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Immunity clause in Nigeria's 1999 constitution: Its implications on executive capacity

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Abstract

In Nigeria, there have been a number of arguments against the retention of the Immunity Clause in the country's 1999 Constitution from different commentators. Most arguments along this line are of the opinion that the Immunity Clause has been abused or is capable of being greatly abused by the political office holders who enjoy it. This paper takes an opposing position to these arguments that are against the retention of the Immunity Clause by stressing its advantages to executive capacity, an argument that has often been ignored by the commentators who are against the retention of the Immunity Clause in the country's Constitution. This paper analyses the concept of the rule of law and the Immunity Clause (as contained in Nigeria's 1999 Constitution; it also highlights the implications of removing the Immunity Clause from the 1999 Constitution) on executive capacity; the paper talks about the justifications for the retention of the Immunity Clause in the 1999 Constitution; and the paper concludes by suggesting that the Immunity Clause should be retained in the Nigeria's Constitution until Nigerians are politically mature to handle a condition without it.

Keywords

Immunity Clause, Rule of Law, Executive Capacity, Constitution

1. Introduction

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 has 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. For example, in 2005, a sitting Governor of Nigeria's State of Bayelsa, Chief Diepreye Alamiesigha was alleged of looting from his state treasury different sums of cash including US$1,043,655.79, £173,365.41 and ₦556,455,893.34 through some of his family members but could not be tried for money laundering and corrupt practices in any of Nigeria's courts of law because he was covered by the Immunity Clause in Nigeria's Constitution (This Day, 16 October 2005 cited in Ogunranti, 2012). Another example is a sitting Governor of Nigeria's State of Plateau, Chief Joshua Dariye who was reported to have been arrested in London in 2004 following over £2 million discovered in his bank account and ₦20 million found on him but who could not be tried for money laundering and corrupt practices in any of Nigeria's courts of law because he was covered by the Immunity Clause in Nigeria's Constitution (The News, 16 October, 2006 cited in Ogunranti, 2012). One last example is that of a sitting Governor and a sitting Deputy Governor of Nigeria's State of Osun, Chief Bisi Akande and Chief Iyiola Omisore who were alleged to be involved in the death of Honourable Odunayo Olagbaju and a Minister of Justice, Chief Bola Ige respectively. These two state functionaries could also not be tried for the murder of these people in any of Nigeria's courts of law because they were covered by the Immunity Clause in Nigeria's Constitution. The counsel to Chief Iyiola Omisore, the prime suspect in the murder of Chief Bola Ige, Mr. Festus Keyamo was reported to have urged the State House of Assembly to remove in order to investigate the murders of these people (Oladipupo, 2002).

From the inception of a new democracy in Nigeria in 1999, quite a number of commentators have spoken or written in support of the removal of Immunity Clause from Nigeria's 1999 Constitution. According to Anyaoku (2010), all forms of corruption will be drastically reduced in Nigeria if the Immunity Clause is removed; President and the Governors should be stripped of any immunity from criminal offences but they should only have immunity from civil offences because constant law suits on civil offences will distort the day-to-day running of the country or the state. At the highest level, Nigeria's President between 2007 and 2010, Alhaji Umaru Yar'Adua consistently spoke in support of the removal of Immunity Clause from the Constitution. At the World Economic Forum in Davos, Switzerland in January 2008, Alhaji Umaru Yar'Adua specifically advocated for the removal of Immunity Clause from Nigeria's Constitution to in line with the principle of rule of law ensure equality of all persons before the law cum supremacy of the law and to prove his strong commitment to the battle against corruption (EFCC, 2008 cited in Ogunranti, 2012). A former Nigeria's Military Head of State, General Muhammed Buhari (rtd.) is one of the commentators in support of the removal of the Immunity Clause from Nigeria's Constitution. During the campaign exercise towards Nigeria's 2011 presidential election, General Buhari was reported to have said that if elected as Nigeria's President, his administration would remove immunity from prosecution for elected officers in criminal cases (The Punch, 28 February, 2011 cited in Ogunranti, 2012). Another former Military and Civilian Head of State of Nigeria, Chief Olusegun Obasanjo was reported to have said in London that keeping the Immunity Clause was stupidity and that anyone caught to have committed an offence while in office should be expressly charged for the committed offence (The Punch, 16 March, 2005 cited in Ogunranti, 2012). Still on the support for the removal of Immunity Clause from the country's Constitution, a former Attorney General of the Federation and a Senior Advocate of Nigeria (SAN), Chief Akin Olujimi was reported to have said in a press conference that the Immunity Clause worked against the country and had to be expunged from Nigeria's Constitution for corruption to be effectively fought (Nigerian Tribune, 8 December, 2004 cited in Ogunranti, 2012). Removal of the Immunity Clause from Nigeria's Constitution was also supported by a human rights activist and a Senior Advocate of Nigeria (SAN), Late Chief Gani Fawehimi. He was reported to have said that corruption would persist in Nigeria if Immunity Clause was not removed in its Constitution as failure to do this would extend the lifespan of executive lawlessness in the country (The Guardian, 26 April, 2004 cited in Ogunranti, 2012). To cap it all, the National Judicial Council (NJC) under the headship of Justice Muhammed Uwais as the Chief Justice of Nigeria in a Memorandum to the Sub-committee on Supplementary and General Provisions of the Joint Assembly Committee on the Review of the 1999 Constitution was reported to have emphasized that the Immunity Clause was being abused and capable of being further abused in a manner that the nation and her democratic system of government could be endangered and therefore should be reviewed in order to close avenues of abuse (The Punch, 16 April, 2004 cited in Ogunranti, 2012). The common position of former President Yar'Adua and the other commentators calling for the removal of the Immunity Clause from Nigeria's Constitution is not likely to be unconnected with the limitation it poses to Professor A.V Dicey's definition of the rule of law which is characterized by the doctrine of *equality before the law* under which every citizen of a country is subject to the authority of the same law.

Fifteen years into Nigeria's new democracy, such an amendment is yet to be made to its Constitution despite the fact that commentators have often portrayed Immunity Clause in bad light. The commentators in support of the removal of the Immunity Clause have not seemed to realize that the Immunity Clause has a number of advantages in governance if and when it is not abused. The commentators also failed to put into consideration the effect the removal of Immunity Clause would have on executive capacity in the country. One question that comes to mind is that *should Nigeria repeal the Immunity Clause from its Constitution because it has been abused or capable of being abused?* The simple answer to this question is that Nigeria should not do so because it may not be wise to throw the bath water away with the baby. There are a number of arguments in support of this position and these will be later stated in this paper.

This paper is divided into three segments. The first segment analyses the concept of the rule of law and Immunity Clause (as contained in Nigeria's 1999 Constitution); the second segment highlights the implications of removing the Immunity Clause from the 1999 Constitution on executive capacity; the third segment talks about the justifications for the retention of Immunity Clause in the 1999 Constitution; and the paper concludes by suggesting that Immunity Clause should be retained in the Nigeria's Constitution until Nigerians are politically mature to handle a condition without it.

2. Relationship between Nigeria's Immunity Clause and the Rule of Law

According to Garner (1999, p. 1114), immunity is "an exemption from serving in an office, or performing duties which the law generally requires other citizens to perform." Immunity Clause is contained in section 308 of the Constitution of the Federal Republic of Nigeria (1999) and it states that:

(1) Notwithstanding anything to the contrary in this Constitution, but subject to subsection (2) of this section:

a) no civil or criminal proceedings shall be instituted or continued against a person to whom this section applies during his period of office;

b) a person to whom this section applies shall not be

arrested or imprisoned during that period either in pursuance of the process of any court or otherwise; and

c) no process of any court requiring or compelling the appearance of a person to whom this section applies, shall be applied for or issued:
Provided that in ascertaining whether any period of limitation has expired for the purposes of any proceedings against a person to whom this section applies, no account shall be taken of his period of office.

(2) The provisions of subsection (1) of this section shall not apply to civil proceedings against a person to whom this section applies in his official capacity or to 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 functions of the office.

What this section implies is that it insulates some public officeholders from civil or criminal proceedings being instituted against them, or from being arrested or imprisoned or compelled to appear in court; it also implies that the section protects these public officeholders in their official capacity only in civil matters in which they are nominal parts. The section lists public officeholders qualified to enjoy immunity to include the President and Vice-President of Nigeria, Governors and Deputy-Governors of the States during their periods of office. And by the *proviso* to section 308(1), account shall not be taken of his period of office in ascertaining the expiration of period of limitation (Olaniyonu, 2006). It is important to state that immunity from prosecution is a well-founded, well-reasoned concept, which has sundry benefits when applied honestly and scrupulously for the greater good and benefit of our society. It thus means that a sitting State Governor or President of Nigeria, during the subsistence of term of office, must have a free hand to act boldly and courageously for public good. In doing so, such a Governor or President would not be hindered by fear for self, for repercussion of actions embarked upon, for general public interest of a state or for national interests clearly defined. All legitimate actions undertaken during the pendency of term of office by a Governor or President must therefore be foreclosed from personal legal liability; hence the concept of immunity clause is honestly not a bad rule as it is widely painted to be.

It may appear as if immunity clause is not in consonance with the concept of the rule of law. The rule of law has been explained to be "an exceedingly elusive notion" which gives rise to a rampant divergence of understandings (Tamanaha, 2004, p. 3; Cole, Reed and Small, 1997). The origin of the doctrine of the rule of law could be traced to the Ancient Greece through the writings of its two great philosophers. Cooper and Hutchinson (1997) claim that a great Greek philosopher, *Plato* as far back as 350 BCE wrote that the collapse of a state where the law was subject to some other authority was not far off and that the situation was full of promise if the law was the master and the government was its slave. Another great Greek philosopher, *Aristotle* wrote that "it is more proper that law should govern than any one of the citizens: upon the same principle, if it is advantageous to place the supreme power in some particular persons, they should be appointed to be only guardians, and the servants of the laws" (Aristotle cited in Ellis, 1919, p. 101). Other writings that apply to the concept of rule of laws are seen in the Holy Bible of the Christians in the book of *Daniel 6: 12* which says that "the thing stands fast, according to the law of the Medes and Persians, which cannot be revoked." This is suggestive of a rule that not even the king can arbitrarily alter a law he has previously enacted. Also applicable to the concept of rule of law is the *Islamic Jurisprudence* which was formulated before the 12th century, under which no official could claim to be above the law, not even the *caliph* (Weeramantry, 1997). Also applicable to the concept of rule of law according to the U.S National Archives is the *Magna Carta of 1215 AD* signed by the King of England, King John under which he placed himself and England's future sovereigns and magistrates partially within the rule of law. This was later corroborated by the *Petitions of Rights of 1648* under which the king was expected to observe the laws of the land. Rule of law in modern times according to Tamanaha (2004) got theoretical foundations in the writings of Samuel Rutherford, a Scotsman in *Lex Rex* (1644), John Locke, an Englishman in *Second Treatise of Government* (1690) and Baron de Montesquieu, a Frenchman in *The Spirit of the Laws* (1748). It is important to state that in modern times, credit for coining the expression *the rule of law* is usually given to a British Professor, Albert Venn Dicey in *An Introduction to the Study of the Law of the Constitution* (1885). The Rule of law is defined by Dicey (1885, p. 98) as "the absence of arbitrary government." Dicey emphasizes aspects of the rule of law which are that no one can be punished or made to suffer except for a breach of law proved in an ordinary court; no one is above the law and everyone is equal before the law regardless of social, economic, or political status; and that the rule of law includes the results of judicial decisions determining the rights of private persons (Palekar, 2009). A later political theorist, Joseph Raz shares common ground with Dicey but argues that the validity of these aspects depends upon the particular circumstances of different societies (Raz, 1977).

It is instructive to note that there are a number of limitations to rule of law and this is admissible most places in the world. Factors such as the use of discretionary powers, existence of special courts, military incursion into politics, periods of war and emergency, granting of immunity to certain people and organizations, and abject poverty and ignorance on the part of the people limits the full operation of the tenets of the rule of law in countries across the globe (Lawson, 2010). In explaining immunity as a limitation to the rule of law, Lawson (2010, p. 93) states that:

"Certain special privileges are accorded certain people and

organizations and by so doing, they are immune from the same set of laws which others are subject. For instance, Ambassadors, High Commissioners and other diplomats enjoy diplomatic immunity in the countries where they represent their countries meaning that none of them can be sued or prosecuted in these countries. Even, if any crime is committed by them in these countries, the highest attracted penalty is to repatriate them to their home countries. Judges are also immune from any legal actions that arise from the discharge of their official duties..... In Britain, the Queen is conceded to do no wrong and as such considered to be above the law. Also, no member of the parliament can be sued or prosecuted as a result of statements made on the floor of the House, even if such are false. Also immune are people certified to be insane, these are people suffering from psychoses. International organizations are also immune from the law. This greatly undermines the equality before the law principle of the doctrine of the rule of law."

In Nigeria, Immunity Clause is an exception to rule of law and this is not abnormal because the country cannot possibly stand out as an exception among the committee of nations as virtually all the countries of the world have one exception or the other to the rule of law with respect to the monarch, the state, legislature, the executive or the judiciary. The only difference is what is accommodated in different political entities. Therefore, having the Immunity Clause in Nigeria's Constitution is indeed in order.

3. Implications of the Removal of Immunity Clause on the Capacity of Executive Arm of Government in Nigeria

The 1999 Constitution allocates a number of functions and responsibilities to the executive arm of government. For instance, at the federal level, it is the duty of the executive under the headship of the President to execute the law (section 5); assent and initiate bills (section 58); grant prerogative of mercy (section 175); grant and withdraw Nigerian citizenship (sections 26 – 30); make certain appointments (section 147); determine the operational use of the armed forces (section 217); prepare budget and formulate policies (section 81); ensure the wellbeing of the citizens (sections 15 – 18); declare war and a state of emergency (section 305); and regulate external relations (section 12). The executive at the state level under the headship of the Governor is allocated a number of functions and responsibilities which are to a very large extent similar to that of the President at the federal level. Considering these enormous tasks of the executive arm of government and the political climate of Nigeria, it would not be out of place for the chief executives (President, Vice President, Governor and Deputy Governor) to be insulated and the only way by which this can be achieved at the moment is via the retention of Immunity Clause in Nigeria's Constitution. Using an old democracy like the United States whose chief executives do not enjoy such immunity as the ones in Nigeria are enjoying may not be an appropriate standpoint of argument in support of its removal from the 1999 Constitution; it is instructive to note that apart from the differential circumstances in the political climate of the US and Nigeria, the stage of maturity of political institutions in the US and Nigeria renders them incomparable (Oladele, 2006).

The executive arm of government needs no distraction and retention of the Immunity Clause in the 1999 Constitution would go a long way in ensuring that the executive arm of government are not distracted. The President is the symbolic head of the nation and the Governors are the chief executives of their states. To wound them by criminal proceedings is to hamstring the operation of the whole governmental apparatus. It would impair government functions and cause unnecessary political distraction. Given the ominous implications of the removal of the Immunity Clause for governance in a volatile polity such as Nigeria's, the Immunity Clause should be seen as a necessary evil (Ohia, 2008). When the term of the officers that enjoy it expires, they become like sitting ducks. As far as Nigeria is concerned, its laws state no time limit for the institution of criminal proceedings. There exist only three statutory exceptions to this rule namely sedition which has six months time limit; treason which has two years time limit; and custom offences which have a seven year time limit. In as much as this is the position of the Nigerian legal system, need for the removal of the Immunity Clause would be unnecessary at the moment as those enjoying the Immunity Clause can be prosecuted as soon as they leave office. Removal of Immunity Clause would in no small measure expose the offices of president and governor to an avalanche of law suits that could distract them from the business of governance (Adujie, 2005). With the way courts in Nigeria grant *ex parte motions* and *injunctions*, the danger that the business of government in Nigeria may be grounded in the absence of an Immunity Clause is real.

It is important not to forget that we have only 74 public officials at the federal and state levels covered by immunity during any four-year term; that means we still have 774 executive chairmen at the local government level who are not covered by the Immunity Clause and scores of commissioners, ministers, heads of parastatals and others who wield executive powers and disburse fat budgets. If the conducts of the persons enjoying and abusing the immunity clause is to be used as a yardstick, one may be pushed to conclude that it should be removed but one constant fact is that abuse does not destroy use (Adujie, 2004). Granted that the Immunity Clause is to forestall frivolous suits against a serving Governor or President, it is also serving as one of the remaining pillars of our federal structure of government. Without Immunity Clause, the President for example would have for mere for fears of competition, confrontation and insubordination, instructed the Attorney-General to file a criminal suit against any of the perceived corrupt governors but with the Immunity Clause operational, the President would have to go through the strenuous length of trying to

intimidate state legislatures to impeach such a governor which may in most cases fail or arduous in others. Also with the police being under exclusive control of the President, it would not be difficult to get any governors arrested. Without Immunity Clause, federalism will fizzle out in Nigeria and give way to a monolithic government with governors as mere heads of individual states at the mercy of the federal-monarch (Anosike, 2005). Giving this palpable danger, the idea of Immunity Clause as a check on frivolous civil suits is superfluous, the real danger is the federal government and hence the need for the Immunity Clause to put it on check. Any attempt to tamper with this check will ridicule our federal structure by empowering the federal government to remove a state-elected executive governor.

It is also important to note that Immunity Clause as expressed in the 1999 Constitution refers to the occupant of the office of the executives at the federal and state levels; the executive institution enjoys the immunity and not an individual (Anugbogu, 2005). Hence, if anyone happens to be the head of the executive, thereby acting in the name of the office, he or she enjoys the immunity. It must be differentiated that privileges attached to an office is different from that attached to a person.

4. Justifications for the Retention of Immunity Clause in the I999 Constitution

There are a number of reasons why the Immunity Clause should be retained in Nigeria's Constitution. First, 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.

Secondly, retention of Immunity Clause is justifiable in that if the President and the 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.

Thirdly, 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 also 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.

Fourthly, 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).

5. Conclusion

It is clear from the preceding arguments that Immunity Clause does not work against rule of law as widely misunderstood; it is clear that Immunity Clause as it were is a limitation to the rule of law within Nigerian political environment; and this is not out of place in any political environment; it is clear that removal of Immunity Clause would unavoidably undermine the capacity of the executive arm of government in Nigeria; and it is clear that there are lots of justifications for the retention of Immunity Clause in the 1999 Constitution. Having cleared all these, it is hoped that the Immunity Clause would be retained in the 1999 Constitution as it has lots of usefulness within the Nigerian political environment at the moment. Nigerian government and people are not yet politically mature like the government and people of United States where absence of Immunity Clause does not undermine executive capacity, Nigeria may need more than half of a century to get there. No doubt, if the Immunity Clause is retained, the executive would perform better than if it is removed and the country would progress.

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