

THE LEGALITY OF OUSTER CLAUSES UNDER THE NIGERIAN LEGAL SYSTEM: A LESSON FROM INDIA*

Abstract

Ouster clause is any provision of law which excludes the jurisdiction of the courts to question the actions of individuals or public officials and institutions. It precludes an aggrieved person from approaching the courts to either enforce his rights or to ventilate his grievances. Although ouster clauses are clearly inconsistent with the fundamental norms of democracy including rule of law; Nigerian statute books are littered with these vestiges of military rule. This paper examined the legality of ouster clauses under Nigerian legal system and the attitudes of Nigerian courts towards them. The research methodology adopted by the researcher is purely doctrinal, whereas analytical, descriptive and prescriptive approaches were employed. This paper found that ouster clauses in statutes other than the Constitution are void ab initio because the jurisdiction of superior courts cannot be ousted by means of ordinary statutes.¹ As for ouster provisions in the Constitution itself, it is recommended that a teleological approach should be adopted by Nigerian courts like their Indian counterparts in dealing with them to ensure that their application does not defeat the ultimate purpose of the Constitution in a constitutional democracy like Nigeria.

Keywords: Constitution, Court, Jurisdiction, Legislature, National Assembly, Ouster Clause.

1. Introduction

One of the unique features of a constitutional democracy is rule of law, a principle which rests on the tripartite pillars of equality before the law, independent judiciary and citizens' rights.² Thus, in a constitutional democracy, judiciary is not only constitutionally independent, but also citizens are vested with unfettered right of free access to courts to ventilate their grievances either against their fellow citizens or against the state and its officials. Contrary to this distinctive feature of a constitutional democracy, citizens' rights of free access to courts in Nigeria are not holistic as jurisdiction of courts to entertain certain cases in Nigeria is either partially or wholly ousted. This is not only a negation of the maxim: *ubi jus ibi remedium* (where there is right there must be a remedy)³, but has also placed some individuals and institutions above the law by insulating them from judicial oversight. Although the Constitution specifically divested the legislature of the power to enact laws that oust or purport to oust the jurisdiction of the courts, Nigerian statute books are replete with all manner of ouster clauses. The reason for this is not far-fetched: Nigeria just returned to a civilian rule after donkey's years of military government. In fact, most of these statutes, including the 1999 Constitution⁴ itself, are nothing but glorified decrees promulgated to serve the parochial interest of the military elites who were hitherto in the helms of affair in Nigeria. The continued existence of these vestiges of military rule in our *corpus juris* has never ceased to generate heated debate among lawyers, academics and jurists. The National Assembly which is the body primarily charged with the responsibility for weeding out obsolete sections of the Constitution seems to have abdicated this responsibility.⁵ As the guardian of the Constitution, the judiciary should take up the gauntlet and ensure that all the ouster clauses in statutes other than the Constitution are nullified since the neither the National Assembly nor the State Houses of Assembly has the constitutional power to oust the jurisdiction of the superior courts by means of ordinary statutes.⁶ As for the ouster provisions in the Constitution itself, a teleological approach should be adopted by the judiciary in dealing with them to ensure that their application does not constitute a clog on the wheel of justice.

2. The Nature and Scope of Ouster Clause

Ouster clauses may be defined as any provisions of law which seek to exclude the jurisdiction of the courts, either expressly or by implication. They usually foreclose the courts from either scrutinizing the actions of some public officials or questioning the legality of such actions.⁷ The goal of an ouster clause could also be to prohibit the court from determining any issue or question as to the competence of any authority or person to make any law.⁸ Furthermore, ouster clauses may preclude courts from investigating the proceedings of a statutory body.⁹ Also,

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¹ G N Okeke and C E Okeke, 'The Justiciability of the Non-Justiciable Constitutional Policy of Governance in Nigeria', *IOSR Journal of Humanities and Social Science (IOSR - JHSS)*, Volume 7, Issue 6 (Jan. - Feb. 2013), 9-14 at 12.

² Okeke & Okeke (2015). 'An Appraisal of the Functional Necessity of the Immunity Clause in the Political Governance of Nigeria.' *Journal of African Law*, 59(1), 99-120, p. 110.

³ *Umeh v. Iwu* (2007) 6 NWLR (Pt 1030) 416 at 428.

⁴ The Constitution of the Federal Republic of Nigeria (Promulgation) Decree No 24 of 1999.

⁵ The Constitution of the Federal Republic of Nigeria (Promulgation) Act, Cap C23, LFN 2004, s. 9.

⁶ G N Okeke & C E Okeke, above at note 1 at 12.

⁷ Above at note 5, s. 308(1) (a).

⁸ *Ibid.*, s. 6 (6) (d).

⁹ *Ibid.*, ss. 143 (10) and 188 (10).

Ouster clauses may aim at rendering a cause of action or a provision of legislation unenforceable and non-justiciable.¹⁰ They do not only take away the jurisdiction of the court to carry out their constitutional functions, but also preclude the citizenry from approaching the courts to either enforce their rights or seek legal redress for losses and damages suffered by them.¹¹ It is for this reason that ouster clauses are said to be anti-people and inimical to effective administration of justice.¹² They have also been said to be antithetical to democracy, a system of government which thrives on the rule of law.¹³ Ouster clauses could either be absolute or partial. They are absolute when they totally exclude the jurisdiction of the court to adjudicate on a matter, and partial when the exclusion of the jurisdiction of court is for a given period of time or subject to the occurrence of certain events. But for ouster clauses to be operational in Nigerian, they must be specific, directive and give no room for speculation and prevarication.¹⁴ This is so because access to court is a constitutional right which can only be taken away by a clear provision in the Constitution.¹⁵

3. Ouster Provisions in Ordinary Statutes

Section 4(8) of the 1999 Constitution provides as follows:

Save as otherwise provided by this Constitution, the exercise of legislative powers by the National Assembly or by a House of Assembly shall be subject to the jurisdiction of courts of law and of judicial tribunals established by law, and accordingly, the National Assembly or a House of Assembly shall not enact any law, that ousts or purports to oust the jurisdiction of a court of law or of a judicial tribunal established by law.

It is clear from the above provision that the exercise of legislative powers by the National Assembly or by a State House of Assembly is not only subject to judicial review, but that the National Assembly and State Houses of Assembly are not permitted to enact any law that ousts or purports to oust the jurisdiction of a court of law or of a judicial tribunal established by law. Thus, where the National Assembly or a State House of Assembly in violation of the above provision enacts any law that ousts or purports to oust the jurisdiction of court, the courts have the inherent power to have the law or its relevant provisions set aside.¹⁶ The Supreme Court amply captured this when it held *Inakoju v Adeleke*¹⁷ that ‘when ouster clause are provided in [ordinary] statutes, the courts evoke section 6 [of the Constitution] as a barometer to police their constitutionality and constitutionalism.’ The courts have consistently evoked section 4 (8) of the Constitution as a shield against any attempt by the National Assembly to oust or limit their jurisdiction.¹⁸ It is instructive to state that the courts also have the inherent power to nullify any ouster clause in existing laws since existing laws can only exist to the extent they are compatible with the provisions of the Constitutions¹⁹ However, the subjection of the exercise of legislative powers by the National Assembly or State Houses of Assembly to judicial review, as well as the preclusion of the National Assembly or State Houses of Assembly from enacting any law that ousts or purports to oust the jurisdiction of a court is not meant to be absolute since they could do so under certain circumstances. This is, in fact, evident from section 4 (8) of the Constitution itself, which began with the proviso ‘except as otherwise provided by this Constitution.’ This proviso simply means that if the Constitution otherwise provides in another section, the National Assembly or State Houses of Assembly may enact a law that ousts or purports to oust the jurisdiction of a court of law. But this proviso is merely ceremonial since it is not provided anywhere in the Constitution that the National Assembly or State Houses of Assembly could enact such law. The only way the jurisdiction of the superior courts could be ousted by the National Assembly is by the amendment of the Constitution itself pursuant to its section 9 and not through the instrumentality of an ordinary legislation.²⁰

4. Ouster Clauses in the 1999 Constitution the of Federal Republic of Nigeria

The 1999 Constitution of the Federal Republic of Nigeria is awash with ouster clauses even though ouster provisions are very rare under modern democratic constitutions and this is not unconnected with its military origin. It shall be recalled that what is now known as 1999 Constitution is a mere schedule to Decree No. 24 of 1999.²¹

¹⁰*Ibid.*, s. 6 (6) (c).

¹¹*Ibid.*, s. 215 (5).

¹² MC Okany ‘The continuation of ouster clause in Nigerian law after 1999: A beneficial wrongdoing’ in MC Ajanwachukwu (ed) *Contemporary Legal Thoughts: Essay in Honour of Chief Jossy Chibundu Eze* (Izu Print, 2008) 318-344 at 320.

¹³ *Inakoju v. Adeleke* (2007) 4 NWLR (Pt. 1025) 427 at 597.

¹⁴ *Stowe v Stowe* (2000) FWLR (Pt. 24)1424 at 1434.

¹⁵ *Global Excellence Comm. Ltd v. Duke* (2007) 16 NWLR (1059)22 at 48.

¹⁶ *AG Abia vs AG Federation* (2006) 10-11 SCM 1 at 66.

¹⁷ Above at note 13 at 597.

¹⁸ *Jimoh vs. Olawoye* (2003)10 NWLR (Pt.828) 307.

¹⁹ C.E. Okeke & M.I. Anushiem, “Appellate Jurisdiction of the Supreme Court of Nigeria over Decision of Appeal Committee of Body of Benchers: An Appraisal”, *AJCAL 1* (2017), 20-36 at 25.

²⁰ G N Okeke & C E Okeke, above at note 1, P. 12.

²¹ Above at note 4.

According to section 1(1) of this Decree, ‘There shall be for Nigeria a Constitution which shall be as set out in the Schedule to the Decree.’ In a bid to cover up this fact, section 1(3) of the Decree provides that ‘whenever it may hereafter be necessary for the Constitution to be printed, it shall be lawful for the Federal Government Printer to Omit all parts of this Decree apart from the Schedule and the Constitution as so printed shall have the force of law notwithstanding the omission.’ So, the fact that 1999 Constitution is chequered with ouster clauses is not surprising in view of its military background. What is rather surprising is that 20 years after the military foisted this so-called Constitution on Nigeria as their parting gift, the same has not been thrown overboard by the National Assembly. Even though ouster clauses are generally regarded as antithesis to democracy and unfriendly to the judicial system, the courts are usually helpless when the Constitution itself provides for ouster clauses.²² Nigerian courts have however devised many ways of bypassing most of these ouster clauses in the Constitution or, at least, ways of reducing the harshness of their application. In this section, we shall examine various ouster provisions in the 1999 Constitution and the attitudes of Nigerian courts towards them.

Questions Relating to Fundamental Objectives and Directive Principles of State Policy

The Chapter II of the 1999 Constitution which embodies 12 sections is styled ‘Fundamental Objectives and Directive Principles of the State policy.’ The Fundamental Objective identify the ultimate objectives of the Nation, while the Directive Principles lay down the policies which are expected to be pursued in the efforts of the Nation to realize the national ideals.²³ Section 13, the first section under the said Chapter II of the Constitution, makes it the duty and responsibility of all organs of government, and of all authorities and persons, exercising legislative, executive or judicial powers, to conform to, observe and apply the provisions of Chapter II of the Constitution. But, section 6 (6) (c) of the Constitution makes it clear that no court has jurisdiction to enforce any provision of the said Chapter II. For emphasis the said section 6 (6) (c) provides as follows:

The judicial powers vested in accordance with the foregoing provisions of this section shall not, except as otherwise provided by this constitution, extend to any issue or question as to whether any act or omission by any authority or person as to whether any law or any judicial decision is in conformity with the Fundamental Objectives and Directive Principles of State Policy set out in Chapter 11 of this constitution.

It is evident from the above section that even though section 13 of the Constitution purports to obligate all organs of government to comply with Chapter II of the Constitution, the power of Nigerian Courts to compel them to comply with those provisions is expressly ousted by section 6 (6) (c) of the constitution.²⁴ However, Chapter II of the Constitution may become justiciable under certain circumstances, and this is evident on the face of section 6 (6) (c) of the Constitution itself, which began with the proviso ‘except as otherwise provided by this Constitution.’ What this means is that if the Constitution otherwise provides in another section, the provisions of Chapter II shall become justiciable.²⁵ Thus, the provisions of Chapter II of the Constitution shall automatically become justiciable where the Constitution otherwise incorporated them in any justiciable section of the Constitution like section 147 (3) of the Constitution that mandates the President to conform with federal character principle while appointing his Ministers. Chapter II of the Constitution shall also become justiciable where the Constitution empowers the National Assembly to implement the provisions of the Chapter II of the Constitution through an ordinary legislation. A case in point is item 60 (a) of the Exclusive Legislative List²⁶ which empowers the National Assembly to make laws to promote and enforce the observance of the Fundamental Objectives and Directive Principle contained in the Constitution. An example of such law is the Federal Character Commission Act²⁷ which empowers the Federal Character Commission to promote and enforce the observance of the Federal Character principle.²⁸

Questions relating to the Competence of the makers of the Existing Laws

The bulk of the laws in force in Nigeria including the 1999 Constitution itself were Decrees and Edicts promulgated during the heydays of military regime. Most of these military regimes came about as a result of *coup d'état*. Under international law, successful *coup d'état* is a lawful procedure by which national legal order can be changed²⁹, but under municipal law, *coup d'état* is a very serious offence against the state.³⁰ The fear that the competence of the military officials to promulgate these Decrees and Edicts may be questioned at the dawn of civilian rule always

²² Above at note 13 at 597.

²³ *Archbishop Anthony Okogie v. AG Lagos State* (1981) 2 NCLR 337 at 351.

²⁴ *Ibid.*, at 350

²⁵ *Federal Republic of Nigeria V. Aneche & 3 ors., In Re Olafisoye*(2004) 1SCM, 36.

²⁶ Part 1, Second Schedule to the 1999 Constitution.

²⁷ Cap. F7, LFN 2004.

²⁸ C E Okeke, ‘Enforcement and Implementation of the Federal Character Principle in Nigeria’, *NAUJILJ* 10 (2) 2019, 174-185 at 179.

²⁹ H Kelsen, *General Theory of Law and State* (Lawbook Exchange Ltd., 1945), 221.

³⁰ Criminal Code Act, Cap C38, LFN 2004, S. 41.

weighed on the valedicting military regime. This is so because the competence of the lawmakers invariably affects the laws made by them irrespective of their utility because you cannot place something on nothing and expect it to stand.³¹ In a bid to regularize their actions and protect these Decrees and Edicts, successive departing military regimes always inserted a clause in the Constitution ousting the jurisdiction of the court to question their competence to make these Decrees and Edicts, which respectively metamorphosed into Acts and Laws at the dawn of the Fourth Republic.³² This ouster clause is embodied in section 6(6)(d) of the Constitution which provides that the judicial powers vested to the courts: '[S]hall not, as from the date when this section comes into force, extend to any action or proceedings relating to any existing law made on or after 15th January, 1966 for determining any issue or question as to the competence of any authority or person to make any such law'.

The above provision merely ousts the jurisdiction of the court to question the competence of makers of the existing laws. In other words, the provision only protects the competence of the makers of those existing laws and not the existing laws themselves which are protected by another section, *to wit*, section 315(1) of the Constitution. Under this section, existing laws can only exist to the extent they are compatible with the provisions of the Constitution³³ and the courts has inherent powers to nullify or invalidate any provision of an existing law which is inconsistent with the provisions of the Constitution.³⁴ This point was succinctly made by the Supreme Court in the case of *Uwaifo vs. Att.- Gen., Bendel State*³⁵, where Idigbe, JSC, stated thus: 'It seems to me that while the Constitution empowers the court to inquire into validity of any existing law, it clearly intends that the court should not inquire into proceedings which seeks to determine issues or questions as to the competence of any authority or person ... to make any existing law.' A similar pronouncement was made in the case of *Nangibo v. Okafor*.³⁶

Questions Relating to Impeachment Proceedings

Impeachment, a catchword among Nigeria politicians, means the removal of elected public officials like the President, Vice-President, Governors or Deputy-Governors, from office by the relevant legislative Assembly. The process of removing such elected public officials from office by impeachment is called *impeachment proceeding*. While section 143 (1) – (9) laid down the procedure for the impeachment of the President and Vice-President, section 188 (1)-(9) make elaborate provisions for the impeachment of the Governors and Deputy-Governors. Our discussion will however focus more on the latter because no impeachment proceeding against the President or the Vice-President had taken place since Nigeria adopted presidential system of government in 1979. Over the years, the State Houses of Assembly take pleasure in impeaching the Governors and Deputy-Governors especially the latter. More often than not these impeachments are done without due regard to the relevant provisions of the Constitution. The reason for this is not farfetched: the framers of the Constitution viewed impeachment proceedings as political questions which can only be resolved politically without judicial intervention.³⁷ Thus, according to Imam et al, 'it would seem from the provisions of the 1979 (now 1999) Constitution that vested the power of impeachment in the legislature that it was meant to be a purely political matter designed to be decided politically.' In fact, section 188 (10) of the Constitution specifically ousts the jurisdiction of the courts to entertain any question relating to impeachment proceeding for the same reason. According to this section 'no proceedings or determination of the Panel or of the House of Assembly or any matter relating to such proceedings or determination shall be entertained or questioned in any court'.

Until recently, Nigerian courts had always treated issues relating to impeachment of elected public officials as political questions in line with the tenor of above provision which is *in pari materia* with section 170(10) of the defunct 1979 Constitution. This provision used to be a magic potion that heals all the ills of impeachment proceedings. Thus, in the case of *Balarabe Musa v Auta Hamzat*³⁸ decided by Court of Appeal, the appellant, the then Governor of Kaduna State, had approached the Court of Appeal to challenge the refusal of the High Court of Kaduna State to stay proceedings of the Penal established by the Kaduna State House of Assembly as part of his impeachment proceedings. Relying on the said section 170 (10) that ousted the jurisdiction of the courts to adjudicate on any issues relating to impeachment proceedings, the Court held that the matter was a political matter within the competence of the legislature. This position was also followed by the Court of Appeal in the case of *Abaribe v. The Speaker Abia State House of Assembly*³⁹ and a number of other cases.

³¹ *U.A.C Vs. Macfoy* (1961) 3 ALL E.R 1169,

³² Above at note 5, s. 315(1).

³³ C.E. Okeke & M.I. Anushiem, above at note 19 at 25.

³⁴ *J.S. Olawoyin vs. Commissioner of Police*, (1961) 1 All N.L.R. (Part 2) 203.

³⁵ (1982) 7 SC 124. See also *Ikine v Edjerode* (2002) FWLR (Pt. 92) 1775 at 1799.

³⁶ (2003) F.W.L.R. (Pt.171) 1529 at 1542.

³⁷ Imam and others, 'Judicial Activism and Intervention in the Doctrine of Political Questions in Nigeria: An Analytical Exposition', *African Journal of Law and Criminology*, Vol. 1 Number 2 (2011), 50-69 at 61.

³⁸ (1982) 3 SCNLR 229.

³⁹ (2003) 14 NWLR (pt 788) 466.

It is satisfying to note that *Balarabe Musa case* and *Abaribe case* and other cases decided along that line are no longer good authorities on the issue of impeachment in Nigeria. This is because Nigerian courts had long turned their back against those cases. This is evident from successive cases decided by various superior courts in Nigeria including the Supreme Court starting from the case of *Inajoku v. Adeleke*.⁴⁰ This suit was commenced by originating summons at the Oyo State High Court by the then Speaker and Deputy-Speaker of Oyo State House of Assembly challenging the removal of the then Governor of Oyo State, Senator Rashidi Ladoja, from office by a faction of Oyo State House of Assembly. The crux of the argument of the plaintiff was that the conditions laid down under section 188 (1) – (9) of the Constitution was not followed during the impeachment proceeding. The defendants responded by filing a preliminary objection challenging the jurisdiction of the court to entertain the suit. In its ruling on the preliminary objection, the trial court held that by virtue of section 188(10) of the 1999 Constitution, the court had no jurisdiction to inquire into the removal of Senator Rashidi Ladoja from office as the Governor of Oyo State and accordingly dismissed the suit. Not satisfied with the ruling of the court, the plaintiff appealed to the Court of Appeal. It was at this point that the Senator Rashidi Ladoja applied and was joined as the 3rd appellant in the suit. In its judgment after hearing the appeal, the Court of Appeal overturned the decision of the High Court, and held that the trial court had jurisdiction to inquire into the matter. Instead of sending the suit back to the High Court for trial on the merit, the Court of Appeal relied on section 16 of its Rules and granted all the reliefs sought by the plaintiffs. Aggrieved with the decision of the Court of Appeal, the appellants appealed to the Supreme Court. While dismissing the appeal, the Supreme Court held that it is only when the conditions laid down in sub-section 1-9 of section 188 are religiously fulfilled that sub-section 10 could come to play.⁴¹ This innovative decision has not only untied the hands of the courts that were hitherto tied by law and practice, but has also opened a floodgate of judicial activism in Nigerian administrative law as regards impeachment of elected public officials.⁴²

Questions Relating to Directives Issued to the Inspector General of Police by the President

Nigeria Police Force is the body constitutionally charged with the responsibility for the maintenance of internal security in Nigeria, and it is directly under the command of the Inspector-General of Police.⁴³ But the Inspector-General of Police is subject to the authority of the President who is the Commander-in-Chief of Nigerian armed forces and the Chief Security of the Federation.⁴⁴ In this connection, section 215 (3) of the Constitution provides that the President or such other Minister of the Government of the Federation as he may authorise in that behalf 'may give to the Inspector-General of Police such lawful directions with respect to the maintenance and securing of public safety and public order as he may consider necessary, and the Inspector-General of Police SHALL comply with those direction or cause them to be complied with'. [Emphasis mine]⁴⁵ The use of the word 'shall' in the above provision indicates that the duty of the inspector general of police or his subordinates to comply with such directions is mandatory.⁴⁶ Although it is clear from the above provision that such direction, informally termed 'Order from Above', shall be 'lawful', in practice once such direction is given, the police cowardly complies with them even when they are manifestly unlawful. The reason for this is not farfetched: section 215 (5) of the Constitution provides that '[t]he question whether any, and if so what, directions have been given under this section shall not be inquired into in any court.' This provision clearly ousts the jurisdiction of the court to entertain any question bordering on the existence or legality of such directions. Unlike other ouster provisions in the Constitution, the application and scope of the instant ouster provision is yet to be put into perspective because it has not been subjected to close judicial scrutiny. A unique opportunity the Supreme Court had to put the application of this provision into perspective in the Case of *A.G. Anambra v A.G. Federation*⁴⁷ was lost. This suit was brought pursuant to the original jurisdiction of the Supreme Court by Attorney-General of Anambra State against Attorney-General of the Federation and 35 Attorneys-General of other States claiming, among other things, for a declaration that the Inspector-General of Police acting on the direction of the President has no constitutional right to withdraw Police Security Details attached to the then Governor of Anambra State.⁴⁸ In its judgment, the Supreme Court per Oguntade Onu, JSC, held as follows: 'It is explicit from an examination of section 215(5) of the 1999 Constitution reproduced above that this Court and indeed any court in the land MAY not look into the question whether any, and if so what directions have been given pursuant to section 215 (4) above.'⁴⁹

⁴⁰ (2007) 4NWLR (Pt.1025) 427.

⁴¹ *Ibid.*, at 61.

⁴² *Dapialong v Dariye* (2007) 8NWLR (Pt1036)289.

⁴³ Above at note 5, s. 215 (2).

⁴⁴ *Ibid.*, s.130 (2).

⁴⁵ A similar provision is contained in section 215 (4) of the Constitution with respect to the State Commissioners of Police.

⁴⁶ *Onochie v. Odogwu* (2006) 6 NWLR (Pt.975) 65.

⁴⁷ (2005) 5 SCM 1.

⁴⁸ *Ibid.*, at 48.

⁴⁹ *Ibid.*, at 55.

It is evident from the above pronouncement that the question of whether the Inspector-General of Police acting on the direction of the President has the constitutional right to withdraw Police Security Details from the Governor of a State was not answered by the Supreme Court, the court merely hid under section 215 (5) that purports to oust the jurisdiction of the court to evade the question and this is not good for Nigerian jurisprudence. As the court of last resort under Nigerian Judicature, the Supreme Court is a policy-making court,⁵⁰ and as such it ought to have seized the opportunity to resolve the unresolved questions surrounding the scope of the ouster provision of 215 (5). It is hoped that the Supreme Court will do the needful when another opportunity come its way not only because this provision is subject to persistent abuse by the President and the Nigerian Police Force, but because the same has become the engine of lawless and high-handedness in Nigeria body polity. It is suggested that in the exercise of its preliminary jurisdiction to determine whether or not it has jurisdiction to adjudicate on such matter, the courts should first determine whether the direction in question is lawful or not. Where the direction is unlawful the court should declare the same illegal and hold the relevant police officer accountable since under section 215 (3) and (4) he is bound to carry out only lawful directions.⁵¹

Questions relating to Officials Protected by Immunity Clause

Section 308 (1) of the Constitution provides as follows: ‘Notwithstanding anything to the contrary in this Constitution, but subject to subsection (2) of this section- (a) No civil or criminal proceeding shall be instituted or continued against a person to whom this section applies during his period of office’. It is clear that the person to whom the above provision applies, *to wit*, President or Vice-President, Governor or Deputy Governor is constitutionally immune⁴ from both civil and criminal proceedings.⁵² Also such person cannot be arrested, imprisoned or summoned by any court while his immunity subsists. However, a civil suit may be instituted against him in his official capacity⁵³, and he may also be made a nominal party in civil or criminal suits.⁵⁴ Also the immunity conferred on the President or Vice-President, Governor or Deputy Governor is not in perpetuity but only for the time when they hold such office.⁵⁵ Thus, ex-Governors and ex-Presidents or their Deputies can be prosecuted whenever they ceased to hold such offices.⁵⁶ For example, the erstwhile Governors of Plateau State, Taraba State and Abia State were tried, convicted and sentenced to various jail terms for offences they committed while they were enjoying immunity. In determining whether such actions have become statute barred, recourse shall not be had to the period when they enjoyed immunity.⁵⁷ By introducing the said section 308(1) with the phrase ‘notwithstanding anything to the contrary in this Constitution’ it is clear that the framers of the Constitution intended section 308 of the Constitution to be absolute and exclusive.⁵⁸

Apart from the exceptions on the face of section 308 of the Constitution as discussed above, there are other exceptions which are founded on case law. One of such exceptions is a pre-election matter. Thus, notwithstanding that every suit pending against the holders of such offices shall not be continued against them, any pre-election matter pending against them before any court shall nonetheless be continued.⁵⁹ Similarly, election petitions challenging the elections that brought them into office could be instituted against them at the relevant Election Tribunals.⁶⁰ Finally, while an action could not be instituted against the holders of such office, they are at liberty to institute an action against any person who infringed on their rights because the Constitution does not prohibit them from doing so.⁶¹ But the defendant in such suit could counterclaim them notwithstanding their immunity,⁶² even though a counterclaim is deemed to be an independent action.⁶³

No ouster provision in the 1999 Constitution has generated as much controversy as the immunity clause. While many have described it as the engine that powers executive recklessness and official corruption in Nigeria, others viewed it as a ‘necessary evil’ aimed at preventing the possible intimidation and harassment of the state Chief Executives by the federal government through the instrumentality of state security outfits. This latter position

⁵⁰ It is a policy-making court because its decisions form part of the laws of the country.

⁵¹ *Hurley v. Minister of Law* (1985) 4 S.A. 709 (D).

⁵² Above at note 5, s.308(3).

⁵³ *Ibid.*s.308(2).

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*, s.308(3).

⁵⁶C A Oloyede and A Bamboye, “Fraud: Kalu joins, Nyame in Prison”, *Daily Trust* (Lagos 6 Dec 2019) <<https://www.dailytrust.com.ng/fraud-kalu-joins-dariye-nyame-in-prison.html>> accessed 3 March 2020.

⁵⁷ Above at note 5, the proviso to s. 308 (1).

⁵⁸ *Global Excellence Comm. Ltd v. Duke* (2007) 16 NWLR (1059) 22 at 40.

⁵⁹ *Ameachi v. I.N.E.C* (2008) 5 NWLR (Pt. 1080) 227 at 365.

⁶⁰ *Agagu v Esanmore* (2008) LPELR-CA/A/122/07 at 26.

⁶¹ *Tinubu v. I.M.B. Securities Plc* (2001) 16 NWLR (Pt. 740) 670.

⁶² G N Okeke & C E Okeke, above at note 2 at 1.

⁶³ *Esoho vs. Asuquo* (2007) All FWLR (Pt.359)1355.

received a boost recently when an amendment bill seeking to extend immunity to the principal officers of the federal and state legislatures was laid before the floor of the House of Representatives.⁶⁴ The rationale behind this bill which has passed for Second Reading in the House of Representatives may not be unconnected with the humiliation of the principal officers of the 8th National Assembly by the Presidency. It shall be recalled that all manner of trump up charges were filed against the presiding officers of the 8th National Assembly merely for disagreeing with the Presidency.⁶⁵ While some of these charges were withdrawn *suo motu*⁶⁶ by the Prosecution upon public outcries, others were dismissed by the courts upon defendant's plea of no case submission.⁶⁷

5. Ouster Clauses and Nigerian Courts: A Lesson from Indian Courts

Nigeria and India are common law countries and as such there are many commonalities in their legal systems. These commonalities are more obvious in their constitutionalism and judicature. Like Nigeria Constitution, Indian constitution which establishes their superior courts of record contains some ouster clauses. The attitudes of Indian courts towards these ouster clauses are so unique that Nigerian courts are by this paper called upon to borrow a leaf from their Indian counterparts. This particularly true of the attitudes of Indian courts towards Part IV of 1950 Constitution of India styled 'Directive Principles of State Policy' which is *in pari materia* with 'Fundamental Objectives and Directive Principles of State Policy' of Chapter II of 1999 Constitution of Nigeria. Like Nigeria's Fundamental Objectives and Directive Principles of State Policy, which are rendered nonjusticiable by section 6 (6) (c) of the Constitution, India's Directive Principles of State Policy are rendered unenforceable by section 37 of the Indian Constitution which, among other things, provides that 'the provisions contained in this Part [of the Constitution] shall not be enforceable by any court.'

Over the years, Nigerian courts have continued to shy away from determining any question relating to Fundamental Objectives and Directive Principles of State Policy owing to the ousting of their jurisdiction by section 6 (6) (c) of the Constitution, whereas their Indian Counterparts have become more innovative and progressive in dealing with their own Directive Principles of State Policy as exemplified in the case of *Olga Tellis v. Bombay Municipal Corporation & ors.*⁶⁸ In this case, some pavement dwellers petitioned the Supreme Court to determine whether their forceful eviction and demolition of their dwelling pavement, which affected their means of livelihood, did not amount to violation of their rights to life under section 21 of Indian Constitution. The Court held that demolition of their dwelling pavement will affect their livelihood and that right to life includes right to livelihood. Also, in a more recent case of *Ahmedabad Municipal Corporation v. Nawab Khan Gulab Khan*,⁶⁹ the Supreme Court held that the State has the constitutional duty to provide adequate facilities to these pavement dwellers to make life meaningful to them. These decisions and a host of other decisions have clearly established the inseparability of Fundamental rights and Directive Principles of State Policy in India. In fact, in the case of *Francis Mullin v The Administrator, Union Territory of Delhi*⁷⁰, the Indian Supreme Court, specifically stated as follows: 'The right to life includes the right to live with human dignity and all that goes with it, namely, the bare necessities of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing oneself in diverse forms.' There are well over 20 cases in which Indian Courts have rendered various aspects of Part IV of Indian Constitution justiciable notwithstanding its non-justiciable character,⁷¹ and Nigerian courts should borrow a leaf from them.

Also, Nigerian Courts have a whole lot to learn from Indian Courts in dealing with legislation ousting the jurisdiction of the court. The current practice in both jurisdictions is that any legislation enacted by the legislature that ousts or purports to oust the jurisdiction of the court shall be nullified by the court. However, while the jurisdiction of the court could be validly ousted by the legislature via constitutional amendment, the reverse is the case in India. This is so because judicial review is viewed by Indian courts as part of the 'basic structure' of the Constitution which can never be taken away even by amendment of the Constitution. Thus, in the landmark case

⁶⁴ L Baiyewu, 'Immunity for National Assembly principal officers, others divides Reps', *Punch* (Lagos 26 Feb. 2020) <<https://punchng.com/immunity-for-nassembly-principal-officers-others-divides-reps/>> accessed 3 March 2020.

⁶⁵ J Onyekwere, 'Discordant tunes over withdrawal of charges against Saraki, Ekweremadu', *The Guardian* (Lagos 11 October 2016) <<https://guardian.ng/features/discordant-tunes-over-withdrawal-of-charges-against-saraki-ekweremadu/>> accessed 3 March 2020.

⁶⁶ *Ibid.*

⁶⁷ T Omilana *et al.*, 'Court dismisses Saraki's false assets declaration charges', *The Guardian* (Lagos) 06 July 2018, <<https://guardian.ng/news/court-dismisses-sarakis-cct-trial/>> accessed 3 March 2020.

⁶⁸ (2007) CHR 236, (1987) LRC (Const.) 351.

⁶⁹ (1997) 11 SCC 123 at 133.

⁷⁰ (1981) 2 SCR 516.

⁷¹ 'Justiciability of ESC Rights—the Indian Experience',

<<http://hrlibrary.umn.edu/edumat/IHRIP/circle/justiciability.htm#26t>> accessed 3 March 2020.

of *Minerva Mills v. Union of India*⁷² the Indian Supreme Court nullified sections 4 and 5 of the Constitution (Forty-Second Amendment) Act, 1975 which purportedly reduced the power of the Courts to pronounce upon the constitutional validity of certain laws. According to the Court:

The power of the judicial review is an integral part of our constitutional system and without it, there will be no government of law and rule of law will become a teasing illusion and a promise of unreality. If there is one feature of our Constitution which, more than any other, is basic and fundamental to the maintenance of democracy and the rule of law, it is the power of judicial review and it is unquestionably a part of the basic structure of the Constitution... hence the power of judicial review may not be abrogated either by the ordinary process of legislation or through the procedure of constitutional amendment.⁷³

The above decision did not only represent the height of judicial activism among Indian judicial officers, but also demonstrated their determination to defend their constitutional system and democracy at all cost. Their Nigerian counterparts would have folded their hands in despair in such situation and declare ‘judicial hands off’ on the ground that constitutional amendment is the prerogative of the legislature in which the judiciary cannot interfere. Nigerian judicial officers should, therefore, learn from their Indian counterparts to resist every legislative or executive attempt to destroy Nigerian constitutional system and democracy under the guise of constitutional amendment by ousting the power of judicial review.

6. Conclusion

Nigeria is a constitutional democracy, yet its statute books are inundated with ouster clauses, which do not only suspend the jurisdiction of the courts but also bar citizens from approaching the courts to enforce their rights or ventilate their grievances. These ouster clauses in Nigerian *corpus juris* are the vestiges of the military rule which need to be expunged from Nigerian statute books. This task has been utterly abandoned by the National Assembly and State Houses of Assembly as the bodies primarily charged with the responsibility for reforming and amending Nigerian legislations.⁷⁴ This has placed enormous responsibility on the courts which always mobilize their inherent powers to liberate themselves from the shackles of these ouster clauses. Dealing with ouster clauses in ordinary statutes does not always pose serious challenges to the courts because such provisions are *ab initio* void since neither the National Assembly nor any State House of Assembly has the constitutional competence to oust the jurisdiction of any court established by law.⁷⁵ The duty of the courts in such cases is to declare offensive provision null and void, and Nigerian courts have been very generous in doing so.⁷⁶ However, dealing with ouster provisions in the Constitution itself has always posed serious challenges to Nigerian courts. More often than not Nigerian Courts have always abdicated their roles on the ground that the courts themselves are subject to the supremacy of the constitutions especially in dealing with question bordering on Chapter II of the constitution which is non-justiciable. It is recommended that Nigerian courts should borrow a leaf from India whose courts have devised means to make Part IV of Indian Constitution which is *in pari materia* with Chapter II of Nigerian Constitution justiciable notwithstanding its non-justiciable status.

⁷² (1980) 3 SCC 625.

⁷³ *Ibid.*

⁷⁴ Above at note 5, s.9.

⁷⁵ *Ibid.*, s.4(8)

⁷⁶ Above at note 23.