immunity protects the majesty and dignity of the office so that the office may not be degraded under the heat of examination or cross-examination in court.⁵⁷

As plausible as the justifications seem, the truth is that immunity that protects public officers from prosecution while in public office for corrupt activities is against the spirit of the law and the oath of office the public officers subscribed to. They took oath to maintain and observe the law and not to breach same through corrupt activities. Conceded that the immunity clause has its benefits, the law should not grant President, Vice President, Governors and Deputy Governors immunity beyond their official legitimate duties. Immunity should be restricted to official acts, otherwise, the law would become an engine of fraud and the masses would continue to be impoverished in the state of abundant resources. The dire need to develop Nigerian economy through open, transparent and accountable management of its resources outweighs the majesty and privileges of the offices involved. It must be emphasized that the persons to whom immunity from judicial process is granted are in charge and control of the Nigerian economy, coercive apparatus of the state and the resources of their various states of the federation. Granting them absolute immunity in the face of their obvious corrupt activities is a constitutional licence to drain the economy and impoverish the citizens. Indeed, it is a constitutional contradiction. Experience has shown

⁴⁹CFRN 1999 (as amended), s 308 (1) (a) (b) (c) (2) (3); *Global Excellence Communication Ltd v. Duke* (2007) ALL FWLR (pt 357) 782

⁵⁰*Alliance for Democracy v Fayose* (2004) 8 NWLR (Pt 876) 659

⁵¹CFRN, 1999 (As amended), ss 146 (2) 191 (2)

⁵²*Ibid.* s 308 (3)

⁵³*Tinubu v. IMB Securities Ltd* (2001) FWLR (pt. 77) 1003

⁵⁴*Alameiyeseigha v Teiwa* (2002) FWLR (pt. 46) 574; *Industrial Commercial Services Ltd v. Bolton BV* (2003) 8 NWLR (pt 822) 223; *Akume v. National Party of Nigeria* (1984) 5 NCLR, 494; *Rotimi v. Macgregor* (1974) NSCC 542

⁵⁵*Fawehinmi v. IGP* (2000) FWLR (pt. 12) 2015; *Fawehinmi v. IGP* (2002) FWLR (pt 108) 1386

⁵⁶M. C. Anozie 'The Scope and the Limit of Immunity Clause in Nigeria' (2012) *Journal of Contemporary Law*, (1), 35

⁵⁷*Ibid*; 29

beyond doubt that the immunity provision has been consistently abused and continuously exploited to the detriment of Nigeria and Nigerians. The enormous and fierce powers of the offices of the President, and Governors and perhaps the Vice President and Deputy Governors are sufficient protection to the holders thereof. In case of the President, his executive powers extend to the execution and maintenance of the constitution, all laws made by the National Assembly and to all matters contained in Exclusive Legislative List including some matters in Concurrent Legislative List to the extent to which the National Assembly has powers to make laws thereof.⁵⁸The President is the Commander-in- Chief of the Armed Forces and appoints heads of various security agencies in the country with consequential power to remove any of them. It is a paradox of legality to constitutionally shield public officers in positions of President, Vice President, Governor and Deputy Governor from the scrutiny of the judiciary even when they engage in obvious looting of the state treasury, especially and arguably when the judiciary is not equally shielded from the executive checks.⁵⁹The immunity clause in favour of the Chief Executives of the Federation and the States and their Deputies has been tested but failed and same should be removed from Nigerian laws including the constitution or be limited to their official acts and no more.

5. Conclusion and Recommendations

Leadership failure in Nigeria occasioned largely by financial crime has multiplied poverty, increased the level of unemployment, subjected citizens to frustration and depression which find expressions in youths' restiveness, herders-farmers conflicts, armed robbery, kidnapping, illegal bunkering, cybercrimes, human and drug trafficking, child labour, among others. Given the above, section 308 of the Nigerian constitution has become an engine of fraud, a constitutional contradiction and should be abrogated forthwith or in the alternative, let it be limited immunity which will not cover all acts of corruption, treason, political assassinations or murder etc which are rampant within our system amongst our politicians. We are contending so because these crimes on the state and her people outweigh the reasons for the provision of immunity from prosecution of these fellows while in office. Hence, a President, Vice President, Governor or Deputy Governor who is involved in corrupt enrichment of any kind or murder or treason should be tried immediately and punished as he has the power to cover up his tracks before leaving office. In addition, it is discriminatory against other heads of arms of government to grant head of the Executive immunity while heads of the Judiciary and the Legislature are prone to prosecution for acts committed while in office. It gives the impression that one arm of government is superior to the other two arms of government, which is not the position of the law in modern governments.

In order to take the fight against corruption in Nigeria to the next level, the Office of the Attorney General should be separated from the Office of the Minister of Justice.⁶⁰ The Attorney General should be the Chief Law Officer of the Federation, responsible to the constitution and not subject to any control or direction whatsoever of the President. It is the view of the authors that the holder of the Office of the Attorney General should be appointed by the President subject to confirmation of two- third majority vote of members of House of Representatives of the National Assembly.⁶¹The office should not be subject to the control of the President after appointment. The extant position where the Attorney General who doubles as the Minister of Justice is nominated by the President, confirmed by the Senate and may be removed by the President without legislative participation is a clog to the wheel of fight against corruption in Nigeria. It makes the fight against corruption in Nigeria selective, vindictive and questionable.

The Office of the Attorney General (not the Office of Minister of Justice) should be the Co-ordinating Office for all the ministries so that government transactions may be vetted to ensure their legality before they are debated and approved by the Executive Council. It should be the constitutional preserve of the Attorney General to institute and undertake any criminal prosecution against any person before any court of law in Nigeria except court martial in respect of offences created under any Act of the National Assembly. The Constitution should empower him to take over and continue any such criminal proceedings that may have been instituted by any other authority or person. But the power of the Attorney General to discontinue at any stage before judgment is delivered any such criminal proceedings instituted or undertaken by him or any other authority or person should be subject to cogent and verifiable reason in the interest of the Public. What constitutes 'cogent and verifiable reason in the interest of the public' should be subject to judicial determination in the light of the peculiarity of each case. This is to comply

⁵⁸ *CFRN 1999 (as amended), s 5 (1) (a)*

⁵⁹ G. Tsa, 'As CCT CONVICTS EX-CJN Guilty as Charged' *Daily Sun*, vol. 15, NO. 4170, Friday April 19, 2019, 1 and 4

⁶⁰ The Minister of Justice would be the Chief Legal Officer of his appointor.

⁶¹ It is common in Nigeria that former Governors almost like a political right 'migrate' to the Senate of the National Assembly. Some of the former Governors that were elected to the Senate are: Orji Uzor Kalu, Chimaroke Nnamani, Samuel Ominyi Egwu, Rochas Okorocha, T. A. Orji, George Akume, Godswill Akpabio, Danjuma Goje, Joshua Dariye, Ibikunle Amosun, etc.

with *section 174 (3) of the constitution* which stresses doing so in public interest, rule of law and to avoid abuse of office.

Above all, the Attorney General who is distinct from the Minister of Justice should not only enjoy constitutional immunity from criminal and civil prosecutions over actions, decisions, omissions and pronouncements made in course of his legitimate, lawful and official functions but also be granted financial autonomy. The office should not be tenured rather the holder be made to retire at the age of 70 subject to voluntary resignation or removal on grounds of illness, misconduct, incapacity to discharge the functions of the office. The removal should originate from the National Judicial Council by 2/3 majority resolution of the Council forwarded to the Senate of the National Assembly for investigation and final confirmation by 4/5 majority vote through secret ballot system. It is only when section 308 of the extant constitution is abrogated and an independent, non partisan Office of the Attorney General distinct from the Minister of Justice is created with immunity to the Attorney General from criminal and civil prosecutions that the fight against corruption in Nigeria would begin. At that point, not only that incumbent President, Vice President, Governors, Deputy Governors may be criminally prosecuted; the President would not have legal control over the person and powers of the Chief Law Officer of the Federation. This would alter the current narrative where the Attorney General is a partisan politician of the same political party with the President yet remains at the heart of the fight against corruption in the country.