

CONSTITUTIONAL IMMUNITY CLAUSE IN NIGERIA: A CLOG ON THE WHEEL OF THE FIGHT AGAINST CORRUPTION*

Abstract

Section 308 of the 1999 Constitution of the Federal Republic of Nigeria (As Amended) provides immunity for the following offices, President or Vice President, Governor or Deputy Governor. It means that no civil or criminal proceedings shall be instituted or continued against a person to whom this section applied during his period of office. The concept of immunity stemmed from sovereign or State Immunity. This is the ability of a state to invoke immunity from the jurisdiction of a court of another state in circumstances where the courts of that other state would have otherwise been vested with jurisdiction on the subject matter. Immunity clause is therefore entrenched into our constitution by the British, our colonial Masters. Clog on the other hand is whatever impedes movement and acts as an obstacles for success. This paper therefore contends that Immunity clause as entrenched in the 1999 constitution of Federal Republic of Nigeria is an obstacle in the effort to rid a nation of corruption. This work will compare immunity clause in the United States of America (USA), in United Kingdom (UK) with what obtains in Nigeria. The research methods to be employed will include; doctrinal, expository historical, comparative etc. This article discusses the immunity clause and its sphere, extent, and limit as it relates to the officers protected. It concludes that by stating that it is not expedient to retain immunity clause in our Constitution because of abuse and exploitation by the offices protected which has caused monumental corruption, The writer is of the view that our leaders (i.e. those protected) are not yet mature for such privilege therefore should be brought to book whenever there is an abuse. This will enable them to be careful when in office.

Keywords: Constitution, Immunity Clause, Fight against Corruption, Nigeria

1. Introduction

Immunity is exemption as from serving in an office or performing duties which the law generally requires other citizens to perform e.g. exemption from paying taxes. It is freedom or exemption from penalty, burden, or duty¹. It can also be referred to as special privilege. It is ability to be protected or exempt from something². Diplomatic immunity means the ability to be shielded from persecution³ which ordinarily the person would have suffered. Immunity is further defined by classifying it as absolute, congressional, constitutional, diplomatic, discretionary etc⁴. Section 308 of the 1999 constitution of the Federal Republic of Nigeria (As Amended), popularly called immunity clause, confers immunity from legal proceedings on certain political office holders⁵. The political offices of President include a person holding the offices of President or Vice President, and Governor or Deputy Governor. The origin of this class of immunity dates back to the era of absolute monarchs, when it was believed that a king could do no wrong hence the term 'sovereign immunity'⁶. The purpose of immunity clause is to provide the incumbent free hand and mind to perform the duties and responsibilities of his office without distraction from litigation. However, this does not prevent criminal investigation while in office. The immunity is basically for the protection of the dignity of the office and for the individual office holder. Consequently, where a civil or criminal proceeding was instituted against and person before he/she became President, Vice President, Governor or Deputy Governor the action will abate automatically.

Nevertheless, I humbly disagree with the reason for the inclusion of immunity clause in our constitution. This is because we do not seem to understand that those offices are meant to serve the masses and not to exploit them. We are not therefore mature to enjoy such privileges. This is because those in such protected offices have greatly

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¹ Black's Law Dictionary 6th Edition (St. Paul Minn. West Publicizing 60 USA, 1990) P. 751.

² Oxford Advanced Learner's Dictionary Edition (Oxford University Press, 1994) 62 just defined immunity as freedom or exemption from legal proceedings.

³ *Ibid.*

⁴ Black Law Dictionary, 8th Edition (Thoins on West USA 2004) p. 438.

⁵ 1999 constitution of the Federal Republic of Nigeria cap C23 Laws of Federation 2004.

⁶ This is provided for in S. 267 of the 1999 constitution and S. 161 of the 1963 constitution.

indulged in massive and monumental corruption which has plunged the whole nation into poverty. Consequently, if those who enjoy such elevated offices are charged to court once they violate any law, they will be very careful while in office and people will come to realize that only those of good character will want to occupy those offices and will be ready to account to the masses who elected them in such offices.

2. Conceptual Clarification

Corruption

Corruption is an act with intent to give some advantage inconsistent with official duty and the rights of others. The act of an official or judiciary person who unlawfully and wrongfully uses his station or character to procure some benefit for himself or for another person, contrary to duty and rights of other⁷. It is synonymous with bribe. Corruption is derived from the Latin word *corruptus* meaning to break or destroy⁸. It means literally to break away, destroy or depart from morality, sound ethics, tradition and civic virtues, law and religion. In practice, corruption is any form of unethical, dishonest or illegal conduct by a person in authority, mostly for private gain⁹. The United States vision 2010 committee defined corruption as all those improper actions or transaction carried at changing the normal course of events, judgments and positive of trust¹⁰. The Committee further listed sixteen forms in which corruption manifest its itself in Nigeria. These include; advance fee fraud (also known as 419), bribery, extortion, nepotism, favoritism, inflation of contract, falsification of accounts, smuggling and racketeering, money laundering, hoarding, adulteration of market goods and denting of measures to reduce their contents, with a view to giving advantage to the vendor, abuse of office, foreign exchange swindling and drug trafficking, heinous economic crimes against the state (most of the time in collusion with multinational companies and foreigners, examination malpractices and election malpractices¹¹

Corruption compasses any act undertaken with the deliberate intent of deriving or extracting monetary or other benefits by encouraging or convincing in an illegal activity¹². The benefits of corruption may also be obtained by harassing innocent people through the abuse of power or authority or authority acquired by an explicit or implicit contract with another party or through solemn promise to act in good faith¹³. It is degeneration in rules and norms of official conduct brought about by the permeating of selfish and unethical consideration, in taking decision by a person in authority knowing that such decision contravene the rules guiding the behavior of a person in such position¹⁴. On the whole, corruption is a departure from morality, ethics, traditions, laws, civic virtues and normal duties for private or status gains¹⁵. In sum, corruption is the abuse of office, abuse of due process for personal or selfish interest as against the common good. It is often heralded by financial or non-financial inducement. Corruption has pervaded every aspect of Nigeria life from the mundane to the sublime¹⁶. It is has become systematic and a way of life of many public servants in Nigeria, corruption has increasingly become a central issue in election campaigns and military interventions in the polity¹⁷. This thing called corruption goes with the effect of exacerbating poverty and is responsible for under-development, increase in the cost of goods and services, the production of substandard goods and services and the gradual destruction of the society. Corruption makes the cost of doing business extremely high.

⁷ Black's Law Dictionary 6th Edition (St. Paul Mann. West Publishing Co USA 1990) P. 345.

⁸ Black's Law Dictionary, 8th Edition (Thoina on West USA), 2004.

⁹ Daniel Kaufmann and Pedro C. Vicente, *Legal Corruption* (World Bank Publication), 2005

¹⁰ Report of the committee on homeland security and Governmental Affairs United States senate to accompany 3 3243 http://www.congress.gov/III/crpt/aopt_338/CRPF-III_SRPT_338.PDF.

¹¹ *Ibid.*

¹² D. Kaufmann and Pedro C. Vicente (n.9) 5-7

¹³ Sesan fabamize, constitutional Immunity clause and the fight against corruption in Nigeria, *Afe Babalola University Journal of sustainable Development, Laws and Policy* vol 3:2 247 p, 156.

¹⁴ S. Igbenedion, workability of the Norms of Transparency and Accountability Against corruption in Nigeria' (2014) 3.

¹⁵ *Op.cit* (no. 13)

¹⁶ N. Ikpeze 'Fusion of Anti-corruption Agencies in Nigeria: A Critical Appraisal' (2013)(1) *Afe Babalola University. Journal of Sustainable Development Law and Policy* 148-150, Creshani sykes and David Malzo, cited in Obe N.I. Ebbe, Political corruption in Africa', in Rick Sarre et al (eds) *Policing Corruption: International Perspective* (Lexington Books 2005) p. 105.

¹⁷ Check corruption perception index (p1) of the transparency interaction for the ranking of Nigeria

Clog

This means anything that impeded motion, as a block attached to an animal or a vehicle. It is an encumbrance, hindrance¹⁸. It is an encumbrance to impede movement¹⁹. Clog is defined as to obstruct or become obstructed with thick and sticky matter. It is something that impedes motion or action. It is also hindrance²⁰ Nigeria underdevelopment, despite the abundance of human and material resources, is because of the corruption that has pervaded the firmament of governance for many decades. Indeed a finance Minister of Britain recently described Nigeria as fantastically corrupt²¹. Though the government is making a lot of noise about fighting corruption but you can see that in all they don't seem to be serious. Even the most corrupt and dangerously corrupt Nigerians once they identify with government they are immediately exonerated. Also the government fighting corruption is not free from it, remember, 'He who comes to equity must come with clean hands'. Therefore one cannot fight corruption when one is soaked in corruption. It is all pretenses in Nigeria. According to transparency international, Nigeria is ranked four in the world corruption index 2019²²

2. Historical Perspective of Immunity Clause in Nigeria

The doctrine of sovereign immunity is of immemorial antiquity. The exact origin of the concept has been a nebulous long term debate. Nevertheless it is a prominent purview among the legal historians that sovereign immunity stemmed from the English common law system. This anachronous principle is established on *rex non potest pecare naxin* (the king can do no wrong). The body solely responsible for law-making and adjudication was the king or his representatives. The king was the most superior being and therefore exempted from legal proceedings, obligations and liability which might occur while discharging some onuses singlehandedly or by proxy. Nigeria is a creation of the 1914 Constitution fashioned out by the Lord Fredrick Lugard, a British imperialist. Prior to the colonial arrangement of the fragmented territories that sum up Nigeria, each territory had its distinct unwritten constitution. English law (common law) was incorporated into the Nigeria's political sphere alongside the territorial unification arrangement. Subsequently, the country witnessed constitutional developments which are classified into two historical epochs; colonial and post- colonial constitutional amendments²³. The constitutions promulgated by the colonialists include; Lord Fredrick Lugard 1914-1922²⁴ Sir Clifford 1922- 1946²⁵, Arthur Richard 1946-1951²⁴, Sir John Macpherson 1951-1954²⁶ and Oliver Lyttleon 1954²⁷ constitution which laid down the transition template towards the 1960 independent constitution²⁸

Nigeria attained her political liberty as a sovereign state under the 1960 independence constitution. In this light, the second phase of her constitutional development began. There were vestiges of colonial blueprints in the 1960 independence constitution. Despite that the 1963 republican constitution granted full political autonomy to the country, numerous colonially induced master plans were retained and incorporated into the 1963 constitution likewise the subsequent constitutional amendments. The colonialists maintained outright dominance with the legislation of draconian and repressive laws such as Seditious Offences Ordinance, immunity clause, etc. So far, the post-independence constitutional amendments have been shielding the Nigerian political elite from proper accountability. The constitutions enacted and promulgated by both the civilian and military administrators respectively hampered for combative tones of average Nigerians against unfavorable and tyrannical policy of

¹⁸ The new International Webster's comprehensive dictionary of the English language Encyclopedia Edition, Trident Press International Florida 2004 (p.249)

¹⁹ Concise Oxford Dictionary (10th Edition). The foremost authority on current English, Oxford University Press Inc. New-York 1999) p.269.

²⁰ Collins English Dictionary, Harpercollins Publishers, Glasgow (10th Edition) 2009) p.236.

²¹ Sesan Fabamise, constitution immunity clause and the fight against corruption in Nigeria, Afe Babalola University Journal of sustainable Development law and policy vol. 8:2 2019) p. 158.

²² Report of Transparency International on world corruption index 2019. Accessed 13th March, 2019 on <https://www.nigerianinfopedia.com/top-10-corrupt-countries-world2016>.

²³ B. Azeez, Immunity clause under Nigerian Constitution: Matters Arising, Faculty of Law, Obafemi Awolowo University, Ile-Ife. Accessed 20th February, 2019

²⁴ Lord Fredrick Lugard Constitution 1914-1922

²⁵ Sir Clifford Constitution 1922-1946.

²⁶ Sir John Macpherson Constitution 1951-1954

²⁷ Oliver Lyttleon Constitution 1954.

²⁸ Independent Constitution 1960.

government. The political institutions are being manipulated to safeguard the colonial heritage of repression²⁹. Immunity clause among other constitutional provisions that were incorporated into the post independence constitutions protects a category of Nigerian political leaders from legal suits. It becomes hodgepodge promotion of institutionalized injustice, outright impunity and unbridled corruption. The Crown Proceedings Act 1947³⁰ has embraced a cause of action against the Crown in English common law. According to section 2(1) of the Act, ‘Subject to the provisions of this Act, the Crown shall be subject to all those liabilities in tort to which, if it were a private person of full age and capacity... ‘The recognition of the Crown’s liability in torts promotes public interest which imported immunity clause from the Crown (common law) has failed to place an equilibrium between the clause and public interest.

3. Immunity Clause in UK

Although the absolute immunity doctrine remained the orthodox position in England until the 1945, an examination of the case law indicates increasing judicial misgiving. The confirmation of the absolute immunity doctrine in the Parliament Belge³¹ was followed for over 50 years but with increasing reservations. The matter came before the Court of Appeal in the Porto Alexander case³² which concerned a write issues against a Portuguese requisitioned vessel for nonpayment of salvage charges. A Court of Appeal³³ upheld the ruling of Hill J that immunity could be claimed simply on the State Immunity Act 1978, enacted to provide a code as to the circumstances in which immunity might be granted. It came into effect on 22 November 1978 and is not retrospective. It therefore followed that cases will come before the courts where the legislation does not pertain either because the events took place before the operative date³⁴ or because the facts come within one of the exceptional situation where the legislation does not apply³⁵. The express purpose of the legislation was to enable the United Kingdom to ratify both the 1926 Brussels Convention on the Unification of Certain Rules relating State Owned Vessels and the 1972 European Convention on State Immunity³⁶. It is arguable that the legislation would be sufficient to meet the United Kingdom obligations under the draft of the International Law Commission, should that document one day enter into force. Another important objective was to ensure that the United Kingdom as a centre of trade was not damaged by rules that were thought to be unfavorable to trading interest³⁷. The legislation begins with the general principle³⁸ that a state will be immune from the jurisdiction of the courts of the United Kingdom save in respect of exceptional situations listed in Section 2.11. Section 2 of the legislation provides that a state shall not have immunity if it submits to the jurisdiction after the dispute giving rise to the proceedings has arisen or where there is a prior written agreement³⁹. The effect of this provision is to set aside the old common law rule that a state could not agree to submit to the jurisdiction in advance⁴⁰. Thus, Saville J was able to rule in *A Company Ltd v Republic of X*⁴¹ that a written submission in advance could on its construction extend to both process and to pre-judgment attachment. However, a choice of law clause in favor of the law of the United Kingdom does not constitute a submission⁴². Section 2(3)(a) provides that a state is deemed to have submitted if it has instituted the proceedings, and normally admission will arise if the state has intervened in or taken any steps in the proceedings⁴³. However, there will be no submission if the purpose of intervening is to assert immunity⁴⁴ or to claim an interest in property in circumstances where the state would have been able to waive. Then, there must be clear evidence of an intention to waive so that

²⁹ *Op. Cit. (No. 21)*

³⁰ The Crown Proceedings Act 1947.

³¹ S. Fabamise, *Constitutional Immunity Clause and Fight against corruption in Nigeria* 2017 (p.165)

³² (1920) 30.

³³ The Porto Alexander (1920) 30.

³⁴ D. Bowett (1978) 193; R White (1979) 42 MLR 72; FA Mann (1979) 50 BYH 43, G. Delsume (1979) 73 AJH. 188.

³⁵ *Hispano Americana Merantile SA. V. Central Bank of Nigeria* (1979) 2 Lloyd’s Rep. 277. 1 Congresso del. Partide (1981) 1 AC, 244.

³⁶ The European Convention on State Immunity was signed in Basle by seven countries including the United Kingdom on 16 May 1972 and came into force on 11 June 1976.

³⁷ See also, Arbitration Act 1979. This concern was mentioned several times during the parliamentary debates and was precipitated by fears that the United States Foreign Sovereign Immunities Act 1976 could lead to financial transactions being lost by the city of London.

³⁸ State Immunity Act 1978, s1; Art 15 of the European Convention on State Immunity (1972).

³⁹ See also art 1 and 2 of the European Convention on State Immunity (1972)

⁴⁰ *Kahum v Pakistan Federation* (1951) 2 KB 1003, *Baccus SRI, v Servicio Nacional del Trigo* (1957) 1 QB 438.

⁴¹ *A company Ltd v. Republic of X* (1900) Lloyd’s Rep. 520 (although by operation of s 16 of the Act property subject to the Diplomatic Privileges Act 1964 will be immunity.

⁴² State Immunity Act, 1978, s. 2 (2).

⁴³ State Immunity Act 1978 s. 2(3) (b); *High Commissioner for India v. Ghash* (1960) 1 QB 134, 28 ILR, 150.

⁴⁴ S. Fabamise, *Constitutional Immunity Clause and Fight against corruption in Nigeria* 2017 (p.165).

a written letter to an employee indicating that she might have certain right under United Kingdom employment could not be constructed as being capable of creating a prior written agreement under s.2⁴⁵.

Similarly as a matter of construction, a letter sent by a medical officer to an industrial tribunal did not constitute submission to the jurisdiction⁴⁶. Any submission will be deemed to extend to any appeal arising out of the action but not to any counter claim unless it arises out of the same legal relationship or facts as the claim⁴⁷. Any submission to the jurisdiction must be by a person having the capacity to act, such as the head of diplomatic mission or by an authorized agent⁴⁸. Any question on possible immunity should in principle be decided at the outset of the hearing before the court at first instance examines the merit of the case⁴⁹. It would seem that if a tribunal at first instance fails to consider the question of immunity because of the absence of relevant evidence then the appellate body is under a duty to consider the matter and is not precluded by rules restricting the submission of new evidence on appeal⁵⁰.

4. Immunity Clause in the United States of America

Unlike the case in Nigeria's Constitution, the immunity clause is not enshrined in the Constitution of the United State of America. Notably, as a common law principle, the courts have recognized certain types of executive immunity⁵¹. The President has absolute immunity from civil liability for his official acts. The leading case on this is *Nixon v. Fitzgerald*⁵². In November 1968, Ernest Fitzgerald, an air force management analyst testified before congressional sub-committee that aerospace development projects would necessitate an increase in cost of over US\$2 billion. In January 1970, the Pentagon fired him in a cost-saving re-organization. Fitzgerald, who believed he was fired from his defense department job in retaliation for testimony in which he had criticized military cost overruns, sued President Nixon and some of his administrative officials for violating his First Amendment and Statutory Rights. The United States Supreme Court in its lead judgment read by Justice Powel held that the President is entitled to absolute immunity from civil damage actions for all acts within the 'outer perimeter' of his authority. The Court held that since the President has authority to prescribe the manner in which the business of the Armed Forces will be performed, including the authority to dismiss personnel, Nixon was immune from liability for firing Fitzgerald even if he caused it maliciously or in an illegal manner. However, the President does not have immunity at all for acts that are completely unconcerned with his official duties. In *Clinton v Jones*⁵³, Paula Jones brought a suit for private damages against President Bill Clinton while he was in office. Jones claimed that while she was by the State of Arkansas and Clinton was Governor of Arkansas, he made sexual advances to her. Clinton contended that as President of the United State of America, he should have temporary immunity to last while he is in office against virtually all civil litigations arising out of events that occurred before he took office. The court, unanimously rejecting the connection, held that no immunity of any kind is expressed in the constitution and that by the decision in the Fitzgerald case, unofficial acts such as the one this case was based on are not within the perimeter, not even the outer perimeter of the President's official responsibility. The American President is also not immune from court processes. The President could be *subpoena* to produce relevant documents in criminal matters. In *United States v Nixon*⁵⁴, in March 1974, a federal grand jury indicated seven Nixon aides on charges of conspiracy to obstruct justice and other Watergate-related offences. The President was named as an un-indicated co-conspirator. The Watergate Special Prosecutor then persuaded the federal trial court to issue a *subpoena duces tecum* to the President requiring him to produce various tapes and documents and tapes were to be used during the trial of the indictments. The President released some of the tapes but refused to produce the tapes themselves and moved to quash the *subpoena*. The trial court rejected the President's claim of privilege. On appeal, it was held that the President is amenable to a *subpoena* to produce evidence for use in a criminal case despite the general immunity. The court noted that neither the doctrine of separation of powers nor the need for confidentiality of high-level communications without more, could sustain an absolute, unqualified, presidential privilege of immunity from judicial process under all circumstances.

⁴⁵ *Ahmed v. Government of Saudi Arabia* (1996) 2 ALL ER 248.

⁴⁶ *Arab Republic of Egypt v. Canal-Ehim* (1996) 2 ALL ER. 237.

⁴⁷ State Immunity Act 1978, s.2(6) reflecting to some extent the position at common law, see *Sultan of Jobore v. Abubakar Tunka Aris Bendulor* (1932), AC 318, *High Commissioner for India v. Cheshj* (1960) 1 QB 134, 28 ILR 150 (CA).

⁴⁸ State Immunity Act 1978, s.2 (7).

⁴⁹ *United Arab Emirates v. Abedghafor* (1993) ACR65, *Arab Republic of Egypt v. Canal Ehim* (1996) 2 ALL ER 237.

⁵⁰ European Convention on State Immunity (1972), Art 4.

⁵¹ State Immunity Act 1978 s.42 (2) (b) for recent consideration of the expression 'habitually resident', see *Nesa v. Chief Adjudication Officer* (1998) 2 AB ER 778 (CA) (1999) 1 WLR (HI) for a review of the concept, see R Ragerson, *Habitual residence the new domicile* (2000) 49 ICLQ 86.

⁵² State Immunity Act 1978 s. 4 (1) (c).

⁵³ *Ahmed v. Government of the Kingdom of Saudi Arabia* (1996) 2 ALL ER 248.

⁵⁴ S.L Emmanuel, *Constitutional Law* (Larchmont N.Y. Emmanuel Publishing Corp. 1992)p.

From the exposition above, the United State of America practices qualified executive immunity. The President is only immune from civil liability for acts in the discharge of his official duties.

5. Immunity Clause in Nigeria

Section 1 of the 1999 Constitution of the Federal Republic of Nigeria established the supremacy of our constitution. By virtue of the said section any law which is not consistent with the Constitution, to the extent of such inconsistency that law is null and void and of no effect. Consequently, it is the grand norm and has a binding force on all authorities and persons throughout the Federation. Section 308⁵⁵ provides for the Restriction on legal proceedings as follows;

308 (1) Notwithstanding anything to the Contrary in this institution, 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 applied during his period of office;
 - b. a person to whom this section applied shall not be arrested or imprisoned during that period either on pursuant of the process of any court or otherwise;
 - c. no process of any court requiring or comparing the appearance of a person to whom this section applies, shall be applied for or issued;
- provided that in asserting 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 the subsection(1) of this section shall not applied to civil proceedings against a person to whom this section applies in his official capacity or to civil or criminal proceedings in which 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 the person holding such office is required to perform the functions of the office.

In *Amechi v INEC*⁵⁶ where there was issue with a serving Governor, it was held that the provision of section 308 of the constitution of the Federal Republic of Nigeria 1999, is not meant to deny a citizen of this country his right of access to the court. It is a provision in place to enable the Governor, while in office, to conduct the affairs of governance free from hindrances, embarrassment and the difficulty which may arise if he is being constantly pursued and harassed with court process of a civil or criminal nature when in office. It is a provision designed to protect the dignity of the office. This is also the holding of the court in *Alamiyeseigha v. Igoniwari*⁵⁷. In *Global Excellence Comm. Ltd v Duke*⁵⁸ where the issue was whether the respondent can commence an action on his personal capacity as a Governor, it was held that from the words used by the framers of section 308 of the 1999 Constitution, it is clear that their interaction is explicitly to confer absolute immunity on the respondent and the others therein mentioned without a corresponding disability on them to the exercise of their rights to institute actions in their personal capacity in any relevant court of law for redress during their terms of office, as in the instant case. In *Tinubu v IMB securities PLC*⁵⁹ the Court of Appeal took the view that a person to whom Section 308 applies could not even as an appellant pursue an appeal before this court during the period of his office. The court took the view that a plaintiff to whom section 308⁶⁰ did not directly apply would not initiate or continue to proceedings against a person whom Section 308⁶¹ applies. The latter person could not pursue an appeal against any decision of the trial court. The reason being that to allow that person was akin to continuation of the proceedings before the lower court. The Supreme Court upheld the reasoning of Court of Appeal. Also in *Industrial Commercial Service Ltd v Balton*⁶² the court of Appeal held that no question of waiver of the relevant immunity by the incumbent of the offices concerned, or indeed by the Court may arise, it is an absolute bar. Even when the

⁵⁵ 1999 Constitution of the Federal Republic of Nigeria

⁵⁶ *Amaechi V. INEC* (2008) 5 NWLR (pt. 1080) 227

⁵⁷ *Alamiyeseigha v. Igoniwani* (2007)7 NWLR (pt 1034) 524 (No. 2)

⁵⁸ *Global Excellence Comm. V Duke* 2017 (16 NWLR pt. 1059) 22

⁵⁹ *Global Excellena Comm. Ltd v Duke* (2007) 16 NWLR (pt.1059). see also *Alamiyeseigha v. Teinas* (2002) NWLR (pt. 96) 552 and *Faweluinmi v IGP* (2002) FWLR (pt. 108) 1355.

⁶⁰ *Tinubu v IMB Securches PLc* (2001) 16 NWLR (pt. 740) 670.

⁶¹ 1999 Constitution

⁶² *Ibid.*

incumbent fails to rely on the immunity clause, the Court will still decline jurisdiction to entertain the case. In *Rotimic and Others v Macgregor*,⁶³ an action for damages for trespass committed by the Defendants against the plaintiff was brought before the court. While the action was pending the first Defendant became the Military Governor of Western State. The provision of section 161(1)(c) of the 1963 constitution applied and the action was struck out against. The Supreme Court held that Section 161(1)(c) of the Constitution prescribe immunity from court process, and the incumbent of the relevant office cannot waive the effect of the section, 80 that even if it was not relied on before the court, the court is bound to give effect to it.

6. Exception to the Immunity Clause

However, there are some exceptions to the immunity clause which include the following: Where the incumbent is nominal party in suit, and suits against official acts. Section 308⁶⁴ of the Constitution of the Federal Republic of Nigeria stipulates that the immunity clause does not extend to civil action against those protected when he is only a named party. The immunity granted by Section 308 does not protect official acts. Therefore, the incumbent cannot while acting in his official capacity claim immunity from legal process. The section will only protect acts as done in the personal capacity and while the person is in office at the time the writ was issued as stated in *Abacha v Fawehum*⁶⁵, where the incumbent is only a nominal party in the civil suit, the immunity granted by section 308 of the constitution⁶⁶ will not apply. In *Anaku v. Governor of Nasarawa Stat*⁶⁷ an action for wrongful dismissal from employment by Lafia Local Government Council was successfully maintained against Lafia Local Government Council with the Governor as a nominal party. Section 308 of the 1999 Constitution does not immune the officials stipulated in its subsection 3 from police investigation. This is because investigation of a crime by the police is a preliminary course, which may or may not result in a criminal prosecution.

7. Conclusion

Immunity clause has been criticized on the ground that the public officials mentioned in section 308(3) of the Constitution are incentivized in the commission of civil wrongs or crime. For instance, by the provision of the immunity clause it is most impossible to hold any case against an incumbent, even if he openly commits an offence. Hence, the Governor of a State is practically above the law because he is immune to prosecution for any type of offence while his tenure lasts. That is why some Governors were alleged to have indulged in carefree looting of their state treasury. Some Governors have allegedly been involved in the murder of political opponents while some have been arrested abroad for money laundering and other criminal activities. Also, waiting for four or eight years before commencing civil or criminal proceedings against the President, Vice-President, Governor or Deputy Governor, will create an opportunity for a criminally minded executive to destroy the evidence and make it almost impossible for the law to take its due course⁶⁸. It must recognize that this cankerworm called corruption has eaten deep into the fabric of the whole nation called Nigeria. Following the fact that those who enjoy and or are protected by 'immunity clause' indulge in monumental corruption from time in immemorial and are protected, therefore almost every other person in Nigeria indulged in corruption of some sort in whatever he or she finds him or herself and of course nothing happens. Nigeria as a sovereign state is not yet ripe and or mature to enjoy immunity clause. This is because most times the President, the Vice-President, the Governor and the Deputy Governor rigged themselves into office at the displeasure of the masses, then in addition they also enjoy the immunity of the protected office which enable them to act with impunity. It is therefore the opinion and or submission of the writer to expunge immunity clause from the grand norm which is the constitution of land. May I conclude by maintaining that immunity clause is one of the causes of corruption in Nigeria if not the major cause.

⁶³ *Industrial Commercial Service Ltd v. Balton B.V* (2003)8 NWLR (pt. 223). See also *Akure v. National Party of Nigeria* (1984) 5 NCLR 494, where the court rejected the contention of the plaintiff counsel that Governor Aper Aku could easily waive the immunity and subject himself to trial.

⁶⁴ *Rotmic and Others...*

⁶⁵ *Abacha v. Fewehuinmi* (2000), 6NWLR (pt 660) 28. See also *Dasuki v. Muazu* (2002) 16 NWLR (pt 793) 319.

⁶⁶ Constitution of the Federal Republic of Nigeria 1999

⁶⁷ *Anzaku v. Governor of Nasarawa State.*

⁶⁸ *This Day*, 22 February, 2008 p. 30.