

# 1 Invulnerability of the Chief Executive and Democratic 2 Sustainability in Nigeria: Issues and Challenges

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## 7 **Abstract**

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

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23 **Index terms**— executive power, executive invulnerability, immunity, political stability.

## 24 **1 Introduction**

25 Based on the above, this paper examines the invulnerability of the heads of executive arm of government in  
26 the discharge of their constitutional duties. It x-rays, the origin of sovereign immunity of the chief executives in  
27 Nigerian polity; and the effects of invulnerability of the chief executive on the political stability of the nation. The  
28 paper concludes with recommendations on the need for modifications in the continued executive invulnerability  
29 towards a good governance and sound democratic process.

30 Keywords: executive power, executive invulnerability, immunity, political stability. The immunity conferred on  
31 the chief executives by Section 308 of the Constitution has done more harm than good since it has been used by  
32 some of the officials concerned as a licence for stealing public funds with reckless abandon. ?? In today's modern  
33 democracy, most especially in sub-Saharan Africa, chief executives are deemed invulnerable as their excesses (both  
34 civil and criminal) cannot be punished as long as they remain in power. This constitutional provision empowered  
35 the chief executives to continuously engage in impunity as long as they enjoy the favour of the legislature. In  
36 Nigeria, only the Legislature is constitutionally empowered to commence impeachment proceedings against the  
37 chief executive. This can be done only when the chief executive is alleged to have committed a 'gross misconduct.'  
38 As long as the chief executive belongs to the same party with the legislators, 'gross misconduct' is subject to  
39 the interpretation of the legislators. As a matter of fact, impeachment has become a political vendetta most  
40 especially, in Nigeria. ?? In a federal system of Government, there are three arms of government as provided for  
41 in the Constitution.

42 In other words, there are no objectives and generally recognised and acceptable criteria to determine what  
43 constitutes gross misconduct.

### 44 2 6

45 The three arms of government are independent and autonomous 7 and enjoy some degree of autonomy in the  
46 discharge of their official duties. It is worthy of note that only the head of the executive (the President, the  
47 Vice President, the Governor and the Deputy Governor) enjoy invulnerability (constitutional immunity) as no  
48 criminal proceeding can be continued or instituted against them while in office as the chief executive. Other  
49 arms of government only enjoy immunity in the discharge of their constitutional duties. This, however, does not  
50 shield them from facing criminal trials 8 while holding the office. "Immunity from damages whether absolute or  
51 qualified represents a sharp departure from the principle that persons are responsible for the harm they inflict  
52 upon one another and that the victims may seek compensation from the perpetrators." 9 5 Section 143 and  
53 Section 188 of the Constitution of Federal Republic of Nigeria. 1999 (as amended) ?? Governor Ladoja of Oyo  
54 State, Peter Obi of Anambra State, Joshua Dariye of Plateau State and Muritala Nyako of Adamawa State are  
55 few of the victims of unlawful and unjust removal of the chief executives simply because they fell apart with their  
56 political god fathers. ?? Sections 4,5 and 6 of 1999 Constitution of Federal Republic of Nigeria (as amended)  
57 provides for Legislative, Executive and Judicial powers of government. ?? Though, this may be so in theory  
58 alone. Instances abound in Nigeria where the President would hound the head of the legislature and engineer its  
59 removal. ?? The on-going trial of the Senate President in Saraki v. Code of Conduct Bureau is a case in point.  
60 ?? The practice in modern societies of making provisions for restriction of legal proceedings against the chief  
61 executive of a nation has been said to be a functionary mandated incident of the president unique office. 10 a)  
62 No civil or criminal proceedings shall be instituted or continued against a person to whom this section applies  
63 during his period of office;

64 Notwithstanding anything to the contrary in this constitution, but subject to subsection (2) of this sectionb)  
65 A person to whom this section applies shall not be arrested or imprisoned during that period either in pursuance  
66 of the process or any court or otherwise; and c) No process of any court requiring or compelling the appearance  
67 of a person to whom this section applies shall be applied for or issued provided that in ascertaining whether any  
68 period of limitation has expired for the purposes of any proceedings against a person to whom this section applies,  
69 no account shall be taken of his period of office. d) The provisions of subsection (1) of this section shall not apply  
70 to civil proceedings against a person to whom this section applies in his official capacity or to civil or criminal  
71 proceedings in which such a person is only a nominal party. e) This section applies to a person holding the office  
72 of president or vice president, Governor or Deputy Governor and the reference in this section to "period of office"  
73 is a reference to the period during which the person holding such office is required to perform the functions of  
74 the office.

75 In order to preserve the rights of a plaintiff to sue any of these officials, it is provided that the statute of  
76 limitations will not run against a claimant until the expiration of the term of office of the official concerned.  
77 By the provision of the immunity clause, it is almost impossible to do anything to an incumbent governor, his  
78 deputy, President and his vice president even, if then openly and brazenly commit an offence 11 . The governor  
79 of a State remains above our laws and is immune to prosecution for any type of offence while his tenure lasts. 12  
80 11 Nixon v. Fitzgerald 457 U.S. 731 at 749, (1982) in Mowoe K.M, Constitutional Law in Nigeria. Malthouse  
81 Press Limited, Lagos, 2008 at 140 12 Senator Iyiola Omisore, former deputy governor of Osun State could not be  
82 arrested and tried for his alleged involvement and complicity in the murder of Chief Bola Ige, former Attorney  
83 General of the federation because the former enjoyed immunity. He was only arraigned in court after he had  
84 been impeached.

85 The section 308 did not attract much attractions and concern until the governors in the Fourth Republic  
86 began to hide under the cloak of immunity clause to commit brazen and wanton corruption 13 and intimidation  
87 of political opponents.

### 88 3 Akinwumi O,

89 The use of protective shield of constitutional immunity as a legitimate instrument and defence of corruption and  
90 money laundering by crooks masquerading as public officials in the dubious game of theft and unlawful transfer  
91 of common wealth into personal purse has gained a proportion so alarming and frequency so outrageous that the  
92 very concept of governance in Nigeria needs a critical characterisation. In reality, the clause has created a class  
93 that is above the law, a class that perpetuates evil in the office through corrupt practices and bad leadership,  
94 consequently leading to the abuse of the clause.

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

### 98 4 Background to the Study

99 Immunity predates colonialism in Nigeria. Ever before the advent of the colonial master, Yoruba ethnic region in  
100 the South western Nigeria had a monarchical structure which was identical with the British monarch. Kingship  
101 in England can be traced to the Anglo-Saxon period. There was a time when the king could do whatever he  
102 pleased in that he was absolutely absolute in the affairs of the state. His will was law. The king in the Yoruba  
103 land is adjudged to possess absolute power and highly revered. He is referred to as "alasekejiorisa" meaning

104 "His majesty whose power is akin to the gods." It was generally believed that the king could do no wrong and  
105 that he wielded enormous and unlimited power as he could acquire land, and even women belonging to other  
106 men and no one could challenge his authority.

107 At the termination of colonialism in 1960, Nigeria inherited the English common law and the doctrine of  
108 sovereign immunity from Britain. Under the doctrine, it is presumed that the king can do no wrong, he lacks  
109 capacity of doing wrong and kings must not and was not allowed to do wrong. ??7 It is unfortunate that in the  
110 pre-colonial Africa, the kings enjoy such prestige and unquestionable show of powers and paraphernalia of office.  
111 In other words, the kind of power and immunity which traditional rulers wielded in the past had been eroded  
112 drastically in this modern era. They had been unclad of prerogatives and immunities and anyone caught in a  
113 despicable act would be prosecuted.

114 The doctrine, as it is understood today, is one of the vestiges and relics of colonialism in this part of the  
115 continent. The statement that the king can do no wrong means that the king of England cannot be held  
116 responsible for anything done in his name. The reason for this is that no order of the king is effective unless and  
117 until it has been countersigned by the parliament, despite that the king is responsible for its order.

## 118 5 18

119 The doctrine of immunity which shields the President, the Vice President, the Governor and the Deputy Governor  
120 evolved from the history of Nigerian traditional political system and monarchical system in England. However,  
121 the doctrine has been a subject of abuse in the recent times when the Governors were engaged in brazen and  
122 unabashed looting of the The Alowa of Ilowa in Osun State was arraigned before a Magistrate's Court for an  
123 alleged rape of a youth corps member in his domain. If the monarch was found guilty, he would be sentenced  
124 accordingly.

125 treasury ??9 III.

## 126 6 Statement of the Problem

127 , abuse of citizens fundamental rights, disregard for the rule of law and wanton killings.

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

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

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

144 This study observes that shielding the executives from prosecution when in office has been counterproductive in  
145 that it empowers them to commit heinous crimes while in office. Through this, the public has subsequently been  
146 prevented from questioning their excesses while in office in that any attempt to do so is usually perceived as an  
147 attempt to divert the attention of the executive from the serious task of governance. It is important to note that  
148 sitting presidents and governors in history have been prosecuted for their excesses without undue legal coverage  
149 of immunity. For example, President Bill Clinton of the United States of America was investigated and found  
150 guilty of improper relationship with Monica Lewinsky, President Andrew Johnson was investigated and indicted  
151 of power abuse and was impeached in 1868; President Richard Nixon was investigated and indicted for misuse  
152 of power and obstruction of justice. Also, at the state level, Governor James Ferguson of Texas was indicted  
153 for financial misappropriation and embezzlement whereupon he got impeached. Governor Evan Meachanalso in  
154 America was investigated, indicted and impeached. Also, Governor John Walton of Oklahoma was investigated,  
155 indicted and impeached. All the above examples are from the United States of America, the model of democracy  
156 and presidential system practised in Nigeria. Interrogating immunity viz-a -viz the powers of executive in Nigeria  
157 politics/political system reveals a scenario of an over powerful executive that is usually protected by the cloak  
158 of immunity while in office. This practice is not only seen as counterproductive, but is such that has promoted  
159 executive recklessness and abuse of powers to the extent that the executive not only dominate governance, but  
160 at times usurp the powers of the other two arms of government.

161 However, consequence to this, the heat often generated by public criticisms and the subsequent government  
162 reactions, in some cases do lead to political instability and unnecessary diversion of government attention from

163 serious task of governance. Under this condition, it is doubtful if the much-sought-after dividend of democracy  
164 by the masses and national development can be realised.

### 165 7 IV. Historical Background of Immunity Clause

166 Immunity has been described as the exemption of a person or body from legal proceedings or liability. ??0 The  
167 idea of immunity is said to have evolved in the old feudal structure of England 21 .where the king was the head  
168 of the community, the leader and the judge. It was, therefore, inconceivable and unimaginable that the king who  
169 doubled as the chief judge and the embodiment of justice in his realm be accused, sued, docked or imprisoned by  
170 any court in his domain. This belief goes beyond the principles of natural justice that a man cannot be a judge  
171 in his own cause but in the fact that the very thought of bringing the king to justice defied rational analysis as  
172 the king was the law and the law was the king. ??2 It should be noted that the King held court, heard cases and  
173 gave judgment. He could not be sued This automatically made the king not only to be seen as above the law  
174 but also made him to act above the law. 20 EseMalemi, Administrative Law Cases and Materials (2006) Grace  
175 Publishers Inc. Lagos, p251. ??1 The feudal system was a social system which developed in Western Europe in  
176 the 8 th and 9 th centuries, in which people served a Lord in their community by working and fighting for him  
177 and in exchange were supported and given land and protection. The Lords were in turn responsible and owed  
178 allegiance to the king who was at the apex of the feudal system. in his own court, as there would be no one to  
179 hear it. Legal process did not lie against him. He was, therefore, immune from legal action and liability.

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

183 In 1397, the House of Commons denounced the scandalous financial behaviour of King Richard II. However,  
184 the member of the House who led the debate was sentenced to death for public humiliation of the king. Though,  
185 the sentence was set aside, the incident set the stage for a bill on parliamentary immunity and in 1689, the bill of  
186 rights Article 9 granted that "the freedom of speech and debates or proceedings in the parliament ought not to  
187 be discussed or questioned in any court or place outside the parliament." ??3 In 1812, the doctrine of immunity  
188 received judicial recognition by the U.S. courts in the case of Schooner Exchange v. M. Faddon Thus this began  
189 the era of formal insertion of immunity clause in laws. 24 1(a) no criminal proceedings shall be instituted or  
190 continued during his period of office against a person to whom this subsection applies and (b) such a person shall  
191 not be arrested or imprisoned during that period either in pursuance of the process of any court or otherwise and  
192 (c) no proceeding in which relief is claimed against such a person in his capacity shall be instituted or continued  
193 in any court during his period of office but in ascertaining whether any proceeding against a person to whom  
194 this subsection applies, his period of office shall be left out of account (2) Subsection (1) of this section applies  
195 to a person including or required to perform the functions of the when the court ruled that foreign states had  
196 absolute immunity from the jurisdiction of a U.S. court for any act.

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

201 Immunity clause took its root from the Nigeria colonial experience. office of the president or of the Governor  
202 of a State and in that subsection period of office means, in relation to such a person, the period during which he  
203 hold or is required to perform the function of the office in question.

204 Section 267 of the 1979 Nigerian Constitution has similar provision in respect of invulnerability of the chief  
205 executive. Interestingly, section 320 of the aborted 1989 Constitution contains immunity clause similarly worded  
206 like section 267 of the 1979 Constitution.

207 However, as general as this blanket immunity may be, there are some exceptions: 25 a. They may be sued in  
208 their official capacity b. They may be sued as a nominal party in an action c. They may be impeached (in case of  
209 the President or Vice President) by the National Assembly (and in case of the Governor and Deputy Governor)  
210 by the State House of Assembly d. They may be sued in an election petition 26 e. They are not immune from  
211 police investigation 27 V.

### 212 8 Cases and Legal Decisions

213 This section briefly highlights concrete instances in Nigeria where the immunity clause had been invoked in  
214 different cases and courts. It is worthy of note that the issue of executive immunity in Nigeria pre-dated the 1979  
215 Constitution. It was accorded due recognition and maximally used during the military regime in Nigeria. In the  
216 case of Ebun Omorogie v. Col. Samuel Ogbemudia, ??8 In the case of Colonel OluRotimi & Ors v. Machregur,  
217 the plaintiff instituted an action against the defendant, a military governor, in his private capacity. The court,  
218 declining submits that it had no jurisdiction to hear the case held as follows:

219 "The provision of Section 161(1)(c) and (2) of the Constitution (1963) makes it obligatory that no proceedings  
220 in which relief is claimed against the governor of any State in the federation in his personal capacity shall be  
221 instituted or continued in any court during his period of office" Per Begho CJ. while considering Section 161 of  
222 the 1963 Constitution, the Supreme Court held that the action instituted against the plaintiff, the then military

223 Governor of Western region of Nigeria in his personal capacity for declaration of the title to land cannot be  
224 maintained against him. The Supreme Court agreed with the learned counsel to the defendant (the Governor)  
225 when he submitted by virtue of Section 161(1)(c) of the Constitution of the Federal Republic of Nigeria, 1963,  
226 the court could not give judgment against the first defendant, that it was not necessary for him to plead that  
227 section of the constitution which though purports to confer a private right or privilege or immunity because it is  
228 evidently a matter of public policy embodied in a public Act or legislation of which the court is bound to take  
229 judicial notice and which could not by the incumbent of the office concerned be waived. This was also the stand  
230 of the court in the case of Samuel Igbe v. His Excellency, Professor Ambrose Alli, Governor of Bendel State of  
231 Nigeria & 1 other. ??0 After canvassing arguments in respect of the preliminary objections, the trial court in its  
232 ruling, held that the action was instituted against the respondent in his personal capacity for acts done in his  
233 official capacity as such, the court had no jurisdiction to In Sultan Alhaji Ibrahim Dasuki v. Brigadier General  
234 Yakubu Muazu, the appellant was the erstwhile Sultan of Sokoto. He sued the respondent who was the military  
235 Administrator of the State. According to the appellant, on the 20 th of April, 1996, the respondent invited him  
236 to his office as the Military Administrator of Sokoto State. On arrival, a letter terminating the appointment of  
237 the appellant was handed over to him. The appellant was led through a side door to a waiting vehicle which  
238 took him to the Airport, from where he was flown to Yola and driven to Jalingo.

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

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

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

251 The respondent filed a preliminary objection to the action basically on the ground that he was at that time, the  
252 Military Administrator of Sokoto State and as such, he was acting in official capacity as in the instant case. He  
253 placed reliance on the provision of Section 267 of the 1979 Constitution. entertain the matter as the respondent  
254 enjoyed immunity from judicial proceedings under Section 267(2) of the 1979 Constitution or Section 308 of  
255 the 1999 Constitution. ??1 On appeal, the Court of Appeal held that the immunity from judicial proceedings  
256 provided under section 267 of the 1979 Constitution or 308 of the 1999 Constitution is merely to protect a person  
257 from harassment of his person while in office for his action done in private capacity. It would not apply where as in  
258 the instant case, the respondent is claiming it on the ground of official act. It is manifest that the respondent had  
259 left office when the writ was issued. The respondent could not by claiming that he acted in his official capacity,  
260 claim immunity from legal process under section 267 or 308 of the 1979 or 1999 Constitution. The section only  
261 protects acts done in personal capacity while the person is in office at the time the writ is issued. It does not  
262 apply when the action complained of is official. ??2 In the cases of Victor Olabisi Onabanjo v. Concord Press of  
263 Nigeria 33 and Tinubu v. I.M.B. Securities Plc, 34 one of the issues for determination was whether section 267  
264 of the 1979 constitution and section 308 of the 1999 constitution respectively constitute disability, disentitling  
265 the incumbent from suing as plaintiff in their personal capacities. In Tinubu v. I.M.B. Securities Plc, 35 the  
266 court of appeal adjourned the case until the respondent who was Governor of Lagos State shall have vacated the  
267 office. The fact of the case was that the appellant by a letter, requested the 1 st respondent to investigate the  
268 alleged crimes committed by Bola Ahmed Tinubu, the former Governor of Lagos State in pursuant to section 4  
269 of the Police Act. ??6 "A person protected under Section 308 of the 1999 Constitution, going by its provision,  
270 be investigated by the Police is, in my view, beyond dispute. The police have discretion whether or not to  
271 conduct investigation into any allegation of crime made to them. And the court will not interfere if on the fact  
272 of a particular case, the discretion is properly exercised. There is therefore, nothing in section 4 of the Police  
273 Act which denies the police of any discretion whether or not to investigate any The respondent declined the  
274 request on the ground that section 308 confers immunity on the holder of the office from Police investigation.  
275 The appellant, thereupon, took an originating summons against the respondent to investigate the Governor.  
276 particular allegation, or when they decide to investigate, to do so to its logical conclusion" ??7 The Supreme  
277 Court on the order of sine dice, per Kutigi, J.S.C. stated inter alia Also, in the same case of Tinubu v. I.M.B.  
278 Securities Plc, the respondents by a writ of summons instituted on 26 th November, 1992 claimed N2.5m from  
279 the appellant, being the credit facility he guaranteed in favour of the 1 st defendant. During the pendency of  
280 the appeal at the Court of Appeal, the appellant was sworn in as Governor of Lagos State on 29 th May, 1999.  
281 The respondent applied for an adjournment of the appeal sine dice until such time as the appellant would cease  
282 to hold office as Governor of Lagos State, having regard to section 308. The appellant opposed the adjournment  
283 on the ground that section 308 does not prevent him from prosecuting his appeal or instituting the action. The  
284 Court of Appeal granted the respondent's application and adjourned the appeal sine dice until the appellant  
285 vacate the office of Governor of Lagos State.

## 11 VI. EFFECTS OF EXECUTIVE INVULNERABILITY ON POLITICAL STABILITY

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### 286 9 38

287 In Victor Olabisi Onabanjo. Concord Press of Nigeria Ltd., : Following Rotimi& 2ors v. Macgregor, I have  
288 no hesitation in coming to the conclusion that the Court of Appeal rightly declined to entertain the appellant's  
289 appeal pending before it, thus, giving effect to the mandatory provision of section 308 of the Constitution above.  
290 But the Court of Appeal was wrong when it proceeded to adjourn the appeal sine die instead of striking it out.  
291 The appeal certainly cannot be continued during the appellant period in office. A proper order striking out the  
292 appeal will therefore have to be substituted for that of an adjournment. the plaintiff, Governor of Ogun State  
293 of Nigeria, in his personal capacity sued the defendant, publishers of the Concord Newspapers claiming damages  
294 for libel. The defendant raised objection to the jurisdiction of the court, saying that since the Governor cannot  
295 be sued in his private capacity while in office, it is inequitable and unconstitutional for the Governor to sue other  
296 persons in his private capacity, on the ground that the supreme purpose of the Constitution is the principles of  
297 freedom, equality and justice. Kolawole J held that the plaintiff can sue in his personal or private capacity. Under  
298 section 267 of the 1979 Constitution, it is expressly stated that the plaintiff, being a governor cannot be sued in  
299 his personal or private capacity; nevertheless, the Constitution is silent on the duty of a court of law to fill in any  
300 gap in the Constitution. Since a Governor is not expressly incapacitated by any provisions of the Constitution,  
301 the Governor can sue in his private and personal capacity. ??0 In Duke v. Global Excel Communications Limited,  
302 41 However, on appeal, following the decision reached in Tinubu v. I.M.B Securities Limited, the respondent  
303 who was the executive Governor of Cross Rivers State at the material time, instituted an action in the High  
304 Court of the State against the appellant for a libellous publications in the Global Excellence Magazine. Upon  
305 the service of writ of summons, a conditional appearance was entered on behalf of the appellant who filed a  
306 notice of preliminary objection based on the provisions of Section 308 of the 1999 Constitution, challenging the  
307 jurisdiction of the court to entertain the matter. He argued that in line with the immunity enjoyed, the Governor  
308 cannot institute an action against the appellant. Swayed by this submission, the court held that the Governor  
309 cannot sue or be sued in his personal capacity.

### 310 10 42

311 In Aper Akuv. Plateau Publishing Company Limited, the Court of Appeal upturned the decision and held that  
312 the Governor though enjoys immunity both in his personal and official capacity, he can nonetheless sue in his  
313 personal capacity. The Supreme Court also upheld the decision of the Court of Appeal. 43 the plaintiff instituted  
314 a libel suit against the Governor of Benue State in Nigeria in his personal capacity against the defendants.  
315 Deciding on the case, AdesiyunCJ, held that Section 267 of the 1979 Constitution gives a Governor immunity  
316 in his personal capacity while in office as Governor but does not disable him from bringing legal proceedings  
317 against other persons while in office as Governor. If the Constitution wants to prevent a Governor from suing in  
318 his private capacity, it should have so provided. It is the duty of a court to interpret the Constitution as it is and  
319 not the duty of the court to amend it. The power to amend the Constitution lies with the National Assembly.  
320 ??4 In the United States Constitution, there is no express provision granting immunity to the President, but it  
321 has been held that he is beyond the reach of judicial direction 'either affirmative or restraining, in the exercise of  
322 his powers, constitutional, statutory, political or otherwise' except where it is ministerial. ??5 the court held the  
323 President amenable to a subpoena to produce evidence for use in a criminal case despite the general immunity. It  
324 noted "neither the doctrine of separation of powers, nor the need for absolute, unqualified presidential privilege of  
325 immunity from judicial process under all circumstances" All these exemptions are enjoyed by the chief executive  
326 during their tenure in office. 47

## 327 11 VI. Effects of Executive Invulnerability on Political Stability

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

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

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

340 Considering the importance of democracy in the development of the contemporary world, it becomes important  
341 to device a means for its sustainability, hence the introduction of immunity for the chief executives at both the  
342 federal and state levels. The clause is to guard against diversion of any kind of the attention of the executive  
343 from performing their official assignments. For instance, without immunity, it will be possible to sue executives  
344 for their actions and inaction in the process of governance and in some situations might require the presence  
345 of the executive in the law court to give evidence and by so doing, valuable time required by the executive for

346 governance will be lost. In other words, the stability of new democracy requires adequate concentration devoid  
347 of any sort of distraction, hence the need for the introduction of immunity in the constitution.

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

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

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

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

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

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

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

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

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

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

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

## 403 12 VII.

## 404 13 Concluding Remarks

405 It has been shown from this discourse that executive immunity is a veritable tool that is originally intended to  
406 provide the avenue for the executives to perform their constitutional roles effectively and with utmost freedom

## 13 CONCLUDING REMARKS

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407 devoid of any distraction. However, nowadays, while considering the high level of corruption involving the  
408 executives, one wonders if the constitutional provision is not being used as a veritable tool shielding the executives  
409 for corrupt practises.

410 As a result of the importance of immunity and the need for development in an emerging democracy, it is  
411 therefore recommended that the immunity under section 308 (1) (a) of the Nigerian constitution should not be  
412 absolute. This can be achieved through separation of powers among the three arms of government so that the  
413 arms of government will be alive to their constitutional responsibilities.

414 We will equally like to suggest that the immunity granted to chief executives should not be total. In other words,  
415 offences such as murder, looting of treasury, perjury, giving false information such as false asset declaration etc  
416 should not be covered by immunity. Since the above listed conducts while in office were not, ipso facto intended  
417 to be protected by the framers of the constitution, therefore, they should not come under the protection of  
418 immunity. The executive can be tamed by the legislature through impeachment or by another constitutional  
419 provision through another institution of government-the Code of Conduct Bureau and the Code of Conduct  
420 Tribunal. Section 172 and 209 of the constitution mandates public officers, including the executives to conform  
421 to the constitutional provisions of the Bureau, by periodically declaring all their assets. When a public official  
422 is found guilty of violating this constitutional provision, such an individual will lose the right to further contest  
423 elections; pension benefits; and cannot benefit from the constitutional provisions on prerogative of mercy for  
424 offence convicted. In addition to this, the supremacy clause of section 1(3) of the Nigeria constitution is applicable.  
425 Therefore, if democracy is indeed the government instituted by the people and for the people, there is need for  
426 government institutions and justice system that work well, that do not relent in their quest to produce the best  
427 among the equals for political leadership that will be committed to making sure that the system is effective in  
428 such that cannot be manipulated by a powerful individual or groups of individuals. This is what is needed to  
429 make true the statement that no one is above the law, and there is no need to create a special class of people  
430 that will be exempted from the law in a democracy.

431 Therefore, if democracy is indeed a system of government that allows for equal opportunity for all; guarantees  
432 justice system that works well; system which does not relent in its quest to produce the best among the equal  
433 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, ?

[Note: 22 Oluyede P.A.O.]

Figure 1:

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

Figure 2:

434 1 2 3 4 5 6

27 Fawehinmiv. IGP (2000) 7 NWLR p.482  
28 (1973) 3 U.I.L.R. 115  
29 (1974) II SC 133

Figure 3:

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<sup>1</sup>(1977)1 QB 729 at 761-762 3 1999 Constitution of the Federal Republic of Nigeria (as amended),<sup>4</sup> Sovereign Immunity and Governor DSP Alamieyesiegha available on [www.segundawodu.com](http://www.segundawodu.com) accessed on Thursday, 21 st January, 2016.

<sup>2</sup>YusuphOlaniyonu: 1999 Constitution: Between Section 188 and Section 308. Available at <http://www.segundawodu.com/olaniyonu> Accessed on Wednesday, 13th January, 2016.

<sup>3</sup>© 2017 Global Journals Inc. (US)

<sup>4</sup>Ibid.19

<sup>5</sup>(1981)1NCLR 124 Invulnerability of the Chief Executive and Democratic Sustainability in Nigeria: Issues and Challenges © 2017 Global Journals Inc. (US)

<sup>6</sup>Year 2017

