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Invulnerability of the Chief Executive and Democratic Sustainability in Nigeria: Issues and Challenges

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Abstract- The debate on the invulnerability of the chief executive in modern democracy has raged on with no end in sight soon. Executive recklessness and impunity seem to have been given a tacit constitutional approval as no criminal proceedings can be brought or continued against the President, the Vice President, the Governor and the Deputy Governor during their tenures in office, though; the provisions do not take cognisance of the statute of limitations as criminal charges could be commenced or continued after the tenures of the holders of these offices. Equality before the law presupposes that the law should apply equally to the rulers and the ruled save for privileges permitted by the Constitution or other law. In the words of that erudite jurist, Lord Denning MR: "To every subject in this land, no matter how powerful, I would use Thomas Fuller's words over 300 years ago 'Be you never so high, the law is above you."1 I. Introduction Based on the above, this paper examines the invulnerability of the heads of executive arm of government in the discharge of their constitutional duties. It x-rays, the origin of sovereign immunity of the chief executives in Nigerian polity; and the effects of invulnerability of the chief executive on the political stability of the nation.

Keywords: *executive power, executive invulnerability, immunity, political stability.*

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Invulnerability of the Chief Executive and Democratic Sustainability in Nigeria: Issues and Challenges

Ola Abegunde[α] & Olusola Akinluyi[σ]

Abstract- The debate on the invulnerability of the chief executive in modern democracy has raged on with no end in sight soon. Executive recklessness and impunity seem to have been given a tacit constitutional approval as no criminal proceedings can be brought or continued against the President, the Vice President, the Governor and the Deputy Governor during their tenures in office, though; the provisions do not take cognisance of the statute of limitations as criminal charges could be commenced or continued after the tenures of the holders of these offices. Equality before the law presupposes that the law should apply equally to the rulers and the ruled save for privileges permitted by the Constitution or other law. In the words of that erudite jurist, Lord Denning MR: *"To every subject in this land, no matter how powerful, I would use Thomas Fuller's words over 300 years ago 'Be you never so high, the law is above you."*[1]Based on the above, this paper examines the invulnerability of the heads of executive arm of government in the discharge of their constitutional duties. It x-rays, the origin of sovereign immunity of the chief executives in Nigerian polity; and the effects of invulnerability of the chief executive on the political stability of the nation. The paper concludes with recommendations on the need for modifications in the continued executive invulnerability towards a good governance and sound democratic process.

Keywords: executive power, executive invulnerability, immunity, political stability.

I. Introduction

The immunity conferred on the chief executives by Section 308 of the Constitution[2] has done more harm than good since it has been used by some of the officials concerned as a licence for stealing public funds with reckless abandon.[3]In today's modern democracy, most especially in sub-Sahara Africa, chief executives are deemed invulnerable as their excesses (both civil and criminal) cannot be punished as long as they remain in power. This constitutional provision empowered the chief executives to continuously engage in impunity as long as they enjoy the favour of the legislature. In Nigeria, only the Legislature is constitutionally empowered to commence impeachment proceedings[4] against the chief executive. This can be done only when the chief executive is alleged to have committed a 'gross misconduct.' As long as the chief executive belongs to the same party with the legislators, 'gross misconduct' is subject to the interpretation of the legislators. As a matter of fact, impeachment has become a political vendetta most especially, in Nigeria.[5] In other worlds, there are no objectives and generally recognised and acceptable criteria to determine what constitute gross misconduct.

In a federal system of Government, there are three arms of government as provided for in the Constitution.[6]The three arms of government are independent and autonomous[7] and enjoy some degree of autonomy in the discharge of their official duties. It is worthy of note that only the head of the executive (the President, the Vice President, the Governor and the Deputy Governor) enjoy invulnerability (constitutional immunity) as no criminal proceeding can be continued or instituted against them while in office as the chief executive. Other arms of government only enjoy immunity in the discharge of their constitutional duties. This, however, does not shield them from facing criminal trials[8] while holding the office. "Immunity from damages whether absolute or qualified represents a sharp departure from the principle that persons are responsible for the harm they inflict upon one another and that the victims may seek compensation from the perpetrators."[9]The practice in modern societies of

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[2] (1977)1 QB 729 at 761-762
[3] 1999 Constitution of the Federal Republic of Nigeria (as amended),
[4] Sovereign Immunity and Governor DSP Alamieyesiegha available on www.segundawodu.com accessed on Thursday, 21st January, 2016.
[5] Section 143 and Section 188 of the Constitution of Federal Republic of Nigeria. 1999 (as amended)
[6] Governor Ladoja of Oyo State, Peter Obi of Anambra State, Joshua Dariye of Plateau State and MuritalaNyako of Adamawa State are few of the victims of unlawful and unjust removal of the chief executives simply because they fell apart with their political god fathers.
[7] Sections 4,5 and 6 of 1999 Constitution of Federal Republic of Nigeria (as amended) provides for Legislative, Executive and Judicial powers of government.
[8] Though, this may be so in theory alone. Instances abound in Nigeria where the President would hound the head of the legislature and engineer its removal.
[9] The on-going trial of the Senate President in Saraki v. Code of Conduct Bureau is a case in point.
[10] Doyle J. in Mason v Melendez 525 Supp 270 at 275 (US) C.T. Winconsin 1981 available on https://www.law.justia.com/cases/federal/district -courts/F. Supp/525/270

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making provisions for restriction of legal proceedings against the chief executive of a nation has been said to be a functionary mandated incident of the president unique office.[10]

Section 308 of the 1999 Constitution of the Federal Republic of Nigeria provides:

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 or 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.
d) 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.
e) 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.

In order to preserve the rights of a plaintiff to sue any of these officials, it is provided that the statute of limitations will not run against a claimant until the expiration of the term of office of the official concerned.
By the provision of the immunity clause, it is almost impossible to do anything to an incumbent governor, his deputy, President and his vice president even, if then openly and brazenly commit an offence[11]. The governor of a State remains above our laws and is immune to prosecution for any type of offence while his tenure lasts.[12]The section 308 did not attract much attractions and concern until the governors in the Fourth Republic began to hide under the cloak of immunity clause to commit brazen and wanton corruption[13] and intimidation of political opponents.

Igbinedon Asabor[14] succinctly captures the executive recklessness and invulnerability when he posits thus:

> *The use of protective shield of constitutional immunity as a legitimate instrument and defence 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 characterisation. In reality, the clause has 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.*

Based on the character of Nigerian chief executives in the usage of immunity to perpetuate and inflict pains on their perceived enemies, the intent of the equality before the law which was vehemently argued and propounded by Albert Venn Dicey appears to have been defeated.

Akinwumi O,[15] while justifying the rationale for the inclusion of immunity clause in the 1963 and 1979 Constitutions of the Federal Republic of Nigeria posits thus:

> *To ensure the inviolability and dignity of the offices of the chief executives, the need to put in place what guarantees and safeguards this protection under section 308 of the 1999 Constitution cannot be over-emphasised. If Presidents were obligated to justify legally each contestable action of the executive branch, they would be subjected to intolerable control and inspection by a supposedly coordinate branch and would be burdened by countless impediments to effective action. Even, if criminal action charges are brought against a President, there are several conceptual problems*

Justice Powel in Nixon v Fitzgerald,[16] summed up the importance of invulnerability of the chief executives as follows:

1. The President cannot make important and discretionary decisions if he is in constant fear of civil liability; and

[11] Nixon v. Fitzgerald 457 U.S. 731 at 749, (1982) in Mowoe K.M, Constitutional Law in Nigeria. Malthouse Press Limited, Lagos, 2008 at 140

[12] Senator IyiolaOmisore, former deputy governor of Osun State could not be arrested and tried for his alleged involvement and complicity in the murder of Chief Bola Ige, former Attorney General of the federation because the former enjoyed immunity. He was only arraigned in court after he had been impeached.

[13] YusuphOlaniyonu: 1999 Constitution: Between Section 188 and Section 308. Available at http://www.segundawodu.com/olaniyonu Accessed on Wednesday, 13th January, 2016.

[14] Sovereign Immunity and Governor DSP Alaieyeseiga available http://www.dawodu.com/ijalayeAssessed on Wednesday 13th January, 2016.

[15] Asabor I, Immunity in International Law, The Vanguard Newspaper, Nigeria (2, October, 2002) 17

[16] Immunity Clause Under the Nigerian 1999 Constitution (as amended): a Curse or Blessing? Available on www.academia.edu accessed on Thursday, 21 January 2016

[17] Supra

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2. Diverting the President's time and attention with a private civil suit affects the functioning of the entire federal government thereby abrogating the separation of powers mandated by the constitution.

II. Background to the Study

Immunity predates colonialism in Nigeria. Ever before the advent of the colonial master, Yoruba ethnic region in the South western Nigeria had a monarchical structure which was identical with the British monarch. Kingship in England can be traced to the Anglo- Saxon period. There was a time when the king could do whatever he pleased in that he was absolutely absolute in the affairs of the state. His will was law. The king in the Yoruba land is adjudged to possess absolute power and highly revered. He is referred to as "*alaseekejiorisa*" meaning "His majesty whose power is akin to the gods." It was generally believed that the king could do no wrong and that he wielded enormous and unlimited power as he could acquire land, and even women belonging to other men and no one could challenge his authority.

At the termination of colonialism in 1960, Nigeria inherited the English common law and the doctrine of sovereign immunity from Britain. Under the doctrine, it is presumed that the king can do no wrong, he lacks capacity of doing wrong and kings must not and was not allowed to do wrong.[17] The doctrine, as it is understood today, is one of the vestiges and relics of colonialism in this part of the continent. The statement that the king can do no wrong means that the king of England cannot be held responsible for anything done in his name. The reason for this is that no order of the king is effective unless and until it has been countersigned by the parliament, despite that the king is responsible for its order.

It is unfortunate that in the pre-colonial Africa, the kings enjoy such prestige and unquestionable show of powers and paraphernalia of office. In other words, the kind of power and immunity which traditional rulers wielded in the past had been eroded drastically in this modern era. They had been unclad of prerogatives and immunities and anyone caught in a despicable act would be prosecuted.[18]

The doctrine of immunity which shields the President, the Vice President, the Governor and the Deputy Governor evolved from the history of Nigerian traditional political system and monarchical system in England. However, the doctrine has been a subject of abuse in the recent times when the Governors were engaged in brazen and unabashed looting of the treasury[19], abuse of citizens fundamental rights, disregard for the rule of law and wanton killings.

III. Statement of the Problem

The American model of presidential system of government adopted in Nigeria has not been practised as it is practised in America. The American and other developed models of presidential system of government have not made their chief executives above the law as it is currently practised in the Nigerian presidential system through the introduction of the immunity clause that has shielded the executives from prosecution irrespective of any unconstitutional act or misdemeanour committed by them before or during their tenure as chief executives. The United States of America constitution does not confer widerange immunity on her federal and state executives from investigation and prosecution.

The Nigerian constitution allows only for the investigation of the executive without prosecution, even if found guilty of the alleged offence. But the unanswered question is "what purpose and benefit is the investigation without prosecution?" Immunity of this sort negates the principle of equality before the law, which is the central thesis of the rule of law. The concept of the rule of law is based on the principle of equality before the law, and is against undue privileges and discrimination in the society. The immunity clause as contained in the Nigerian constitution legally raises the executive above the law and the state.

The constitutional provision enables the executives to dominate and exercise undue influence on the other two arms of government inspite of the constitutional provision of separation of power which should ordinarily allow and encourage checks and balances among the arms of government.

This study observes that shielding the executives from prosecution when in office has been counterproductive in that it empowers them to commit heinous crimes while in office. Through this, the public has subsequently been prevented from questioning their excesses while in office in that any attempt to do so is usually perceived as an attempt to divert the attention of the executive from the serious task of governance. It is important to note that sitting presidents and governors in history have been prosecuted for their excesses without undue legal coverage of immunity. For example, President Bill Clinton of the United States of America was investigated and found guilty of improper relationship with Monica Lewinsky, President Andrew Johnson was investigated and indicted of power abuse and was impeached in 1868; President Richard Nixon was investigated and indicted for misuse of power and obstruction of justice. Also, at the state level, Governor James Ferguson of Texas was indicted for financial

[18]Ibid.

[19]The Alowa of Ilowa in Osun State was arraigned before a Magistrate's Court for an alleged rape of a youth corps member in his domain. It the monarch was found guilty, he would be sentenced accordingly.

[20] Federal Republic of Nigeria v. James Ibori (Unreported: Suit No. FCH/ASB/IC/09

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misappropriation and embezzlement whereupon he got impeached. Governor Evan Meachanalso in America was investigated, indicted and impeached. Also, Governor John Walton of Oklahoma was investigated, indicted and impeached. All the above examples are from the United States of America, the model of democracy and presidential system practised in Nigeria. Interrogating immunity viz-a –viz the powers of executive in Nigeria politics/political system reveals a scenario of an over powerful executive that is usually protected by the cloak of immunity while in office. This practice is not only seen as counterproductive, but is such that has promoted executive recklessness and abuse of powers to the extent that the executive not only dominate governance, but at times usurp the powers of the other two arms of government.

However, consequence to this, the heat often generated by public criticisms and the subsequent government reactions, in some cases do lead to political instability and unnecessary diversion of government attention from serious task of governance. Under this condition, it is doubtful if the much–sought–after dividend of democracy by the masses and national development can be realised.

IV. Historical Background of Immunity Clause

Immunity has been described as the exemption of a person or body from legal proceedings or liability.[20] The idea of immunity is said to have evolved in the old feudal structure of England[21].where the king was the head of the community, the leader and the judge. It was, therefore, inconceivable and unimaginable that the king who doubled as the chief judge and the embodiment of justice in his realm be accused, sued, docked or imprisoned by any court in his domain. This belief goes beyond the principles of natural justice that a man cannot be a judge in his own cause but in the fact that the very thought of bringing the king to justice defied rational analysis as the king was the law and the law was the king.[22]This automatically made the king not only to be seen as above the law but also made him to act above the law.

It should be noted that the King held court, heard cases and gave judgment. He could not be sued in his own court, as there would be no one to hear it. Legal process did not lie against him. He was, therefore, immune from legal action and liability.

From time immemorial, the King or Queen was the first common law judge, hence he/she was immune from legal action. This has been expressed in the Latin maxim *rex non protest peccare* meaning "*The King can do no wrong*." The English doctrine of sovereign immunity has a chequered history which is rooted in antiquity.

In 1397, the House of Commons denounced the scandalous financial behaviour of King Richard II. However, the member of the House who led the debate was sentenced to death for public humiliation of the king. Though, the sentence was set aside, the incident set the stage for a bill on parliamentary immunity and in 1689, the bill of rights Article 9 granted that "the freedom of speech and debates or proceedings in the parliament ought not to be discussed or questioned in any court or place outside the parliament."[23] Thus this began the era of formal insertion of immunity clause in laws.

In 1812, the doctrine of immunity received judicial recognition by the U.S. courts in the case of Schooner Exchange v. M. Faddon[24] when the court ruled that foreign states had absolute immunity from the jurisdiction of a U.S. court for any act.

Over the years, there had emerged various forms and dimensions of legally recognised immunities ranging from transactional immunity which grants immunity to the witness from prosecution for offence to which his compelled testimony relates to official immunity from law suits. Other types of immunities are: functional immunity, diplomatic immunity, parliamentary immunity and judicial immunity.

Immunity clause took its root from the Nigeria colonial experience. Immunity for chief executive was first provided for in Section 161 of the 1963 Republican Constitution of Nigeria which provides as follows:

1(a) no criminal proceedings shall be instituted or continued during his period of office against a person to whom this subsection applies and (b) such a person shall not be arrested or imprisoned during that period either in pursuance of the process of any court or otherwise and (c) no proceeding in which relief is claimed against such a person in his capacity shall be instituted or continued in any court during his period of office but in ascertaining whether any proceeding against a person to whom this subsection applies, his period of office shall be left out of account (2) Subsection (1) of this section applies to a person including or required to perform the functions of the

[20]EseMalemi, Administrative Law Cases and Materials (2006) Grace Publishers Inc. Lagos, p251.

[21] The feudal system was a social system which developed in Western Europe in the 8th and 9th centuries, in which people served a Lord in their community by working and fighting for him and in exchange were supported and given land and protection. The Lords were in turn responsible and owed allegiance to the king who was at the apex of the feudal system.

[22]Oluyede P.A.O, Constitutional Law in Nigeria (2008), Evans Brother Limited Nigeria Publisher, Lagos, p 466 cited in Adekunbi Johnson Odusanya, The Role of Constitutional Immunity of The Executive in The Sustenance of Democracy: Nigeria as a Case Study (2015)Ekiti State University, Ado Ekiti Law Journal, Volume 6, 374-376.

[23]The Guardian outlook, Sunday, February 24, 2008. Kingsley Ogbona, Immunity: Protecting Democracy not Kleptocracy cited in Adekunbi Johnson Odusanya, The Role of Constitutional Immunity of The Executive in The Sustenance of Democracy: Nigeria as a Case Study (2015)Ekiti State University, Ado Ekiti Law Journal, Volume 6, 374-375.

[24] (7 Cranch)116 3L. Ed 287. (1812)

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office of the president or of the Governor of a State and in that subsection period of office means, in relation to such a person, the period during which he hold or is required to perform the function of the office in question. Section 267 of the 1979 Nigerian Constitution has similar provision in respect of invulnerability of the chief executive. Interestingly, section 320 of the aborted 1989 Constitution contains immunity clause similarly worded like section 267 of the 1979 Constitution.

However, as general as this blanket immunity may be, there are some exceptions:[25]

a. They may be sued in their official capacity
b. They may be sued as a nominal party in an action
c. They may be impeached (in case of the President or Vice President) by the National Assembly (and in case of the Governor and Deputy Governor) by the State House of Assembly
d. They may be sued in an election petition[26]
e. They are not immune from police investigation[27]

V. Cases and Legal Decisions

This section briefly highlights concrete instances in Nigeria where the immunity clause had been invoked in different cases and courts. It is worthy of note that the issue of executive immunity in Nigeria pre-dated the 1979 Constitution. It was accorded due recognition and maximally used during the military regime in Nigeria. In the case of Ebun Omoregie v. Col. Samuel Ogbemudia,[28] the plaintiff instituted an action against the defendant, a military governor, in his private capacity. The court, declining submits that it had no jurisdiction to hear the case held as follows:

> "*The provision of Section 161(1)(c) and (2) of the Constitution (1963) makes it obligatory that no proceedings in which relief is claimed against the governor of any State in the federation in his personal capacity shall be instituted or continued in any court during his period of office" Per Begho CJ.*

In the case of Colonel OluRotimi & Ors v. Machregur,[29] while considering Section 161 of the 1963 Constitution, the Supreme Court held that the action instituted against the plaintiff, the then military Governor of Western region of Nigeria in his personal capacity for declaration of the title to land cannot be maintained against him. The Supreme Court agreed with the learned counsel to the defendant (the Governor) when he submitted by virtue of Section 161(1)(c) of the Constitution of the Federal Republic of Nigeria, 1963, the court could not give judgment against the first defendant, that it was not necessary for him to plead that section of the constitution which though purports to confer a private right or privilege or immunity because it is evidently a matter of public policy embodied in a public Act or legislation of which the court is bound to take judicial notice and which could not by the incumbent of the office concerned be waived. This was also the stand of the court in the case of Samuel Igbe v. His Excellency, Professor Ambrose Alli, Governor of Bendel State of Nigeria & 1 other.[30]

In Sultan Alhaji Ibrahim Dasuki v. Brigadier General Yakubu Muazu, the appellant was the erstwhile Sultan of Sokoto. He sued the respondent who was the military Administrator of the State. According to the appellant, on the 20th of April, 1996, the respondent invited him to his office as the Military Administrator of Sokoto State. On arrival, a letter terminating the appointment of the appellant was handed over to him. The appellant was led through a side door to a waiting vehicle which took him to the Airport, from where he was flown to Yola and driven to Jalingo.

At theSokoto Airport, on the above mentioned date, the appellant who was over 70 years of age and hypertensive, requested to be allowed to send for his drugs which were in his personal travelling brief case. He was obliged. The brief case was collected from his family but was not delivered to him.

On the 28th of July, 1988, after his release from detention, the appellant wrote to the then Commissioner of Police, Sokoto State for the return of his brief case. The Commissioner of Police admitted that the brief case was delivered to him at the Airport after the Aeroplane had taken off but that from the enquiries made from the Sokoto State Government, Sokoto Police Command and State Security Services, the whereabout of the briefcase was only known to the respondent.

According to the appellant, the contents of the briefcase were personal documents, foreign currency, drugs and other valuables. He, therefore, prayed the court for an order directing the respondent to return to him, those items; in the alternative, the payment of the sum of ten million Naira (N10,000, 000.00) as special and general damages.

The respondent filed a preliminary objection to the action basically on the ground that he was at that time, the Military Administrator of Sokoto State and as such, he was acting in official capacity as in the instant case. He placed reliance on the provision of Section 267 of the 1979 Constitution.

After canvassing arguments in respect of the preliminary objections, the trial court in its ruling, held that the action was instituted against the respondent in his personal capacity for acts done in his official capacity as such, the court had no jurisdiction to

[25] Femi Jemilohun:Government Liability in Nigeria in Essays on Administrative Law in Nigeria, Petoa Education Publishers, Ado Ekiti, Nigeria
[26] See generally EseMalemi Cases and Materials on Administrative Law
[27] Fawehinmiv.IGP (2000)7 NWLR p.482
[28] (1973)3U.I.L.R. 115
[29] (1974)II SC 133
[30] (1981)1NCLR 124

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entertain the matter as the respondent enjoyed immunity from judicial proceedings under Section 267(2) of the 1979 Constitution or Section 308 of the 1999 Constitution.[31]

On appeal, the Court of Appeal held that the immunity from judicial proceedings provided under section 267 of the 1979 Constitution or 308 of the 1999 Constitution is merely to protect a person from harassment of his person while in office for his action done in private capacity. It would not apply where as in the instant case, the respondent is claiming it on the ground of official act. It is manifest that the respondent had left office when the writ was issued. The respondent could not by claiming that he acted in his official capacity, claim immunity from legal process under section 267 or 308 of the 1979 or 1999 Constitution. The section only protects acts done in personal capacity while the person is in office at the time the writ is issued. It does not apply when the action complained is official.[32]

In the cases of Victor Olabisi Onabanjo v. Concord Press of Nigeria[33] and Tinubu v. I.M.B. Securities Plc,[34]one of the issues for determination was whether section 267 of the 1979 constitution and section 308 of the 1999 constitution respectively constitute disability, disentitling the incumbent from suing as plaintiff in their personal capacities. In Tinubu v. I.M.B. Securities Plc,[35]the court of appeal adjourned the case until the respondent who was Governor of Lagos State shall have vacated the office. The fact of the case was that the appellant by a letter, requested the 1st respondent to investigate the alleged crimes committed by Bola Ahmed Tinubu, the former Governor of Lagos State in pursuant to section 4 of the Police Act.[36] The respondent declined the request on the ground that section 308 confers immunity on the holder of the office from Police investigation. The appellant, thereupon, took an originating summons against the respondent to investigate the Governor. The Supreme Court held per Uwaifo J.S.C that:

> *"A person protected under Section 308 of the 1999 Constitution, going by its provision, be investigated by the Police is, in my view, beyond dispute. The police have discretion whether or not to conduct investigation into any allegation of crime made to them. And the court will not interfere if on the fact of a particular case, the discretion is properly exercised. There is therefore, nothing in section 4 of the Police Act which denies the police of any discretion whether or not to investigate any particular allegation, or when they decide to investigate, to do so to its logical conclusion"*[37]

Also, in the same case of Tinubuv.I.M.B Securities Plc, the respondents by a writ of summons instituted on 26th November, 1992 claimed N2.5m from the appellant, being the credit facility he guaranteed in favour of the 1st defendant. During the pendency of the appeal at the Court of Appeal, the appellant was sworn in as Governor of Lagos State on 29th May, 1999. The respondent applied for an adjournment of the appeal sine dine until such time as the appellant would cease to hold office as Governor of Lagos State, having regard to section 308. The appellant opposed the adjournment on the ground that section 308 does not prevent him from prosecuting his appeal or instituting the action. The Court of Appeal granted the respondent's application and adjourned the appeal sine dine until the appellant vacate the office of Governor of Lagos State.

The Supreme Court on the order of sine dine, per Kutigi, J.S.C. stated inter alia[38]:

> *Following Rotimi& 2ors v. Macgregor, I have no hesitation in coming to the conclusion that the Court of Appeal rightly declined to entertain the appellant's appeal pending before it, thus, giving effect to the mandatory provision of section 308 of the Constitution above. But the Court of Appeal was wrong when it proceeded to adjourn the appeal sine die instead of striking it out. The appeal certainly cannot be continued during the appellant period in office. A proper order striking out the appeal will therefore have to be substituted for that of an adjournment.*

In Victor Olabisi Onabanjov. Concord Press of Nigeria Ltd.,[39] the plaintiff, Governor of Ogun State of Nigeria, in his personal capacity sued the defendant, publishers of the Concord Newspapers claiming damages for libel. The defendant raised objection to the jurisdiction of the court, saying that since the Governor cannot be sued in his private capacity while in office, it is inequitable and unconstitutional for the Governor to sue other persons in his private capacity, on the ground that the supreme purpose of the Constitution is the principles of freedom, equality and justice. Kolawole J held that the plaintiff can sue in his personal or private capacity. Under section 267 of the 1979 Constitution, it is expressly stated that the plaintiff, being a governor cannot be sued in his personal or private capacity; nevertheless, the Constitution is silent on the duty of a court of law to fill in any gap in the Constitution. Since a Governor is not expressly incapacitated by any

[31]Obih v. Nbakwe (1964) I SCMLR. P.431
[32]Op Cit.
[33] (1981)2NCLR 399
[34] (2001)16NWLR (Pt.740))640-670
[35] supra
[36] Cap P19, LFN 2004
[37](2000)7NWLR (Pt.665)533 Par. B-H
[38] Supra
[39] Op cit

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provisions of the Constitution, the Governor can sue in his private and personal capacity.[40]

In Duke v. Global Excel Communications Limited,[41]the respondent who was the executive Governor of Cross Rivers State at the material time, instituted an action in the High Court of the State against the appellant for a libellous publications in the Global Excellence Magazine. Upon the service of writ of summons, a conditional appearance was entered on behalf of the appellant who filed a notice of preliminary objection based on the provisions of Section 308 of the 1999 Constitution, challenging the jurisdiction of the court to entertain the matter. He argued that in line with the immunity enjoyed, the Governor cannot institute an action against the appellant. Swayed by this submission, the court held that the Governor cannot sue or be sued in his personal capacity.

However, on appeal, following the decision reached in Tinubu v. I.M.B Securities Limited,[42] the Court of Appeal upturned the decision and held that the Governor though enjoys immunity both in his personal and official capacity, he can nonetheless sue in his personal capacity. The Supreme Court also upheld the decision of the Court of Appeal.

In Aper Akuv. Plateau Publishing Company Limited,[43]the plaintiff instituted a libel suit against the Governor of Benue State in Nigeria in his personal capacity against the defendants. Deciding on the case, AdesiyunCJ, held that Section 267 of the 1979 Constitution gives a Governor immunity in his personal capacity while in office as Governor but does not disable him from bringing legal proceedings against other persons while in office as Governor. If the Constitution wants to prevent a Governor from suing in his private capacity, it should have so provided. It is the duty of a court to interpret the Constitution as it is and not the duty of the court to amend it. The power to amend the Constitution lies with the National Assembly.[44]

In the United States Constitution, there is no express provision granting immunity to the President, but it has been held that he is beyond the reach of judicial direction 'either affirmative or restraining, in the exercise of his powers, constitutional, statutory, political or otherwise' except where it is ministerial.[45] In the United States v. Nixon,[46] the court held the President amenable to a subpoena to produce evidence for use in a criminal case despite the general immunity. It noted "neither the doctrine of separation of powers, nor the need for absolute, unqualified presidential privilege of immunity from judicial process under all circumstances"

[40] Op cit
[41] (2007)1 WRN 63, 85-88
[42] Supra
[43] (1985)6 NCLR 338
[44] Op Cit
[45]Mississippi v. Johnson 4 Wall. (71 U.S) 475 (1867)
[46] 418 U.S. 683 (1974) quoted by K.M. Mowoe ibid.

All these exemptions are enjoyed by the chief executive during their tenure in office.[47]

VI. Effects of Executive Invulnerability on Political Stability

The original intention for the inclusion of immunity clause in the Nigerian constitution was done in good faith but politicians have used the clause to their personal advantage and to the detriment of democracy and national development. Hence, the constitutional provisions and the subsequent application of immunity have become a threat to political stability and democratic growth in Nigeria.

The constitutional clause gives the Chief Executives both at the federal and state levels too much powers and allows them to commit all manners of atrocities (civil and criminal) and get away with them since they cannot be sued or tried in court during their tenurein office. For example, the personal account of a serving governor in Ekiti State, Mr Ayodele Fayose was frozen on 28th June, 2016by the Economic and Financial Crime Commission (EFCC) after conducting investigation on the governors' source of income.

Executive immunity in an emerging democracy is essential for the growth of the system; but it is inimical to the stability of the system as a result of lack of adequate political culture among the political gladiators in the polity.

Considering the importance of democracy in the development of the contemporary world, it becomes important to device a means for its sustainability, hence the introduction of immunity for the chief executives at both the federal and state levels. The clause is to guard against diversion of any kind of the attention of the executive from performing their official assignments. For instance, without immunity, it will be possible to sue executives for their actions and inaction in the process of governance and in some situations might require the presence of the executive in the law court to give evidence and by so doing, valuable time required by the executive for governance will be lost. In other words, the stability of new democracy requires adequate concentration devoid of any sort of distraction, hence the need for the introduction of immunity in the constitution.

Generally, immunity allows for the proactive policy formulation and implementation. The clause legally empowers the executive to take action or make policy statement in situations where there are life threatening challenges, such as outbreak of diseases, natural disaster, terrorist invasion, war, among others.

The occurrence of any of the above listed and others may not allow for legislative meeting and

[47]AkinwumiOgunranti: Immunity Clause Under the Nigerian 1999 Constitution (as amended); A Curse or Blessing. Available on www.academia.edu accessed on Monday, 18th January, 2016.

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deliberation to take place. In a bid to guard against such situations from getting out of hand, the executive is constitutionally empowered to take action in the interest and on behalf of the country. An example of the exercise of such power was the invasion of Odi village in Bayesa State and Zakin Biam in Benue State, Nigeria, during the administration of Chief Olusegun Obasanjo when soldiers were being killing wantonly while on official duties. It allows for continuity of government policies and programmes. The fact that the constitution has restrained individuals and groups in the country from instituting a legal action against the chief executive will to a great extent safe guard the executive to complete its tenure in office. However, this can only happen when the legislature has not considered any of the actions of the executive as against the constitutional provision, which constitutes impeachable offence.

The constitutional provision of immunity was with the intention of guiding and nurturing the ailing system of government to maturity in such that there will be no diversion to the process governance. In addition to this, it will aid accelerated development of the various institutions of democracy to the level that the system can be self-regulating.

Having glowingly talked on the significance of granting immunity to chief executives, it is essential to note that for reasons which cannot be exhausted here, scholars and public analyst have argued for the outright removal of the clause from the constitution of the Federal Republic of Nigeria.

First, it allows for impunity and recklessness on the part of the executive. Because the chief executives cannot be sued for their action either for satisfying personal interest or that of other individuals such as close allies, godfather and political party stalwarts among others, they embark on actions that are not constitutional. Such actions include arbitrary termination of tenure of appointment of individuals who are not in their political good book, appointment of caretaker committee to oversee the administration of local government; formulating and enforcing personal policy as government policy that are meant to punish their perceived political enemies, non-compliance with the rulings of the judiciary mostly when the judgement is against their actions, etc.

Second, it is believed that immunity breeds corrupt leaders. Going by the submission that absolute power corrupts absolutely, immunity empowers the executive to exercise absolute powers on their subjects and still be shielded by the law. The corrupt acts that can be perpetuated by the executive are numerous. Therefore, all actions and inactions of the executive that is motivated for benefit or otherwise, such as punishment of perceived political enemies are corrupt acts.

Furthermore, it is a temptation for the executives that lack political education and culture. This simply means that chief executives without the proper political culture and political education such that can make them have the understanding that, they are only holding the position they occupied in trust for the electorates.

The need for comportment and maturity in conducting government business with all seriousness is requires for the benefit of the citizens irrespective of their religious beliefs, political affiliation, ethnic origin, social status in the society among other factors.

The last but not the least, immunity encourages abuse of power by the executives. Any action of the executive that is not in the interest of the general public and also lies outside the deliberation and approval of the legislature can be regarded as an abuse of power. The tendency for utmost usage of power is inherent in every human being like the traditional rulers in Nigeria in the pre- colonial era. Any power without adequate regulation will be recklessly utilized to the advantage of whoever is exercising such powers. There are many instances in the Nigerian democratic system where the chief executives had refused to comply with the rulings of the judiciary. They forget that the judiciary is the third arm of government that is constitutionally empowered to exercise judicial control over other arms of government in order to ensure the stability of the system.

The above negative effects of immunity are as a result of lack of political maturity by the leaders, absence of democratic political culture as against autocratic and dictatorial culture that the Nigeria political leaders exercise which may be a product of both military incursion into Nigerian political system and the process of Nigerian traditional political system. For example, the ranks and files of the military obey the last order of superior officers. Also, in the Nigerian pre-colonial traditional political system, once a king is enthroned nobody dethrones such unless death or when the misdemeanours of such king have become unbearable to the general public. At that level, the king is forced to commit suicide.

In the light of the level of corruption involving the executives, one wonders if the immunity has unintentionally served as incentive for corrupt practises.

VII. Concluding Remarks

It has been shown from this discourse that executive immunity is a veritable tool that is originally intended to provide the avenue for the executives to perform their constitutional roles effectively and with utmost freedom devoid of any distraction. However, nowadays, while considering the high level of corruption involving the executives, one wonders if the constitutional provision is not being used as a veritable tool shielding the executives for corrupt practises.

As a result of the importance of immunity and the need for development in an emerging democracy, it is therefore recommended that the immunity under

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section 308 (1) (a) of the Nigerian constitution should not be absolute. This can be achieved through separation of powers among the three arms of government so that the arms of government will be alive to their constitutional responsibilities.

We will equally like to suggest that the immunity granted to chief executives should not be total. In other words, offences such as murder, looting of treasury, perjury, giving false information such as false asset declaration etc should not be covered by immunity. Since the above listed conducts while in office were not, ipso facto intended to be protected by the framers of the constitution, therefore, they should not come under the protection of immunity. The executive can be tamed by the legislature through impeachment or by another constitutional provision through another institution of government- the Code of Conduct Bureau and the Code of Conduct Tribunal. Section172 and 209 of the constitution mandates public officers, including the executives to conform to the constitutional provisions of the Bureau, by periodically declaring all their assets. When a public official is found guilty of violating this constitutional provision, such an individual will lose the right to further contest elections; pension benefits; and cannot benefit from the constitutional provisions on prerogative of mercy for offence convicted. In addition to this, the supremacy clause of section 1(3) of the Nigeria constitution is applicable. Therefore, if democracy is indeed the government instituted by the people and for the people, there is need for government institutions and justice system that work well, that do not relent in their quest to produce the best among the equals for political leadership that will be committed to making sure that the system is effective in such that cannot be manipulated by a powerful individual or groups of individuals. This is what is needed to make true the statement that no one is above the law, and there is no need to create a special class of people that will be exempted from the law in a democracy.

Therefore, if democracy is indeed a system of government that allows for equal opportunity for all; guarantees justice system that works well; system which does not relent in its quest to produce the best among the equal for political leadership, that will be committed to making sure that the system is effective and that it cannot be manipulated by powerful individuals or groups of individuals, rather a system that will promote rule of law, …

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