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The Implications of Immunity Clause and the Pollution of Excellency for Democratic Consolidation in Nigeria

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Abstract: *The paper ascertains immunity clause and the pollution of exellency: the implication for democratic consolidation in Nigeria. Immunity is a freedom conferred on a person to protect him from litigation or persecution. The immunity clause provides a shield for the President, Vice President, Governor or Deputy Governor from frivolous litigation in respect of personal or criminal proceedings that would distract him from the business of governance. However, the purpose has been manipulated to promote injustice, impunity and corruption. The feature emphasizes the functional necessity of the clause which the constitution canvasses for political office holders. Any trial relating to crime committed by any political office holder commence after their tenure in office expires. This raise the issues that evidence against them might have been destroyed, prosecution witnesses may die before the trial commences and changes in the law can enable them to evade justice. For this reason, the constitutional provisions on immunity have become a threat to democratic consolidation in Nigeria. The paper examines the relevance of constitutional provisions on immunity for certain categories of political-office holders for democratic consolidation in Nigeria using descriptive and documentary research to support our analytical conclusions. It traces the origin and roots of immunity for political office-holders to 1963 Republican Constitution and rationale for its inclusion in Nigerian constitutions. On the strength of evidences from Nigeria's Second (1979-1983) and Fourth Republic (1999 till date), the original intent for its inclusion in the constitution was good, but political actors is using it to disjoint our nascent democracy. Instead of the political class to mend fence, they bent on playing at the gallery. The paper recommends review of constitutional provisions to take cognizance for transparency, accountability and good governance to ensure that political chief executives are not constrained in performing their constitutional duties. In this way, the paper concludes that the excesses of elected chief executives can be curbed while Nigerians can reap more dividends of democracy now and in future. The clause should be reviewed to checkmate the anomalies being perpetrated in disguise by die hard politicians.*

Keywords: Immunity Clause, Democracy, Democratic Consolidation, Constitutional Provisions.

Introduction

After several years of military rule, Nigeria has returned to a democratic rule since 29 May, 1999. However, the experience so far since Nigeria returned to democratic rule shows that all has not been well with our democratic experience, especially as it affects the immunity of chief executives from judicial proceedings. The debate about removing the Immunity Clause from the Constitution of the Federal Republic of Nigeria 1999 has been on for a number of years. Within the years of its new democracy that commenced in 1999, Nigeria had situations that may to some extent suggest that the Immunity Clause is redundant, abused, misused and totally out of tune with the aspirations of the Nigerian people (Adejumo, 2008). Most of such abuses were perpetrated by Nigeria's sitting State Governors. Immunity clause in Section 308 of the 1999 Constitution, shields the president, vice president, governors and their deputies from all civil and criminal proceedings against their persons for the duration of their time in office. This means that they can only be tried either at the expiration of their terms in office, or if they are impeached by the National or State Assembly, according to the laid-down guidelines in Sec. 143 for the president and vice-president; and sec. 188 for governors and deputies in the Constitution. The purpose the clause was meant to serve has been hijacked and largely turned into an engine of fraud (FRN, 1999). The intention for its inclusion in the constitution was good but politicians have bastardized the privilege, and willfully undermine the wisdom behind the grant of immunity to the detriment of Nigerians. Immunity clause is an open-ended protection that breeds criminals in power as it gives bold latitude, with impunity to commit crime against the state and the people. The idea that the clause serves as a check on frivolous law suits is good, but the claim that institution of criminal proceeding against

those in position of authority would interfere with their constitutional duties and invariably distract them from the business of governance is lame duck one-sided. The real danger is the criminal intent of political elite whose immunity protection needs to be put on check. The loophole created by this constitutional lapse has an incentive which continues to recruit criminal gangs whose mantra is 'steal now and settle your way later (Mofe, 2009).

More so, the constitution should not be used to shield misdemeanor of those who became distracted not by avalanche of criminal proceeding as being claimed, but by their own inordinate desire, the moment they conspired to steal from our common patrimony. If the executive wants no indictment, or criminal proceedings instituted against it, the political office holder must then strive to refrain from such things that may compromise the law and abuse his or her office. Immunity clause remains in hostage by this criminal intent, billions of nation's resources is being stolen daily with some portion reserved in anticipation to combat a potential battle for impeachment or criminal law suit following an arrest after the pendency of office. In other words, the money stolen is used to wade-off arrest from anti-graft agencies, obstruct justice at the courts, and castrate any impeachment move on the floors of the national or state assemblies. If an executive cannot be removed from office except by impeachment process, or challenged with criminal proceeding except until after the pendency of office. The allegations of corrupt enrichment can be made, but cannot be investigated and proved against incumbent executive political office-holders, nor be called to account for their actions and inactions while in office, nor made to resign on proof of gross misconduct puts such individuals above the law. When punishment is put on a latter day and there is no punishment at the point of abusing an office, this encourages recruitment of more criminals with the intention to go into government to steal and use part of the same money to hedge themselves against impeachment or law suit. This explains why cases of high profile individuals were not prosecuted, and others that were prosecuted were not successfully affected, talk less of being convicted beyond a slap-on-the-wrist conviction. In elections, the same politicians rig an election to steal people's mandate which puts them in government houses and allow their opponents to fight from outside by going to court, while they use state machinery to fight back (www.vanguardnewsonline, 2014).

Finally, the provision of immunity clause in the constitution poses some limitation that biases against the rule of law which is characterized by the doctrine of equality before the law under which every citizen of a country, no matter how highly placed is subject to the authority of the same law. If immunity clause is accepted in the constitution to check frivolous law suits that may impair government functions and cause unnecessary political distraction, then by the same token, the clause should be reviewed to check the new wave of stealing people's money. The clause should not cover fraud, corruption and vindictive tendencies in government. Since graft wrought the same effect as overthrowing the sovereign, any incumbent executive found polluting the excellency with our common patrimony should be arrested, tried and charged with treasonable felony against the state.

Clarification of Concepts

Immunity

In legal parlance, immunity refers to exemption from performing duties, which the law generally requires other citizens to perform, or from a penalty or burden that the law generally places on other citizens. Immunity is defined as 'freedom from duty or penalty, an exception from any charge, duty, tax or imposition. Immunity is a right peculiar to some individual or body, an exception from some general duty or burden, a personal benefit or favour granted by law contrary to the general rule. Black's Law Dictionary defines immunity as a defense to tort liability which is conferred upon an entire group or class of persons entitles under circumstances where considerations of public policy are thought to require special protection for the person, activity or entity in question at the expense of those injured by its tortuous act. Historically, tort litigations against units of governments, public officers, and charities and between spouses, parents and children, has been limited or prohibited on this basis. Eneh () states that it should be noted that 'exemption' carries a similar meaning as immunity, so that when one is exempted from existing legal relations, he said to have immunity or exemption. The doctrine of immunity turns out to be the correlative of disability and the negative of liability, in other word; immunity is clearly analogous to disability tending to no liability. According to Oladele (2005) the word immunity sounds like a Yoruba word-'immuniti' which means the state of being unconquerable and invincible. Honourable Justice Mutalib Ambali, the Grand Khadi of Kwara State while explaining what immunity is states that immunity means exemption or is like special protection granted to certain categories of public officers from a duty or liability of services of process in the interest of smooth and good performance of their services to the society. Immunity could be absolute or qualified. Absolute immunity is a complete exemption from civil liability, usually afforded to officials while performing their duties. It includes immunity from civil or criminal prosecution against the holder in his personal capacity while in office. Qualified immunity on the other hand is immunity from civil liability that is conditioned or limited, for instance by a requirement of good faith or due care. Under the Nigerian law, this extends to immunity for an official act exemplified by those enjoyed by Nigerian judges and lawmakers, whereas criminal acts and acts not falling within

their official mandates are liable to Court processes. Immunity benefits different government officials or exists at different levels under different epithets. Thus, legislative immunity is enjoyed by lawmakers, executive immunity is enjoyed by elected officials of the executive branch of government, judicial immunity is granted to judges, diplomatic immunity is enjoyed by a sovereign government, while constitutional immunity is one contained in the Constitution.

Section 308 of the 1999 Constitution of the Federal Republic of Nigeria (as amended), popularly define immunity clause from legal proceedings on certain political office holders. So protected include a person holding the office of President, Vice-President, 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 this is known as "sovereign immunity". The purpose of immunity clause is to provide the incumbent a free hand and mind to perform the duties and responsibilities of his office without distraction from litigation. The immunity protects the dignity of the office and not the individual office holder as such. If a civil or criminal proceeding was instituted against any person before he/she became federal, state or local government chief executive, the action will abate automatically. However, experience has shown that it is not only protected officers that are corrupt in Nigeria. There are cases of corrupt practices carried out by officials who are not protected by the immunity clause. Examples are local government chairmen, directors of government institutions, ministers, and so on. A Director of Police Pension Fund embezzled billions of naira recently. These categories of persons are not protected by section 308 of 1999 Constitution; the incentive for corruption is not immunity clause.

Democracy

According to Erunke (2012), democracy is a fluid concept that has received many definitions by scholars in the contemporary world of scholarship. According to Almond, Powell, Strom and Dalton (2004), democracy is a political system in which citizens enjoy a number of basic civil and political rights, in which their most important political leaders are elected in free and fair elections and accountable under the rule of law. For Lipset cited in Dada et.al, (2013), democracy is a political system which supplies regular constitutional opportunities for changing the governing officials and a social mechanism which permits the larger possible part of the population to influence major decisions by choosing among contenders for political office. In the same vein Schumpeter citied in Dada et.al, (2013), sees democracy as a political method of institutional arrangement for arriving at political, legislative and administrative decisions. It is a method by means of competitive struggle for the peoples' vote and this competition for votes is the distinguishing character of the democratic method. For Dahl (1982), democracy is a system of elected representative government operated under the rule of law, where the most significant groups in the population participate in the political process and have access to effective representation in the practice of making government decisions that is allocation of scarce resources.

Democratic Consolidation

Scholars have drawn their attention on the concept democratic consolidation since the advent of the third wave of democratization. Schedler (1998), see democratic consolidation is an omnibus concept, a garbage-can concept, a catch-all concept, lacking a core meaning that would unite all modes of usage. Literally, there are two ways to view the concept of consolidation. Consolidation as avoiding democratic break down and consolidation as transformation from a diminished sub-type of democracy to a consolidated liberal democracy (Linz and Stephan, 1996, Valenzuela, 1992).The former has to do with the process of stabilizing and maintaining while the latter focused on the process of deepening or organizing democracies (Shedler, 1998). Most scholars accept the original understanding of the concept as being associated with the challenge of securing and extending the life expectancy of new democracies, of building immunity against threat of regression to authoritarian and reverse waves (Schedler, 1998). According to Diamond (1997), democratic consolidation represents a state whereby institutions, rules and constraints of democracy becomes the legitimate means for the acquisition and exercise of political power. For Jega (2006) cited in Erunke (2012), democratic consolidation describes the vital political goal for a transiting democracy with intermittent flop by authoritarian rule. It involves overlapping behaviour, attitudinal and constitutional dimensions through which democracy becomes reutilized and deeply internalized in social, institutional and psychological life as a political calculation for achieving success. Ademola (2011), conceives democratic consolidation as an identifiable phase in the process of transition from authoritarian to democratic system that are critical to establish a stable, institutional and lasting democracy. Similarly, Beetham cited in Mohammed (2013) describe democratic consolidation as the challenge of making new democracies secure and extend their life expectancy beyond the short term of making them immune against the threat of authoritarian repression and building dams against eventual reverse waves. For Frimpong-Mansoh (2012), democratic consolidation is a firm establishment and successful

completion of political democratization process. According to Ogundiya (2009), democratic consolidation is about regime maintenance regarding the political institution as the framework for political contestation and adherence to the democratic rules of the game. Put differently, democratic consolidation entails widespread acceptance of rules that generate political participation and competition. Linz and Stephan (1999) contend that in a consolidated democracy, it is the only game in town that offer a framework encompassing behavior, attitudinal and constitutional means of determining democratic consolidation. There are no significant socio-economic, political, institutional or national actors trying to achieve their aims through unconstitutional means, violence or secession from the state. Attitudinally, consolidation is achieved when a strong public opinion, privileges, democratic institution is the only means of governance. Constitutionally, in consolidated democracies, social forces, state and non-state actors are subjected to abide by laws, procedure and sanctioned institutions for conflict resolution. Although there may be severe problems of governance, and widespread dissatisfaction of the ruling party, the public and elites uphold the belief to constitutional means as the only legitimate way to change government. Huntington (1991) argues that democracy becomes consolidated when an entrenched regime delivers free, fair and competitive election by which the party that wins power at the initial elections during transition phase loses in subsequent elections and hands over power to the winning party and when the winning party in turn hand over power peacefully to another party at subsequent elections.

Origin and Root of Immunity

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 peccare maxim (the king can do no king). The body solely responsible for law-making and adjudication was the king or his representatives. The king was the most superior beings 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 Lord Frederick 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 amendments. The constitutions promulgated by the colonialists include; Lord Lugard 1914-1922, Sir Clifford 1922-1946, Arthur Richard 1946-1951, Sir John Macpherson 1951-1954 and Oliver Lyttleton 1954 constitution which laid down the transition template towards the 1960 independence constitution. Nigeria attained her political liberty as a sovereign state under the 1960 independence constitution; 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. 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 the combative tones of average Nigerians against unfavorable and tyrannical policy of government. The political institutions are being manipulated to safeguard the colonial heritage of repression. Immunity clause among other constitutional provisions that were incorporated into the post-independence constitutions protects a category of Nigerian political leaders from legal suits. The Crown Proceedings Act 1947 has embraced a cause of action against the Crown in English common law. According to section 2(1) of the Act (supra), "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 though the enforcement of the legal liability is limited. Unfortunately, the Nigerian constitution which imported immunity clause from the Common law has failed to place equilibrium between the clause and public interest. The crime committed by various Nigerian governments since independence is immeasurable. Both the military and civilian governments have successfully organized extra judicial killings, genocide, illegal importation of arms, sponsoring militant groups and other grievous offenses against countless and defenseless Nigerians without facing trials. Similarly, both governments shared a common trait in flouting court orders and siphoning the country's resources. The democratic dispensation is infamous for organizing discreditable elections. Virtually every election is characterized with violence, arson, massive rigging in favour of the incumbent government or their anointed candidates. The state apparatus becomes a repressive instrument against dissenting voices, the public treasure turns to private assets and the nation with a groaning and dying people. The purpose of enshrining the immunity clause under Section 308 of the 1999 constitution as

amended, was elucidated by the Supreme Court in the case of Bola Tinubu vs. IMB Securities Plc (2001) "The immunity clause is meant to provide a shield for the person of the President, Vice President, Governor or Deputy Governor from frivolous or vexatious litigation in respect of personal or criminal proceedings that would distract him from the serious business of governance." This purpose has been manipulated to promote injustice, impunity and corruption. The clause should be reviewed to checkmate the spate of anomalies being perpetrated under the guise of immunity clause. In tandem with rising contemporary realities, the Nigerian judicial system has been debased utterly. The floating of court orders by the persons who are immune to legal suits is alarming. Judicial institution must be protected for democracy and good governance to thrive. Immunity clause at the detriment of judicial contempt nullifies the sanctity of the rule of law. Moreover, immunity clause is a sharp contrast against natural law and equity. All are equal before the law and the law must be equal to everyone. No individual should be privileged or discriminated against all extant laws. An injunction or a relief can be granted to prevent a travesty of justice in some peculiar cases. While the law recognizes an instant relief in certain peculiar legal suits, justice is raped if the defendant is protected from legal suits. Immunity clause greatly abhors corruption. The immunes have turned the national treasury into private pockets. Corruption hampers the country from progress. The fight against looting is exigent and should not be selective or obstructed under any excuse.

Rationale and Public Arguments on Immunity Clause

In spite of everything, the immunity under Section 308 of the 1999 Constitution is well-meant. The President, or as the case may be, a governor, is not suitably placed to enjoy the luxury of time defending lawsuits, whether frivolous or meritorious, while in active duty as governor or president. Our proclivity for lawsuit knows no bounds; removal of that immunity clause from our constitution would in all probability ends up doing more harm than good to our fragile constitutional democracy. Every Ademola, Usman, and Okechukwu, as well as members of the opposition parties would, through frivolous lawsuits and spurious petitions, incapacitate sitting President or Governors as the case may be, without regard to judicial ethics or the concerns of Nigerian voters. In the process, take them off course from real and purposeful governance. In essence, executive immunity enhances harmony in the political process that would, no doubt, be eroded, if Presidents and Governors are exposed to the vagaries of our judicial system. Adding to that, arrest and trial of those protected under the section, would paralyze activities in the affected states or at the federal level, as the case may be. That was the rationale and legislative intent of section 308 of the 1999 Constitution defined as the thinking of the drafters based on public policy considerations. There is no doubt that the benefits of the Immunity Clause outweigh the defects. The defects, if at all, are traceable to the inability of those empowered with law enforcement obligations to make the Constitution live up to its true purpose as the supreme law of the land. It requires diligent performance (prosecution) as expected of true fiduciary (EFCC, Police, ICPC, and the AG). It's all about the interpretation and genuine intent to fight the ills of corruption and unjust enrichment that irredeemably wrecked a supposedly great nation-state. We should not act on the impulse of the moment and abrogate a constitutional framework that is imbued with the right ingredients to serve worthy national purpose growing our democracy and simultaneously, ensuring stability in the political system.

Our core leadership team is made up of some greedy and shameless opportunists you could ever find on the face of the earth; be that as it may, we cannot embark on constitutional amendment just to accommodate our idiosyncrasies and every unfortunate aberration. That's retrogressive political evolution. What would you do, if God willing, we are fortunate to have selfless and honest leaders at the helm of affairs? Amend the constitution once again to align with the new reality? No. We can do better. We must be proactive, creative, and sincere in our approach to war against corruption and assets recovery or forfeiture. Those who are known to be corrupt should be apprehended, prosecuted, and made to forfeit their illegally acquired wealth to the state as soon as they cease to function under the protection of Section 308. According to the FBI,

> *"Many criminals are motivated by greed and the acquisition of material goods. Therefore, the ability of the government to forfeit property connected with criminal activity can be an effective law enforcement tool by reducing the incentive for illegal conduct. Asset forfeiture takes the profit out of crime by helping to eliminate the ability of the offender to command resources necessary to continue illegal activities*."

Today, there are thousands of fraudulent Nigerians out there on the street, including former Governors and former Deputy Governors, as well as former Presidents and former Vice Presidents, known to have fraudulently enriched themselves with public funds. They are living free and living large on our wealth. And we watch. They have no immunity and they enjoy no immunity. But we watch. They are yet to be apprehended and prosecuted by the law enforcement agencies, in spite of the fact that these fraudulent Nigerians and ex-political leaders do not enjoy any atom of immunity. It is very sad that some sections of the Nigeria political establishment, including opinion leaders

and public affairs commentators so gotten embroiled in that perverted notion that once a Governor or Deputy Governor ceases to function as Governor or Deputy Governor, or is elected to the Senate or House of Representative, he or she is still immune from arrest and trial for the unjust enrichment perpetrated as Governor or Deputy Governor. That is complete baloney. The immunity is office specific – it is over at the end of the protected period. The same rules apply to President and Vice President. Therefore, the Section should be strengthened in order to serve the intended purpose, and not diluted by any means. Immunity and unjust enrichment are mutually exclusive. That we want to strengthen our democratic values via some constitutional mechanisms doesn't translate to encouraging official misconduct. The rationale was to engender purposeful governance, to ensure uninterrupted governmental activities at the state and federal levels consistent with fundamental principles of democracy and rule of laws. The major constraint is the nonchalant culture prevalent within the judicial branch bordering on procedural rigmarole – unnecessary adjournments and frequent injunctive orders, without reasonable excuse or a show of irreparable harm or injury to the defendant.

Reasons for Immunity Clause in the I999 Constitution

There is already a constitutional process in the 1999 Constitution by which a President or governor can be dealt with if he or she errs; that process is known as impeachment. If an offence is established against the President or Governor, it can ultimately lead to his /her removal via impeachment. So in essence, incumbent President or Governor must only be removed from office through an impeachment before being subject to the criminal process. The Chief Executives should not be taken from duties that only they can perform unless and until it is determined by the parliament that they are to be relieved of those duties. The President or a Governor can be swiftly removed from the office for gross misconduct which includes the commission of a crime. Category of impeachable offenses is not limited to abuses of official power. In line with the aforementioned point, impeachment process is better suited to the task because it is fast and efficient. It will be done by the representatives of the people because the whole country or the entire state will be involved in the process. In addition, it is faster than a criminal trial and there is no appeal from the verdict of the assembly. Again, once the executive is removed, he can then be prosecuted and his removal will facilitate effective political administration of the state and place the political system on a healthy course.

Corroborating this position, Romney (2008) asserts that at its most basic level, impeachment is the assertion of power by a legislative body over an individual who cannot be removed by any other way. Practically, all those who have written on the subject agree that impeachment involves a protection of a public interest, incorporating a public law element, much like a criminal proceeding. It is thus logical in laws for these public officers not to be prosecuted or imprisoned while in office and prior to their impeachment.

It is justifiable in that if the President and Governors are not immune from criminal proceedings, their subjection to the jurisdiction of the courts would be inconsistent with their position as heads of the executive branch. Because of their unique powers to supervise executive branch and assert executive privilege, the constitutional balance generally should favor the conclusion that a sitting President or Governor may not be subjected to criminal prosecution. This is because the possession of these powers by the President and the Governors renders their prosecution inconsistent with the constitutional structure. Such powers which relate so directly to their status as Commander in-Chief or Chief security officers, are simply incompatible with the notion that the President or the Governors could be made a defendant in a criminal case and criminal proceedings and execution of potential sentences would improperly interfere with their duties and be inconsistent with their status (Oladele, 2006). Their status as defendants in a criminal case would be repugnant to their office as chief executive, which includes the power to appoint judges and oversee prosecutions. In other words, just as a person cannot be judge in his own case, these executives cannot be prosecutors and defendants simultaneously. Most importantly, courts would be unable to subject powerful officials to criminal process and it is doubtful whether it is practical to have a prosecutor who is part of the executive branch prosecute the President or Governor.

The retention of the Immunity Clause in the 1999 Constitution is justified in that prosecution of a sitting President or Governor prior to impeachment would create serious practical difficulties and interruption in political administration. If the Immunity Clause is removed from the 1999 Constitution, it would definitely be a difficulty to arrive at the point the President or the Governor could be impeached; could it be while the criminal proceedings are going on against him/her or after his/her trial and conviction? If the public officer is to be presumed innocent until found guilty which must be proved beyond reasonable doubt, then, he/she cannot be removed during the pendency of criminal proceedings. In view of this, process of his/her removal cannot proceed until a court had resolved a variety of complicated threshold legal questions and hold the chief executive criminally liable. It is important to note that a criminal trial in court can take several months or years to conclude and the accused has the right of appeal. In this way, a President or a Governor may complete his term before he is finally convicted. At the same time, the

President or the Governor may spend a considerable amount of his time in office meeting with his legal team to prepare a defense to the criminal allegations against him/her. Hence, putting aside the possibility of criminal confinement, the severity of the burden imposed upon the President or the Governors by the initiation of a criminal prosecution and also from the need to respond to such charges through the judicial process would seriously interfere with their ability to carry out their functions (Adujie, 2004). An individual's mental and physical involvement in the preparation of his defense both before and during any criminal trial would be intense; the same applies to either the President or the Governor of a state since they are also human. The process contemplates the defendant's attendance at trial and, indeed, his right to confront witnesses who appear at the trial.

The retention of the Immunity Clause in the 1999 Constitution is justified because its removal does not favor public policy. The President and the State Governors are elected directly through a general election. However, a criminal trial of a sitting President or a Governor will confer upon a single Judge, the power to overturn the wish of the people as demonstrated in the general elections. Allowing criminal proceedings against a sitting executive would aggrandize judicial power and narrow constitutionally defined executive powers. Public policy disfavors prosecution of a sitting executive (Adujie, 2004). Chief among the reasons is the respect for the office as a chief executive and the availability of the impeachment route. It is therefore, submitted that the power to perform this onerous task can be more fittingly done or handled by the representatives of the people, either the state assemblies or the national assembly through an impeachment process. Nigeria should not succumb to the danger of handing the eviction of a President or Governor to the people who did not elect him/her in the first place. One good thing about democracy is that it hands over the removal of a person from an office to the people who elected such a person. For example, the members of the National Assembly or State Houses of Assembly can be recalled by the people if such members err; same applies to the President of Governor, the people through their representatives, that is, the legislators at the National Assembly or Houses of Assembly can impeach any President or Governor who has been found wanting on the terms of agreement of his being elected. Therefore legislators are elected to their offices not only for the purpose of enacting laws, but also for the purpose of checking the President and his/her Vice or Governor and his/her Deputy. If Immunity Clause is removed, it would mean the people who elected the President or the Governor are taken for fools because after electing the candidate of their choice, the President or the federal government for example can sue a Governor on criminal grounds and send him packing. If such happens, it follows that the power of the people which is the bedrock of democracy is compromised and diminished as the President or the federal government would unavoidably assume the status of a big-brother whipping governors to queue. When the people are alienated, it would be difficult to hold them together; continued centralism in Nigeria may make the country experience the kinds of ugly situations experienced in Rwanda, Somalia, Sierra Leone, Liberia, Congo, the Soviet Union, and Yugoslavia (Soyinka, 2001).

Challenges for Immunity Clause and Democratic Consolidation in Nigeria

Electoral Malpractice one of the tenets of democracy is orderly change of government through credible free, fair and periodic elections. Since restoration of democratic rule in the country, change of government has been orderly while elections have been periodic. Between 1999 and 2011 three civilian administrations have emerged and there have been three successive transitions from civilian government to another both executive and legislature (Obasanjo regime, 1999-2007, Yar'adua-Jonathan regime, 2007-2011; Jonathan regime, 2011-2015, Buhari regime, 2015 till date). Since 1999, the country has successfully passed through five legislative houses both at the centre and the component units. Elections in the fourth republic have been characterized by irregularities and malpractices which magnitude increases in every election. The institutions of state such as police, military, and electoral body collude to manipulate the electoral process in favour of certain candidate. Election is one of the cardinal principles of democratic process, free, fair and credible elections are central to the consolidation of democracy. This defines the degree of freedom exercised by the people in selecting who represent them in government. But the case in Nigeria system is manipulated in favour of certain individuals and political parties (Ogbonnaya, Omoju and Udefuna, 2012).

Poverty is another factor that constitutes grave challenges to democratic consolidation in the Nigeria. The country is blessed with abundant human and natural resources and yet its people are poor. According to UNDP (2009), hunger exhibits its ugly face in most homes where the average citizen contends with abject poverty. The average Nigerian is alienated from himself as he lacks the wherewithal to afford the basic necessities of life such as education, medical facilities. According to Victor (2002) cited in Ogbonnaya, et.al (2012) about 70% of Nigeria population are poor, the consequence of this is that the poor are easily brainwashed and their right of choice terribly manipulated making an objective choice seldom to consideration. Besides, various forms of inducements and gratification which provide temporary relief from the scourge of poverty are given attention in making democratic

choices. Poverty has been identified by some scholars as the cause of security challenges confronting the nation (Awoyemi, 2012; Harrington, 2012).

Corruption according to transparency international (2011), the level of corruption and other related crimes in the country attracted $4million and $8 million dollars loss on daily basis and a loss of $70.58 million dollars to the national economy annually and that the country has lost more than $380billion to graft since the country attained independence in 1960. It has been argued that the war on graft has been difficult to win because the act is perpetrated by policy makers themselves (Olu, 2008). A clear indicator to this fact is the US$620, 000 oil subsidy bribery scandals rocking the National Assembly and the latest one is the two armored cars bought by the National Civil Aviation Authority at whooping sum of #255million for the Aviation Minister Stella Oduah (Nation, 2013). Corruption distorts governance and provides perverse incentives for dysfunctional behavioural as well as diminishes the quality of citizens life by diverting funds for social service into private pockets (Oko, 2008).

Incumbency factor gives the incumbent an undue advantage over other participants in the electoral process through the means of manipulating the entire electoral process. The manipulation can take different forms ranging from compilation of voters' register, the appointment of electoral officers, members of electoral tribunal to protect stolen mandates, use of state instrument of coercion and apparatus to intimidate opposition parties and denial of access to state owned media houses to ensure they regain or elongate their tenure against popular will as well as the use of state funds for campaign. The effect of incumbency factor on democratic consolidation is that it leads to the erosion of the principle of democratic governance which has led to the emergence of political godfather and family dynasty (Nwanegbo and Alumona, 2011).

Lack of viable Opposition Parties Since the inception of this republic, there has been no viable and credible opposition party capable of checkmating the ruling party. Opposition parties are vital in every functional and people oriented democratic government. This is because they checkmate the excess of government or its agencies by highlighting constitutional rules and appropriate principle and practice in democratic governance. Nigeria's political environment has been dominated by People Democratic Party since restoration of democratic rule in 1999 to 2015 but now All Progressive Congress is now in-charge from 2015 till date. Although Nigeria has over fifty political parties, most of them are very weak to provide needed opposition to the ruling party at the centre. Absence of viable opposition in today's Nigeria democratic system left the ruling party to call the shots on most national affairs with impunity (Njoku, 2012).

Insecurity since the return of democracy, the country has experienced ethno-religious crises, sectarian mayhem, questioning and shaking the survival of the country. Some of these crises include: Yoruba/Hausa-Fulani disturbance in Shagamu, Ogun State; Aguleri, Umuleri and Umuoba Anam of Anambra State; Ijaw/Itsekiri crisis over the location of local government headquarter; the Jukun, Chamba and Kuteb power struggle over who control Takum; incessant turbulence in Jos; the 2011 post-election violence in the northern part of the country as well as the constant sectarian crisis exemplified by the activities of the Boko Haram. The analysis of the above upheaval will reveal that our democracy is under siege prompting Dauda and Avidime (2007) argue that the current security situation in the country is a major obstacle to the consolidation of democracy. It is important to note that despite these challenges there is a light at the end of the tunnel. After fourteen years of uninterrupted democracy, the longest in the history of the country. There abound significant elements of democratic consolidation in the political system and these are vibrant press, independent judiciary and a budding civil society as well as widespread acceptance of elections as a means of choosing political leaders.

Incidence of Political Thuggery it is widely believed that thugs were usually hired maintained and equipped by some politicians to subvert the electoral process to their utmost political advantage. In addition, thugs by their modus operandi are predisposed to intimidate, harass or even harm the opponents of their sponsors. For instance, in Oyo State during the days of strongman of Ibadan politics Chief Lamidi Adedibu (Garrison Commander), he was reputed to have maintained a battalion of thugs who only needed his fingers to spur them into actions (Iwere, 2009). His philosophy and style of politics called Amala politics as well as his alleged state support and protection gave rise to his political excesses, arbitrariness and lawlessness in Ibadan and Oyo State in general (Njoku, 2010).

Immunity Clause and Nigerian Factor

The immunity clause as stated earlier is meant to protect the President, Governors and their deputies from vexatious litigation, so that they can concentrate on the State affairs and carry out their duties efficiently, thus, protecting the dignity of the office. This is the ideal situation in a 'civilized' country for example developed countries of the world like United State of America where we have a well organized political system and leaders. The rationale for this immunity clause makes it desirable in governance. The Nigerian experience of the immunity clause has been horrendous, traumatic and reflective of social anomaly in the sense of misgovernance and underdevelopment. The immunity clause has overwhelmingly continued to serve as conduit pipes of siphoning the

nation's wealth by the leaders without any fear of litigation. Asaibor (2002) implicitly underscores the above in his remark that the use of protective shield of constitutional immunity as a legitimate instrument and defense of corruption and money laundering by crooks masquerading as public officials in the dubious game of theft and unlawful transfer of common wealth into personal purse has gained a proportion so alarming and frequency so outrageous that the very concept of governance in Nigeria needs a critical characterization. In reality, the clause has merely created a class that is above the law, a class that perpetuates evil in the office through corrupt practices and bad leadership consequently leading to the abuse of the clause. A cursory look at Nigeria situation reveals that majority of the leaders who enjoys the immunity have committed several criminal offences and subversively abused the spirit of the clause. Whether in the South west, South South, South East, North central, North West, North east geographical zones of the country, various cases of the abuse of immunity clause abound. Examining some of these cases will depict the particular situation in Nigeria. Former Gov. Diepreye Alamiesigha of Bayelsa State is one of the examples. On Thursday, 15 September 2005 following a petition addressed to the Economic and Financial Crimes Commission (EFCC) by some citizens of Bayelsa state against the Governor, revealing that some members of his family had looted from the Bayelsa State treasury a sum of 1,043,655.79 dollars; 173,365.41 pounds and 556,455,893.34 Naira (Adedayo, 2002). Alamiesigha was arrested and was undergoing trial in London before he fled (dressed like a woman) back to Nigeria. The implication of this is that since Alamiesigha was in Nigeria, he could not be tried for money laundering and corrupt practices before the Nigerian courts because of Section 308 of the Constitution which oust the jurisdiction of the Constitution. Alamiesigha knew he could not be tried in Nigeria because of the immunity he enjoyed as a Governor. It however took the intervention of the Legislature by impeaching Alamiesigha so as to remove the immunity cloak that protected him from trial in Nigeria and he was subsequently arraigned in Court after impeachment. This is a clear case of the abuse of immunity in Nigeria. It may be argued that immunity clause is powerful to the extent of protecting a Governor who is outside Nigeria, but I will respectfully submit that this is not the position of law. The immunity clause does not extend outside Nigerian shores (Nwabueze, 1999).

Another instance is that of Joshua Dariye of Plateau State who was arrested in London in 2004 for money laundering charges. 20 million Naira was found on him, while over 2 million Pounds was discovered in his bank account. In furtherance to this, a Federal High Court on the charges of alleged money laundering and illegal financial deals, presided over by Justice Abdullahi Liman initially granted a Summons against Dariye, but after considering the immunity clause, the Court on 16 December 2004 set aside the earlier order of summons. It follows that Dariye enjoyed immunity in Nigeria even if such recognition was not given in London (News Magazine, 16 October 2006)). Another instance of the abuse is the case of former Deputy Governor of Osun State Hon Iyiola Omisoore was strongly alleged to be involved in the death of former Minister of Justice, late Chief Bola Ige could not be arrested based on the immunity he enjoys as a Deputy Governor. No action could be taken until he was removed from office and his tenure abruptly brought to an end under the provision of section 188 of the Constitution. Also, the case of James Onanefe Ibori drives home this point. Ibori was the Governor of Delta state from 1999-2007. His salary was less than 25,000 Dollars a year. The Former Governor of oil rich Delta State was accused of stealing funds worth 290 Pounds by Economic and Financial Crimes Commission. In fact, in 2007, a United Kingdom Court froze assets belonging to Ibori worth $35m. Ibori could not be tried for all these allegations while he was in office because of the immunity clause he enjoyed, and even when he was tried in December 2007, he was cleared by the Federal High Court sitting in Asaba of 170 charges connected to alleged money laundering because of lack of evidence (FRN v James Ibori, 2009). It however took the intervention of the United Kingdom Court in May 2010 to arrest him in Dubai and extradite him to the United Kingdom to answer for the alleged corruption charges. Recently, to make mockery of our judicial system, Ibori was sentenced to 13 years imprisonment in the United kingdom Court after pleading guilty to charges of financial misappropriation Nation Newspaper 17 April, 2012).

It is not only the cases of Ibori, Alamiesigha, and Joshua Dariye that the immunity clause has been abused. Governors and their deputies had always faced charges after leaving office. For example Former President Olusegun Obasanjo was accused to have misappropriated Petroleum Training and Development Funds (PTDF) after leaving office, Peter Odili of Rivers State was also accused of misappropriating 520 billion Naira power point project and the looting of the treasury, Peter Ayodele Fayose who was alleged to have established a poultry business in the name of his family members through the public funds he had access to Lucky Igbinedion of Edo State was also charged for looting of Edo treasury (Thisday Newspaper, 17 October 2006). He was charged with more than 150 counts of embezzlement. He was accused of money laundering and stealing more than 25 million dollars during his eight years tenure in office. It is interesting to note that former Governor of Lagos state, Asiwaju Bola Tinubu was charged before the Code of Conduct Tribunal with the offence of maintaining foreign account while in office (1999-

2007).It was alleged that the former governor control ten foreign account with the balance of £21,000, a joint account with his wife with the balance of £10,118 (Punch Newspaper, 8 October 2011). It remains to be seen if Bola Tinubu will be convicted of this offence but the point to make here is that the immunity clause under Section 308 has enabled Nigerian chief executives and their deputies to loot public funds and desecrate on the dignity of the office sought to be protected.

Recently former governor Danjuma Goje of Gombe State was declared wanted by the Economic and Financial Crimes Commission over the alleged mismanagement and diversion of over 52 Billion Naira belonging to the State. Goje suspiciously obtained loans amounting to 37.9 billion naira from 27 banks. The Commission declared him wanted when he failed to submit himself to the Commission. Also, the Economic and Financial Crimes Commission arrested former Governors: Gbenga Daniel of Ogun State (2003-2011); Christopher Alao Akala of Oyo state (2007-2011)and Alhaji Aliu Akwe Doma of Nassarawa State 2007-2011 (Punch Newspaper, 6 October 2011). For an alleged diversion and misappropriation of N58.5billion (Daniel); N25 billion (Alao Akala); and Akwe Doma (N18 billion) totaling 101 billion Naira. Gbenga Daniel was alleged to have diverted about 12 billion Naira revenue in Ogun state Bureau of Lands and Survey, non remittance of 1 billion Naira deducted from Ogun state worker's salaries, fraudulent and illegal payment of 1 billion Naira purportedly as counterpart funding for water projects, illegal debt servicing to the tune of 5.2 billion Naira as against an appropriation of 350 million for the same purpose in 2009. This is just to mention a few allegations against these former governors. It shows the extent to which the immunity clause is abused. All these crimes cannot be brought to book no matter how grievous the crime can be. Thus, political office holders in Nigeria see Section 308 as a tool for corruption.

Conclusion and Suggestions

The legislative intent for providing constitutional immunity clauses is to protect the dignity and integrity of the holder of an elective office. This intention is fundamental in Nigeria given the fledgling and emerging nature of the nation's democratic institutions. Removing the immunity clause could open a floodgate of frivolous litigations against elected officers especially from "professional litigants" with the aim of distracting the officer from the very serious business of governance. The investigation of the activities of the incumbent office holders should continue as it does not conflict with the provisions of the section and they can be made to answer to these investigations as soon as they leave office. However, constitutional immunity should not be extended to the legislative arm of government because such immunity does not avail the third arm of government (judiciary). More importantly, all the members of the legislature are equal upon being elected. The leaders become "primus inter pares" upon election to leadership positions and can be removed anytime and substituted by another member with or without minimal disruption to legislative business.

Furthermore, the process of removal from office of protected officers as provided for in the Constitution should be used in proven cases on breach of trust, corruption or mismanagement. The officer concerned can face charges as soon as they are lawfully removed from office as the immunity will abate immediately. For Nigerians, whatever we do, we must not lose sight of the underlying imperative, designed to engender consistency and robust democratic values in our troubled political system that Section 308 represents. Therefore, we must be bold about consolidating those democratic values, without regards to the race or the social status of the culprits before and during trial. That is the first step to renewing Nigeria. It is about equal rights and justice. Whether the clause is removed or not, emphasis should be placed on creating the enabling environment for enduring democracy through true separation of powers, free press, corruption free judiciary, formation of functional and competent public prosecution process, electoral reforms, change in value system and the promotion of good governance. It is time for all Nigerians to uphold and defend this fundamental principle of equal justice for all, which is one of the most important principles in a democracy. In conclusion, immunity clause is unethical for Nigerian political system. All political leaders must be strictly held accountable for their brazen actions to resuscitate the country from wreckage. The National Assembly and state Houses of Assembly have failed woefully in exercising their constitutional roles of curbing executive excess, rascality and gross misconducts. It was posited in the case of Gani Fawehinmi v. IGP (2002) 8 SCM 77 that "although a governor enjoys immunity from arrest and prosecution, he doesn't enjoy immunity from investigation." It is evident that the Inspector General of Police (IGP), Economic and Financial Crime Commission (EFCC) and Independent Corrupt Practices Commission (ICPC) which are empowered to investigate the persons conferred with immunity clause take instructions from the Nigerian president. The institutions have failed to make giant strides in impartial investigations pending the time that the persons covered by immunity lose the clause.

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