



APPRAISAL OF THE ENFORCEMENT OF FUNDAMENTAL HUMAN RIGHTS AGAINST PUBLIC OFFICERS UNDER SECTION 308 OF THE CONSTITUTION OF THE FEDERAL REPUBLIC OF NIGERIA, 1999 (AS AMENDED)

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Abstract

This paper appraised the enforcement of fundamental rights against public officers under Section 308 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended). The said public officers – President, Vice President, Governors, and Deputy Governors, are exempted from Civil & Criminal prosecution and by implication fundamental Rights under section 308 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) as they are clothed with immunity. However, this research work evaluated the said provision of the Constitution (section 308 CFRN 1999 as amended) Vis-a Vis fundamental right provisions under Chapter IV of the Constitution of the Federal Republic of Nigeria, 1999 (As Amended). Fundamental rights provisions are sui generis, hence the need to be given necessary attention and be exempted from the provision of section 308 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended). The extent and scope of the provision of section 308 of the said Constitution, was also in focus. The pros and cons of the immunity clause were also considered. The provision of the 308 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) was also appraised in relation to the fundamental human rights which has attained global relevancy and finds expression in Nigeria which must be preserved and protected by all the arms of government especially, the Executive in line with the provision of section 14 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended). It was the recommendation of the writer that the provision of Section 308 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) be limited or exempted from the provision of Chapter IV of the Constitution. By so doing, it will make such officers accountable to the people in fundamental rights cases. The recent decision of the Federal High Court in the case of Yahaya Bello v Murtala Ajaka is a welcome development and was also recommended as the way to go for the purpose of making the said public officers accountable to the very people that brought them to power.

Keywords: Fundamental Human Right, Immunity clause, Constitution, Enforcement.

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Introduction

Human Rights have attained Universal acceptance and recognition in view of its growing importance across the globe. Its relevance and importance transcends religious, political, cultural and economic background. According to Michelline, Human rights are universal in context across centuries in spite the conflicting political tradition that have elaborated the different component of human rights², but they are universal. These rights are universal, they are the same everywhere. They are inalienable; they can neither be taken away, nor given up³. It is in the light of the foregoing that these rights have attained international legitimacy with various international instrument like the Universal Declaration of Human Rights of 1948, African Charter on Human and People's Right 1981 and other International instruments. The Effect of the World War II, has brought the reality of human rights most countries of the world which led to the formation of the United Nations⁴. The preamble to the U.N. Charter, brings to fore the commitment of the Countries of the world towards safeguarding and protecting Human rights. The said preamble provides 'We the people of the United Nations ... reaffirm faith in fundamental human rights, dignity and worth of the human person, in the equal right of men and women and of nations large and small...' ⁵. The Universal declaration of Human Rights herein referred to as (UDHR), is among the most important documents of the 20th century⁶. It has been translated into 337 different languages. It has become a touchstone for action by government, individuals and nongovernmental groups. It has been ratified by most countries in the world.⁷ However countries like North Korea, Iran and South Sudan have not ratify the said declaration⁸.

However, those human rights that are enforceable in law are known as fundamental rights and are distinguished from mere aspirations or individual ideas of rights⁹. Thus, fundamental rights are now embodied in Chapter IV of the Constitution of the Federal Republic of Nigeria, 1999 (As Amended). It is the responsibility of the three arms of government to protect and preserve these rights of every citizen. The Constitutional Drafting Committee of 1979 Constitutional Conference expressed thus:

² Micheline R. Ishay: *The History of Human Rights from Ancient Times to the Globalization Era*. (University of California Press Berkeley 2018) 3

³ UNDP Human Right and Millennium Development Goals making the link

⁴ Universal Declaration of human Rights. http://www.buffalo.edu/ubnow/stories/2015/12/qa_welch_udhr.html accessed on 20/2/2015

⁵ Ibid

⁶ Ibid

⁷ Ibid.

⁸ www.quora.com/What-are-the-Countries-that-have-not-ratified-and-signed-the-Universal-Declaration-on-Human-Rights-Why-do-Countries-refrain-from-signing-and-or-ratifying-this-documents? accessed on 26/8/24 ⁹ Duru Onyekachi Wisdom Ceazer, 'An Overview of the Fundamental Rights Enforcement Procedure Rules 2009' > <http://ssrn.com/author=1874278> accessed on 24/6/22.

All Fundamental rights are in the final analysis right which imposes limitation on executive government and are accordingly justiciable⁹

Fundamental Rights which are guaranteed in the Constitution are not privileges in the sense that they could be withdrawn at the whim and caprices of the government of the day¹⁰. They are rights and freedom which the Executive, Legislative and the Judiciary are all enjoined to preserve and protect¹⁰. Notwithstanding, the foregoing, the provision of Section 308 of the Constitution of the Federal Republic of Nigeria, 1999(as amended) has exempted some public officers from any liability with the regards to any civil case. In other words, Section 308 the Constitution of the Federal Republic of Nigeria herein referred to as (“the Constitution”), has provided Immunity clause protecting the President, Vice President, Governor and Deputy Governor from Civil action against them while in office. By implication, these public officers cannot be held accountable for the infringement of fundamental rights provided under Chapter IV of the constitution against any person during their stay in office.

This work seeks to appraise the provision of Section 308 of “the Constitution and the enforceability and otherwise of Chapter IV of the constitution against such public officers in the light of the growing norm of the importance of fundamental rights across the globe.

Conceptual Clarification

Rights. It refers to something that is due to a person by just claim, Legal guarantee, or moral principle¹².it also refers to what is done in accordance with or conformable to moral law or to some standard of rightness, equitable, just; righteous.¹¹ It also means something that a person is or should morally or legally allow to have, get or do¹².

Human rights are those rights that inhere in the very nature of the person. They define and affirm humanity, they exist to ensure that human life remains sacred and guarantee that inhumanity and injustice are prevented or redressed¹³¹⁴. It is also seen as freedom, immunities and benefits that according to modern values, especially international level, all human beings should be able to claim as a matter of right in the society in which they live¹⁶.

Fundamental human rights refers to those rights that have been recognized and have constitutional backing in Nigeria, these rights are contained in Chapter IV of the Constitution of the federal Republic of Nigeria, 1999, as amended. (CFRN, 1999)¹⁵ Fundamental rights are the basics human rights enshrined in the constitution. These rights are called fundamental rights

⁹ “‘Reports On the Constitutional Drafting Committee, Vol 1 1976(xvi)’ in J. Nnamdi Aduba, *An Introduction to Human Rights Law in Nigeria*(Innovation Communications 2016) ¹⁰See n1

¹⁰ Ibid

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Garner B.A , *Black Law Dictionary* (9 Edition 2009)P. 1436

¹¹ *The New International Webster’s Comprehensive Dictionary on English Language Comprehension* (Typhon Media Corporation 210) P. 1088.

¹² www.britannica.com accessed on 28/8/2024.

¹³ Uchenne Emelounye, ‘Rule of Law and Human Right Development’ in Nnamdi Aduba, *An introduction to Human Rights law in Nigeria* (Innovation communication 2016).

¹⁴ See n

¹⁵ www.resolutionlaw.ng.com accessed on 28/8/24

because they are enshrined in the constitution which guarantees them and they are justiciable i.e. that is they can be enforceable by Court.¹⁶.

Immunity. It refers to the condition being protected from the law¹⁹¹⁷¹⁸. It also refers to an exemption from duty, liability or service or processes especially such an exemption granted to a public official or governmental unit²⁰. It also referred to freedom of exemption, as from a penalty burden, duty or evil, such as the exemption of ecclesiastical persons from duties and burden thought unbecoming their sacred character²¹.

Fundamental Rights Provided Under The Constitution Of The Federal Republic Of Nigeria 1999, As Amended

For the purpose of this study, it will be apt to spell out briefly the Fundamental Rights, provided under the extant Constitution (as amended). The said Fundamental Rights provided under Chapter IV of the Constitution are as follows:

- i. The Right to life ¹⁹
- ii. Right to dignity of Human Person ²⁰
- iii. Right to Personal Liberty ²¹ iv. Right to Fair Hearing ²²
- v. Right to Private Life and Family Life ²³
- vi. Right to Freedom of thought, conscience and Religion ²⁴ vii. Right to Freedom of Expression and Press ²⁵ viii. Right to peaceful Assembly and Association ²⁶ ix. Right to Freedom of Movement ²⁷
- x. Right to Freedom from Discrimination ²⁸

¹⁶ 'Fundamental rights-Articles 12-35 of the Indian Constitution' > byjus.com accessed on 28/9/2024

¹⁹ Dictionary Cambridge.org. accessed 28/8/24

¹⁷ See n

¹⁸ See n

¹⁹ Section 33 Constitution of the Federal Republic of Nigeria, 1999 (as amended)

²⁰ Section 34 Ibid

²¹ Section 36 Ibid

²² Section 36 Ibid

²³ Section 37 Ibid

²⁴ Section 38 Ibid

²⁵ Section 39 Ibid

²⁶ Section 40 Ibid

²⁷ Section 41 Ibid

²⁸ Section 42 Ibid

xi. Right to Acquire and own immovable property anywhere in Nigeria ²⁹

The foregoing are the Fundamental Rights encapsulated under the provision of the Chapter IV of the Constitution that enables a person to activate the provision of Section 46(1) of the CFRN, 1999, (as amended) to enforce his right.

A foray, into Chapter II of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) provides for certain rights which though not justiciable but its realization makes the enforcement under chapter IV of the Constitution realizable. Chapter II of the Constitution which starts from section 13 to 21 of the Constitution provides for social economic rights³⁰. These rights include Political, Economic, Educational and Environmental rights which form the fulcrum of the objectives and directive principle of state³¹. The responsibility to ensure that the whole provision of Chapter II of the Constitution is adhered to and complied accordingly lies on all the organs of government and all the authorities exercising legislative executive and judicial powers.³² In carrying out its political objectives the State is expected to promote national unity by providing adequate facilities to encourage mobility to people, to ensure citizen secure resident right, promote and encourage the formation of association and foster inter-ethnic marriage³³. While carrying out its economic objective, it is expected that they will enhance the maximum welfare, freedom and happiness which will also enhance social justice and equal opportunity³⁶. On the social objectives, section 17 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) provides that the State Social order is founded on ideals of freedom, equality and justice and further lay emphasis on ensuring equality of rights, the sanctity and the dignity of the human person are maintained and enhanced. The State is also mandated to direct her policy towards ensuring all citizen without discrimination have means of livelihood, employment, adequate facilities, adequate health facilities are available to all persons without discrimination³⁴. In realizing educational objective, the State is expected to ensure that all citizens have equal and adequate educational opportunities at all level.³⁵ Government is also expected to show commitment by ensuring free primary, secondary and university education is available to all citizens³⁶. The state show also direct its policy towards ensuring that the environment is improved and safe water, air, land, forest and wild life of Nigeria³⁷.

²⁹ Section 43 Ibid

³⁰ Kazeem Sabit, 'Chapter II of the Nigerian Constitution 1999 as Amended and the Ouster Clause of Section 6 (6) c of the Constitution: An Overview' > papers.ssrn.com accessed on 29/8/2024

³¹ See section 15 – 18, 20 of the Constitution of the Federal republic of Nigeria (as amended)

³² Section 13 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended). ³⁶ Section 15 Ibid

³³ Section 16 Ibid

³⁴ Section 17 Ibid

³⁵ Section 18 Ibid

³⁶ Section 18 (3)Ibid

³⁷ Section 20 Ibid

As laudable as the provisions of section 15, 16, 17 18 and 20 of the Constitution are, they said provisions are only ideals and mere aspirations of the state without more as they are not justiciable by virtue of the provision of the Constitution³⁸. Why was Chapter II made non justiciable? According to the Constitution Drafting Committee; to render the fundamental objective in the Constitution justiciable ... will only lead to confrontation between the executive and the legislature on the other hand and the judiciary on the other³⁹. The further submit that by their nature they are rights which can only come into existence after the government has provided facilities for them⁴⁰.

A careful perusal of the provision of Chapter II and Chapter IV of the Constitution unveils that, the fundamental rights provided under the Constitution can only make sense and come alive to the ordinary citizen only if the provisions of Chapter II of the Constitution are realized. It behooves on the government to bring the reality of the rights of citizen in Chapter II of the Constitution to the ordinary citizen. It is only by doing that the provision of Chapter IV of the Constitution will make any meaning.

In view of the importance of Fundamental Rights, the Fundamental Rights Enforcement Procedure Rule 2009 made pursuant to Section 46(3) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) opens a floodgate for interested persons, nongovernmental organization (NGOs) to approach the Court on behalf of an applicant for the purpose of enforcing a person's right⁴¹. The 2009 Fundamental Rights Enforcement Procedure Rules aimed at advancing democracy by deepening and prioritizing human rights enforcement.⁴² The said Rules were made to energize the democratic system of government after its first ten years⁴³. It is only through issues of human rights that government can connect to their citizens.⁴⁴

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The Immunity Of Public Officers Provided Under Section 308 Of The Constitution Of The Federal Republic Of Nigeria 1999(As Amended).

A Constitution is a legal document and a living document. As a legal document, it encompasses the constitutional relationship between people and government which the government is entrusted with by the People; thereby making the government accountable to the people. The Constitution is also a legal document that charts the path for the various arms of government to operate without friction. As a living document, the Constitution encompasses the aspiration, hope and destiny of a people who collectively agreed to be bound by such document and pursue

³⁸ Section 6(6)ibid

³⁹ Kachikwu and Ozeokome in J Nnamdi Aduba, *An Introduction To Human Rights in Nigeria* (Innovation Communications 2016)p.20

⁴⁰ ibid

⁴¹ Paragraph 3(e) of the preamble t the Fundamental Right Enforcement Procedure Rules 2009

⁴² See n⁸

⁴³ Ibid

⁴⁴ Ibid

a common destiny together. The Constitution does not depend upon any law to derive its validity and force but from the collective will of the expressed declaration⁴⁵. It follows therefore that the Nigerian Constitution derived its validity from the people of Nigeria from whom government derived all its power and authority⁴⁶. In the case of Nigeria the debate on whether the people gave the present Constitution is still raging on.

Scope And Extent Of Immunity Of Public Officers As Provided Under Section 308 Of The 1999 Constitution (As Amended)

By virtue of section 5 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended), the executive power, is conferred on the President at the Federal level and the Governor at the State level⁴⁷.

Section 308 (1) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) provides thus:

- (1) Notwithstanding anything to the contrary this Constitution, but subject to subsection (2) of this section:
 - a. No civil or criminal proceedings shall be instituted or continued against a person to whom this section applies during his period of office;
 - b. a person to whom this section applies shall not be arrested or imprisoned during the period either on pursuant of the process of any court or otherwise; and
 - c. no process of any Court requiring or compelling the appearance of a person to whom this section applies shall be applied or issued:

Provided that in ascertaining whether any period of limitation has expired for the purpose of any proceedings against a person to whom this section applies, no account shall be taken of his period of office.

- (2) The provision of subsection (1) of the section shall not apply to civil proceedings against a person to whom the section applies in his official capacity or to civil or criminal proceedings in which such a person is only a nominal party.
- (3) This section applies to a person holding the office of President or Vice President, Governor or Deputy Governor; and the reference in this section to “period of office” is a reference to the period during which the person holding such office is required to perform the function of the office.

From the foregoing Constitutional provision, it follows that the scope of immunity clause only avails anybody holding the office of the President, Vice President, Governors and Deputy Governors for the period in which they hold office in their respective capacities. By implication,

⁴⁵ *Musa v Hamza* (1982) 3NCLR.229-463

⁴⁶ Section 14 (2) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended)

⁴⁷ Akinwummi Ogunranti, “Immunity Clause Under Nigerian Constitution (As Amended): A Curse Or Blessing” >www.academia.edu accessed on 22/2/24

immunity clause will not shield the aforementioned persons who have left office⁴⁸. Immunity clause also does not extend to local government Chairmen, Ministers or traditional rulers⁴⁹⁵⁰. The provision of section 308, does not cover legislative and judicial officers even though strenuous efforts have been made to confer same on the legislators unsuccessfully in the past. It should also be noted that immunity granted under section 308 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) is personal and not official⁵¹. The said section prohibits the institution or in any event of prior suits the continuation of civil or criminal proceedings against the president, governors and their deputies⁵⁴⁵². Consequently, all Nigerian Courts are therefore bound to take judicial notice of this provision even when not pleaded⁵³. By virtue of Section 3 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended), “there shall be thirty six states in Nigeria...” It follows therefore that the immunity clause in the Constitution benefits 74 public officials at both the Federal and State Level during the tenure in office⁵⁴. The net effect of section 308(CFRN) on proceedings against the aforementioned persons, render such civil or criminal proceedings null and void and of no effect⁵⁶, In *Industrial & Commercial servicing Nigerian Ltd V. Balton*,⁵⁷ it was held that once one of the parties to the suit belongs to the category of office holders named in section 308 (3) (CFRN), the Suit must be struck out. Also, in *R v Madan*⁵⁵, it was held that immunity clause, need not be expressly claimed, that the existence renders the exercise of jurisdiction null and void. Thus, the Court is robbed of its jurisdiction. It is therefore no surprise that the High Court of Kaduna State struck out the action instituted by the Economic and Financial Crimes Commission against Governor Joshua Dariye of Plateau State⁵⁶ many years ago In *Attorney General of the Federation v Abubakar*⁶², the Court construed the meaning of the word “Notwithstanding” which is used in the open section of section 308 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) as follows: When the word “notwithstanding” is used in a section of a statute, it is meant to exclude an impinging or impending effect of any other provision of the statute or other subordinate legislation so that the said section may fulfill itself. It follows that, as used in section 251 (1) of the 1999 Constitution, no provision of the Constitution shall be capable of undermining the said section.

In view of the foregoing, the above authority makes section 308 (CFRN) absolute, unqualified, unfettered which cannot be undermined by any statute⁵⁷

⁴⁸ Ibid at 22

⁴⁹ *Dalhatu v Muazu* (2002) 16 NWLR (Pt 793)

⁵⁰ See n

⁵¹ Ibid ⁵⁶

Colonel Olunotimi & Ors v Macgregor (1974) 11 SC 133.138-141

⁵² See n

⁵³ *Colonel Olurontimiors v Macgregor* (1974) 11 SC 133.138-141

⁵⁴ (2003) 8 NWLR (PT 822) 223

⁵⁵ (1962) QB1

⁵⁶ *The Guardian Newspaper* (Nigeria 7, December 2004) 21. ⁶²(2007) All FWLR (PT 398)

117.

⁵⁷ *Emesin v Nwachukwu* (1999) 6 NWLR (PT 605) 154 at 167

⁶¹ See n⁵¹

The Pros and Cons of Immunity Clause

Before immunity clause was transplanted into Nigerian Legal System. Nigeria being a Commonwealth nation inherited the English Common Law and the doctrine of Sovereignty immunity from Britain.⁶¹ Immunity is an antiquated concept which has its roots in the ancient feudal structure of England which later became a Common law principle⁵⁸. The royal and legal phraseology that the king can do no wrong (*Rex non potest peccare*) is of historical antiquity. The said concept of immunity clause presupposes that the king lacks the legal capacity of doing wrong and the king must and was not allowed or entitled to do wrong.⁶⁶

In Nigeria, before the advent of colonialism in the 18th and 19th centuries our kings govern our communities⁵⁹. In the Southwest of Nigeria for example, these kings reigned and ruled absolutely and exclusively as they have rights over life and death of their subject. Hence they are being described as “Kabiyesi”, meaning no one dare query the acts and deeds of kings⁶⁰. These are the kind of powers and immunities which traditional rulers enjoyed in the past⁶¹.

Nigeria transported the immunity clause which protects the President, Governors and their deputies under section 308 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended).

However, it should be noted that the 1963⁶² Constitution, 1979⁶³ Constitution, and the 1989⁶⁴ Constitution, all made provisions for immunity clause.

The proponent of immunity clause avers that it is necessary for one to understand law in terms of its practical functions in the society⁷³. They submitted that there is a need to have the Constitutional immunity for political officers not to be necessarily encumbered by Litigation. The absence of the immunity clause, will open a floodgate of litigation against such oppress and will definitely lead to capsizing of the boat of governance⁶⁹. According to Beko Ransome Kuti, (the foremost human right crusader) the presence of immunity clause in the Constitution would be abused by political detractors of the concerned public office holder⁷⁵. In like manner, Uwazurike, a Lawyer opined that Immunity Clause should be left to remain, as it serves the purpose of starving off possible indignities that may be thrown the way of the affected public officers⁶⁵. He also posits that dignity must be accorded to this office since they hold the said offices as the trustee of the people and only immunity can ensure that dignity.

⁵⁸ Malami E. *The Nigerian Constitutional Law* (Princeton Publishing Co. Lagos 2006) 447 ⁶⁶Ibid at 458

⁵⁹ Ibid

⁶⁰ See n⁵¹

⁶¹ Ibid

⁶² Section 161(1) of the Constitution of the Federal Republic of Nigeria 1963

⁶³ Section 276(1)(a) of the Constitution of the Federal Republic of Nigeria 1979

⁶⁴ Section 320 of the Constitution of the Federal Republic of Nigeria 1989 ⁷³ See n⁵¹

⁶⁵ See n⁵¹

The opponent of immunity clause on the other hand, submits that the provision of section 308 of the Constitution is antithetical to the doctrine of equality before the law. They further submit that immunity clause have not brought good to a number of people and to the society, considering the outcome of section 308 Constitution of the Federal Republic of Nigeria (ASAMENDED) to the society⁷⁷. The outcome of this is that, the rights of some individuals in the society are placed above others by not subjecting the Chief Executives to account for their action while in office⁶⁶ and this begets injustice. It is argued further that immunity from prosecution is subject to abuse by the public officers⁶⁷. In the word of Justice Alfa Belgore (Rtd) (the former Chairman of the National Judicial Council (NJC) in Nigeria), while representing the NJC's position on the immunity clause before the Senate committee: The immunity from criminal prosecution granted to specified officers of State under section 308 of the Constitution is being abused and capable of being abuse in a manner that could endanger the nation and its democratic system of government⁶⁸. In the same vein, Nuhu Ribadu, the former Chairman of Economic and Financial Crimes

Commission and present National Security Adviser, averred that unless we remove the Immunity clause, it will be difficult to address the problem of corruption in Nigeria. Whether he holds same views years later is debatable.

Appraising The Enforcement Of Fundamental Rights Against Public Officers Under section 308 Of The Constitution Of The Federal Republic Of Nigeria (As Amended)

It has been established earlier in this work, that the importance of fundamental human rights over every rights is settled by the various international instruments and municipal laws that gave such credence. Chapter IV of the 1999 Constitution of the Federal Republic of Nigeria, 1999 (as amended), has encapsulated the fundamentals of such rights. However, in the light of the provision of Section 308 of the Constitution of the Federal Republic, 1999 (as amended) which provides for immunity for certain public officers, it follows that, fundamental right is also cob webbed by the said provision of section 308 of the 1999 Constitution (as amended). Simply put public officers covered by the provision of section 308 of the Constitution of the Federal Republic of Nigeria cannot be sued by anybody who they have infringed on his fundamental Rights during their term of office, until after their tenure. Reckoning the Nigerian political culture where a person can serve two tenures as a governor (8years) and may subsequently become a President and may also serve two tenures (8years) cumulating to 16 years his immunity elapse. It then means that where such a person becomes a Governor for 8 years and subsequently becomes a President for another period of eight years and is found wanting in human rights violation, the victim will have to wait for a period of 16 years, before he can legal seek redress. Thus, it is submitted that it violates the overall purpose and intend of the provision of section 308 of the Constitution. From the provision of section 14(2) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) to the effect that:

⁶⁶ Ibid

⁶⁷ Ibid

⁶⁸ Ndidi O. 'How Far Can Senate

go?' ><http://news.biafranigeriaworld.com/archives/2004/june/18/07.html>> accessed on 2 May 2012.

⁶⁹ Igbanjode 'Immunity: to be or not to be?' This day Newspaper, (Nigeria 7 June 2005)⁷⁵ This Day Newspaper (Nigeria 18, April 2001) 13

(2) It is hereby accordingly, declared, that-

(a) Sovereignty belongs to the people of Nigeria from whom government through this constitution derives its powers and authority.

Simply put, the validity and, legitimacy of the Nigerian Constitution, does not depend on any law but upon the people of Nigeria! This is the import of the preamble to the Constitution- WE THE PEOPLE OF THE FEDERAL REPUBLIC OF NIGERIA – The purpose and intent of Section 14 (2) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended), is to make public officers- President, Vice President, Governor and Deputy Governor, trustee of the People's power and authority from which the legitimacy of their offices is derived.

These accords with the social contract theory which postulates that human beings were in a state of nature before they voluntarily gave up some of their rights in order to join a society⁶⁹. The Society in turn provides them with safety, prosperity and more materials goods than they would have had otherwise⁷⁰.

According to Aduba a revered Professor of Constitutional law;

Fundamental human rights which are guaranteed in the constitution are not privileges in the sense that they could be withdrawn at the whims and caprices of the government of the day. They are rights and freedoms which the executive, the legislative and the judiciary are all enjoined to preserve and protect. Any violation by anybody even the government is liable to be called to order, where the violation has resulted into injury which could be compensated in financial terms; courts are duty bound to make orders of reparation in monetary terms.⁷¹

In view of the foregoing, it is the utmost responsibility of the three arms of government – Executive, Legislative and Judiciary to preserve, protect and uphold the ideals of Fundamental Human Rights as provided by Chapter IV of the Constitution of the Federal Republic of Nigeria, 1999 (as amended). It is safe to submit that, section 308 of the Constitution provides a shield to such public officers which by necessary implication takes away the rights of ordinary citizens from having their fundamental rights protected and preserved by the very persons that voted to power! However, the provision of section 308 of the Constitution placed such public officers – President, Vice president, Governors and Deputy Governors above others; by not subjecting these Chief executives to account for their actions while in office.⁷² The said section makes mockery of the doctrine of Supremacy of the law and equality before the law. No man should be placed above the other every man whatever his or her position in life in the country is subject to the ordinary law of the land in the country⁷². The provision of section 308 of the

⁶⁹ Madison Makeski, Matthew Scandler & Lesley Chapel, 'Social Contract Theories/Over view, Philosophers & Example' > Study.com accessed on 6/3/2024

⁷⁰ ibid

⁷¹ J. Nnamdi Aduba, *An Introduction to Human Rights in Nigeria* (Innovation Communications 2016) ⁷⁸

See n⁵¹ at 67

⁷² Ibid

Constitution of the Federal Republic of Nigeria, 1999 (as amended) has placed such officers over and above the law.

Consequently, It follows therefore, that the people who elected such public officers into the helm of responsibilities and donated their power and authority to them by virtue of section 14(2) of the Constitution of the Federal Republic of Nigeria (as amended), as Trustees, for themselves and their future generation, cannot hold such public officers accountable especially with regards to protecting, preserving and upholding their fundamental human rights. The provision of section 308 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended), seeks to fortify the above submission.

The recklessness and highhandedness of public officers who are covered by the provision of section 308 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) leaves much to be desired. This challenge the legitimacy of the said provision in the light of the sovereignty of the people as provided in the Constitution, especially with regards to the preservation and protection of Fundamental Human Rights. The Nigerian experience of the immunity clause has been horrendous, traumatizing and reflective of social anomaly in the sense of mis-governance and underdevelopment⁷³.

In reality, the immunity clause, has merely created a class that is above the law; a class that perpetuates evil in the office through bad leadership⁷⁴. A cursory look at Nigerian situation reveals the majority of the leaders who enjoy the immunity have committed several offences and subversively abuse the clause⁷⁵. The Former Deputy Governor of Osun State Chief 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 enjoyed as a Deputy Governor⁷⁶.

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)⁷⁷ for alleged diversion and misappropriation funds. This is just to mention a few allegations against the former Governors. However, all these allegation and alleged crime by these former Governors were not prosecuted.⁷⁸

However, the dearth of institutions that could checkmate these public officers, have ironically enhanced and aided them in their highhandedness and abuse of office. The highhandedness of some of these Chief Executives have been exemplified in various abuses of Fundamental Rights during their tenure in office.

Incidence Of Human Rights Abuses By Some Public Officers Covered By Immunity Under Section 308 Of The Constitution Of The Federal Republic Of Nigeria, 1999 (As Amended)

The Nigerian political milieu is replete with cases where public officers who enjoyed immunity under section 308 of the Constitution of Nigeria, exhibited highhandedness and executive

⁷³ See n⁵¹ at 39

⁷⁴ Ibinedon Asasor, 'Immunity in International Law,' *The Vanguard Newspaper* (Nigeria 2 October, 2002) 17

⁷⁵ See n⁵¹ at 40,

⁷⁶ *ibid*

⁷⁷ *Punch Newspaper* (Nigeria 6 October 2011) 4

⁷⁸ See n⁵¹

restlessness by abusing public trust through the violation of the Fundamental Rights of the very people who have entrusted them with such rights. A case in point is the case of former Governor of Ebonyi State David Umahi who, while in office in April 2020, had a journalist by name Agwu Bright, detained and prevented from attending a press conference at the Ebonyi Government House⁷⁹. After the Conference, the Governor had Agwu Bright brought into a room where the Governor accused the journalist of publishing false and damaging information on the prevalent of Lassa fever in Ebonyi State contrary to section 3 of the Ebonyi law on Covid 19 and other infectious diseases According to Agwu, the former Governor ordered the Commissioner of Police to detain him at the Police State Command; Agwu was taken to the station where he was detained until 10pm when he was released without any charge against him⁸⁰. Also, the Former Governor of Cross River State, Ben Ayade, also caused a journalist to be arrested and detained and subsequently tried for making a publication on. “How Ayade approved and diverted N500m for Cross River Micro Finance Bank”⁸¹. The said publication caused a serious displeasure to the Governor that caused him to set the machinery of the state for the arrest, detention and the trial of Agba Jalingo. Longe, a media Right Agenda Director, described the arrest, detention of Agba Jalingo for over 13 days and the charges of treason preferred against him for criticizing Cross River State

Governor on Social Media as a shameful and ridiculous trivialization of our criminal law⁸². Lending his voice to such displeasure, Femi Falana, submitted that a Nigerian, cannot be charged with criminal offences for criticizing a Governor or any public officer in Nigeria.⁸³ He further argued that in the case of *Nwankwo v State*⁸⁴, the Court of Appeal held that any public officer who feels defamed by any publication should sue for libel, as it is illegal to use the machinery of the state to harass political opponents in Nigeria⁸⁵. Femi Falana went further to advice Nigerians that in the light of the decision of the Court of Appeal in *Nwankwo v State*, Nigerians should resist any move to wipe out the freedom of expression fought for and won from Colonial regime⁸⁶.

In a similar development, the Former Governor of Kaduna State, Mallam Nasiru El-Rufai, as a sitting Governor in 2018, had the President of Adara Development Association (ADA), arrested over alleged insult to his person⁸⁷. The Governor was attending a town hall meeting with religious and community leaders in Kasuwan Magani over the persistent killing of Christians in Kajuru Local Government Area of the State. In the course of the meeting Mr. Maisamari who was not yet a leader of Adara Development Association (ADA) had raised his hands to speak but the Governor would not allow him. When he insisted, Mallam El-Rufai

⁷⁹ ‘Committee to Project Journalist’>c.p.j.org-nigeria police arrest and detention accessed on 12/3/24

⁸⁰ Ibid

⁸¹ ‘Police Charge journalist Agba Jalingo with Terrorism for Criticizing Gov. Ayade’

>punch.com.police-charge-journalist-Agba Jalingo-with terrorism-for criticizing-Gov Ayade accessed on 13/3/2024

⁸² Ibid

⁸³ Ibid

⁸⁴ (1985) 1 NCLR 247

⁸⁵ Ibid

⁸⁶ Ibid

⁸⁷ David Hundeyin ,’How Nigeria Governor and Serial Human Right violation, Nasir ElRufai spends Millions funding Oxford University’>davidhundeyin.substack.com accessed on 14/3/2024

ordered for his arrest by the Police⁸⁸. He was taken into custody in Kaduna on ground that he abused the Governor in a press statement he issued in December 2018⁸⁹.

What is more, the story of former Governor of Enugu State, who placed his wife under house arrest when he was a Governor, is worth noting. Mrs. Chima said her husband Sullivan Chime, has placed her under house arrest and cried out for assistance to human rights bodies to rescue her⁹⁰.

Based on the foregoing catalogue of cases of Human Rights abuses by some Governors who used the machinery of the state to feather their nests, this posed the question as to the legitimacy of immunity clause in fundamental rights cases in view of the abuses of power by some state executives who enjoy the said immunity. It is crystal clear that immunity clause has been used by the said Chief Executive as a shield to promote, perpetuate recklessness and, high handedness by violating the fundamental human rights of the very people whom they took an oath to protect and defend. The said public officers usually conspire with security agencies to use the machinery of the state like the police force to infringe and violate the rights of persons. With the growing trend of democracy and the respect for human rights becoming a global song, the need to make public officers covered by immunity clause under section 308 of the Constitution of the Federal Republic accountable and make them observe and respect Fundamental Human Right, is imperative. They have sworn to uphold and protect the Constitution of the Federal Republic of Nigeria 1999, (As Amended), of which Fundamental human Right is inclusive.

To give premium to Fundamental Human Rights, the Fundamental Rights Enforcement (Enforcement Procedure) Rules herein referred to as the (2009 FREP Rules), was enacted with the aim of advancing democracy by deepening and prioritizing human rights⁹¹. The 2009 FREP Rules, was made to energize the democratic government after its first ten years⁹². The philosophy behind the formulation of the Rules is the concept of prioritization of human rights⁹³. It is only through issues of human rights that government can connect with to her citizen⁹⁴. Prior to the 2009 FREP Rules, the Fundamental Rights Enforcement Procedure Rules of 1979 Rules was holding sway. However, the said Rules were laced with technicality, and fraught with many difficulties and bottlenecks.⁹⁴ The 2009 FREP rules, was a welcome relief as it willed away the various road blocks that became an impediment for the actualization and realization of human rights like the issues of *locus standi*, statute of limitation among others.

⁸⁸ Ibid

⁸⁹ Ibid

⁹⁰ 'Clara Chime First Lady of Enugu State begs Human Rights Groups to Release her from House Arrest imposed by Governor Sullivan Chime' >saharareporters.com accessed on 14/3/2024 ⁹⁸ See n⁸

⁹¹ Ibid

⁹² Ibid

⁹³ Ibid

⁹⁴ Ibid

Paragraph 3 (b) of the preamble to the FREP Rules aptly captures the purpose and the intent of rules. The said provision read thus; For the purpose of advancing never for the purpose of restricting the applicant's right and freedom the applicant's right and freedom, the court shall respect municipal, regional and international bills of rights cited to it or brought to its attention or of which the court is aware, whether these bills constitute instruments in themselves or form parts of larger documents like the constitution...

In the light of the above provision of the fundamental Rights enforcement Rules 2009, the Federal High Court of Abuja recently ordered Yahaya Bello, the former Governor of Kogi State to pay N500 million as damages for violating the Fundamental Rights of Murtala Ajaka, Candidate of the Social Democratic Party (SDP)⁹⁵, as a sitting Governor in Suit marked FHC/ABJ/CS/952/2023. Justice Inyang Ekwu, had earlier overruled the preliminary objection filed by Governor Yahaya Bello that as a sitting Governor, he is covered by the provision of Section 308 of the Constitution of the Federal Republic of Nigeria 1999 (as amended). The Court overruled the objection and found Governor Yahaya Bello to have violated the right of the Applicant⁹⁶. Therefore the Court holds the view that the Fundamental rights of every citizen is sacred which the Court is enjoined to protect, preserve and uphold. However, it remains to be seen what the Appellate Court would say. However, the Federal High Court, should be commended for advancing the cause of human rights in accord with the fundamental rights enforcement rules.

Conclusion

From the foregoing, it is evident that the provision of section 308 of the constitution has elevated the occupants of these offices over and above the very people who voted them to power. From our experience as a nation, most of these public officers have violated their oaths of office by using their offices to violate and infringe on the fundamental rights of the very people who have vested them with the authority and power of such offices. The eroding values of our institution of government have made it difficult to tame these public officers from using their offices to violate the fundamental rights of persons whom they are supposed to protect by virtue of their oath of office. To this end, it is necessary to restrict or limit the application of the provision of section 308 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) to exempt the very provisions of Chapter IV of the Constitution of the Federal Republic of Nigeria, 1999 (As Amended). When this is done; it will make such public officers protected under section 308 of the Constitution of the Federal Republic of Nigeria, 1999 (As Amended) accountable to the people with respect to fundamental rights. The recent decision by the Federal High court in the case of *Yahaya Bello v Murtala Ajaka* is the way to go. By making such public officers accountable to the very people they took an oath to serve will go a long way in reducing the high rate of human rights abuse by such public officers.

⁹⁵ Bolanle Labinitan, 'Court Orders Yahaya Bello to Pay Ajaka N500m over rights Violation' >www.thecable.ng/December 7 2023). accessed on 15/3/2024

⁹⁶ Ibid