RECONSIDERING EXECUTIVE IMMUNITY UNDER THE NIGERIAN CONSTITUTION

by

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Introduction

Immunity from civil and criminal prosecution is granted to elected executive office holders during their tenure in office under the Nigerian constitution. Given the allegation of corrupt practices against some of these office holders there have been calls for the removal of the immunity conferred on them by the Constitution, so as to make way for their possible prosecution in court while in office. Others have argued for the retention of the immunity provision, otherwise called the immunity clause. The debate is currently raging on, with politicians, political parties and members of the academia contributing to it. In this paper attempts shall be made to examine the various argument as to the retention or otherwise of the immunity clause in the Constitution. At the end, recommendations shall be made based on our findings. The order of progression of this paper shall be an examination of the concept of immunity, followed by the scope of executive immunity under the Nigerian constitution, consideration of the debate, and finally, our recommendations.

The Concept of Immunity

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Immunity is an antique concept with roots in the ancient feudal structure of England which later became a Common Law principle. The concept thrived at the time of absolute monarchies in medieval England when it was the norm that sovereignty and governmental powers were personified in the person on the throne of England. The person occupying the English crown was at the top rung of the feudal ladder and as such was not subject to the court within the realm. The foregoing was premised on the thinking at the time that the king as a result of his office, status and position in society as the sovereign could do no wrong. The concept held sway in England until democratic thoughts and institutions caused the concept to lose its moral force. In 1947, as practically as possible, the crown was made liable in tort in the same way as private persons through the Crown Proceedings Act, 1947. The Act also reformed the rules of procedure governing civil litigation by and against the Crown. However, the concept of immunity went along with the English as they conquered new lands, and the new territories acquired along with the English legal system, the concept of immunity.

According to the Black’s Law Dictionary, immunity means: “Any exemption from a duty, liability, or service of process;…

2. During that epoch, it was believed that allowing the King to be sued in his court was a contradiction to the sovereignty of the King except where he endorsed on the petition fiat justicia – let justice be done. This protection from prosecution also extended to the acts of officials of the crown done during the course of the performance of their duties to the crown. See R.J. Gray: ‘Private Wrongs of Public Servants’ (1959) 47 Cal. L. Rev. 303.
4. In feudal times, it was believed that the king could do no wrong as his status, position, powers and prerogatives removed from him the ability to do wrong. See P.A.O. Oluyede, ibid.
5. The major democratic thought that contrasted – and still contrasts - greatly with the concept of immunity is equality before the law; one of the branches of the concept of the rule of law.
such an exemption granted to a public official”. Quoting Edward Kionka, the dictionary stated further that:

An immunity is a defence to tort liability which is conferred upon an entire group or class of persons or entities under circumstances where considerations of public policy are thought to require special protection for the persons, activity or entity in question at the expense of those injuries by its tortuous act. Historically, tort litigations against units of governments, public officers, and charities, and between spouses, parents and children, has been limited or prohibited on this basis.

Immunity protects the holder from liability that would otherwise have been imposed. Immunity is not a defence to a legal action; it eliminates or postpones a person’s ability to advance a legal claim against the immune for wrongful action. If a legal claim is filed against the immune, he or she only needs to ask the court to dismiss the claim on the basis of the immunity, without necessarily filing a defence to the claim. Immunity could be absolute or qualified. Absolute immunity is a complete exemption from civil liability, usually afforded to officials while performing their duties. From the Nigerian standpoint, it includes immunity from civil or criminal prosecution against the holder in his

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8. Nigeria’s constitutional provision suspends or postpones the legal claim unlike the English system which eliminated the legal claim. See section 308(1), (2), (3) of the Constitution of the Federal Republic of Nigeria, 1999 (1999 Constitution).
9. See the Nigerian cases on executive immunity cited in this chapter.
personal capacity while in office. 11 Qualified immunity on the other hand is immunity from civil liability that is conditioned or limited, for instance by a requirement of good faith or due care. Under Nigerian law, this extends to immunity for an official act exemplified by those enjoyed by Nigerian judges and lawmakers, whereas criminal acts and acts not falling within their official mandates are liable to court processes. Immunity benefits different government officials or exists at different levels under different epithets. Thus, legislative immunity is enjoyed by lawmakers, executive immunity is enjoyed by elected officials of the executive branch of government, judicial immunity is granted to judges, 12 diplomatic immunity is enjoyed by foreign diplomats and envoys, and sovereign immunity is enjoyed by a sovereign government, while constitutional immunity is one contained in the constitution. 13

Immunity is an internationally recognised concept. By the Vienna Convention on Diplomatic Relations 1961,14 foreign Heads of States and diplomats are immuned from civil and criminal processes of foreign countries. Nigeria, being a signatory to this

12. In Dasuki v. Muazu [2002] 16 NWLR (Pt. 793) 319 at 341, per Musdapher, J.C.A., while commenting on the scope of section 267 of the Constitution of the Federal Republic of Nigerian, 1979, which contained the immunity for elected executive office holders, held that the respondent, a former governor of Sokoto State, could not on claiming that he had acted in his official capacity claim “judicial immunity” from the legal process. The use of judicial immunity by His Lordship was as to the substance of the immunity, that is, immunity from judicial processes and not as to the official entitled to it. The usage this way could be confusing. For instance, will legislative immunity suggest immunity from legislations? And executive immunity, immunity from executive actions? Or constitutional immunity, immunity from constitutional provisions? 13

13. These are the ones that are closely related to our topic. For more see Black’s Law Dictionary, supra note 7 and Legal Dictionary, supra note 6.
Reconsidering Executive Immunity under the Nigerian Constitution

In the United States, constitutional immunity exists for members of congress only. By the provisions of the United States Constitution, members of Congress enjoy two qualified immunities, which are: (1) the exemption from arrest while attending a session of the body to which the member belongs, excluding an arrest for treason, breach of the peace, or a felony; (2) the exemption from arrest or questioning for any speech or debate entered into during a legislative session. This immunity is termed qualified because the ‘Speech or Debate Clause’, as most American writers call it, is strictly limited to legislative functions. The immunity of the president is not constitutionally provided for; rather it has been given judicial recognition through the interpretation of the concept of separation of powers. However, Presidents in the United States have generally argued that they should enjoy absolute immunity, meaning that except for impeachment proceedings, they can personally ignore all other civil or criminal proceedings before courts of law. Recent decisions of the Supreme Court of the

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16. Article 1 Section. 6: ‘The Senators and Representatives shall receive a compensation for their Services, to be ascertained by Law, and paid out of the treasury of the United States. They shall in all cases, except treason, felony and breach of the peace, be privileged from arrest during their attendance at the session of their respective houses, and in going to and returning from the same; and for any speech or debate in either house, they shall not be questioned in any other place.’

17. See article cited in note 21. infra.

18. See Marbury v. Madison, note 19, infra.

19. For instance in Marbury v. Madison 5 US 154 (1803), neither President Thomas Jefferson nor Secretary of State, James Madison (the nominal defendant) appeared in court even through an attorney. In Nixon v. Fitzgerald, 457 U.S. 731 (1982), the US Supreme Court held that a president could not be personally sued for dismissing a federal employee, even though it was alleged that the dismissal was retaliation for the employee’s “whistle-blowing” cooperation with a congressional committee.
United States points to a rejection of this argument in civil proceedings, at least. In tracing the development of executive immunity in the US, a distinction was made between immunity for constitutional violations and immunity for nonconstitutional violations, as well as immunity of federal officials and immunity of state officials. State officials’ immunity for nonconstitutional violations is a matter left to each State’s laws; while, with the exception of the President, no executive official, state or federal, was fully immune from damages actions for constitutional violations.

The Supreme Court of the Philippines has held that the grant of executive immunity is to ensure that the exercise of presidential duties and functions are free from any hindrance or distraction, considering that the office of Chief Executive is a job which, aside from requiring all of the office-holder’s time, also demands undivided attention.

20. In Jones v. Clinton, 520 U.S. 681 (1997), an Arkansas State employee brought a suit seeking damages, claiming that during his tenure as Governor of the State of Arkansas, President Clinton of the United States had made crude and unwanted sexual advances toward her and that she had been punished for rejecting them. President Clinton’s argument for a postponement of the suit till he left office was refused by both the Court of Appeal and the Supreme Court of the United States. Relying on Nixon v. Fitzgerald, Amy Marshall criticised the Court of Appeal decision in Jones v. Clinton. See A. Marshall “Jones v. Clinton: Reconsidering Presidential Immunity” The Richmond Journal of Law & Public Interest, 1 (1996) also at http://law.richmond.edu/rjolpi. Samuel Krislov has asserted that despite some sweeping language in Jones v. Clinton, it remains open whether criminal proceedings could be instituted against a sitting President. He distinguished the indictments of Vice-presidents Aaron Burr for killing Alexander Hamilton and Agnew for taking bribes while serving as the governor of Maryland on the ground that ‘the vice presidency, in practical terms, is not a crucial office. Nor does the vice president embody a branch of government as the executive inherently does’. See generally: S. Krislov: “History of Executive Immunity in the United States” in www.answers.com/topic/executive-immunity. (Last visited 7/4/2009).


22. Ibid.

The concept of sovereign immunity was one of the Common Law principles inherited by Nigeria as a former colony of Britain.\textsuperscript{24} Under colonial rule, the position was that the Queen had sovereignty over the whole Nigerian territory and as such she enjoyed sovereign immunity throughout the territory.\textsuperscript{25} On attainment of independence, a Nigerian represented the Queen but on attainment of a republican status the President of Nigeria succeeded the Queen as Head of State.\textsuperscript{26} The immunity enjoyed by the Queen was transferred to the President and the Governors after the attainment of republican status in 1963. Thus, section 161 of the 1963 Republican Constitution provided that:

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 personal capacity shall be instituted or continued in any court during his period of office; but in ascertaining whether any period of limitation has expired for the purpose of any proceedings against a person to whom

\textsuperscript{24} One writer had said that how this concept came to be accepted as applicable in Nigeria is not easy to comprehend in view of the constitutional provision that sovereignty belongs to the people: M.O. Unegbu: “Immunity of State from Judicial Proceedings in Nigeria” 5 RADIC (1993) 869, 870-871.
this subsection applies, his period of office shall be left out of account.

2. subsection (1) of this section applies to a person holding or required to perform the functions of the office of the President or of the Governor of a Region, and in that subsection “period of office” means, in relation to such a person, the period during which he holds or is required to perform the functions of the office in question.

A similar but more explicit provision was incorporated into the 1979, 1989 and the current 1999 constitutions. A similar but more explicit provision was incorporated into the 1979, 1989 and the current 1999 constitutions.27

The purpose of the immunity contained in the Constitution is to bar any form of inhibition of the office holder in the performance of his duties during his tenure in office.28 The immunity clause is a temporary privilege which ensures that no one is allowed to stop the wheel of governance by holding the President or Governor to ransom under any guise. It is a temporary protection intended to shield the occupant of the office from distractions while executing the duties inherent in that office.29

It is important to mention that the government does not enjoy immunity from actions bordering on torts or contract since after

27. See section 276 of the 1979 Constitution, section 320 of the 1989 Constitution and section 308 of the 1999 Constitution which are all similar in wording.
29. Dalhatu v. Muazu, supra, note 12. By virtue of s. 308(3) of the 1999 Constitution, a person holding the office of President or Vice-President, Governor or Deputy Governor, is entitled to enjoy constitutional immunity. Section 3 of the 1999 Constitution provides that “There shall be thirty-six States in Nigeria...” It follows therefore that the immunity clause in the 1999 Constitution benefits 74 public officials at both the federal and state levels during any four-year term. The immunity ceases once the beneficiary is removed from office or when his term of office expires.
the coming into force of the 1979 Constitution. Under the 1963 constitution, consent to sue the government had to be obtained in compliance with the *Petition of Rights Act* before an action could be successfully maintained against the government. At present, actions can be brought against the government without going through the procedure of the Petitions of Rights Act. Furthermore, public servants other than elected office holders, may be liable civilly unlike in the United States where immunity extends to some high executive appointees. However, a suit against a public servant may be statute barred under the *Public Officers Protection Act* or under other relevant laws.

30. E. Malemi: *supra* note 1 at 452-462.
33. Arguments were made by counsel though without success in favour of the retention of the procedure under the *Petitions of Rights Act* in the cases of *Samuel Igbe v. The Governor, Bendel State of Nigeria* (1981) 1 Nigerian Constitutional Law Review 183 and *Shugaba v. Federal Minister of Internal Affairs & Ors.* (1981) Nigerian Constitutional Law Review 2 459. See one interesting commentary on the *Shugaba case*: O. Akanle: “Government Liability in Damages and the Constitution: the Saga of the Shugaba Case” (1982) Nigerian Current Law Review 205-215. *Contra Olufumilayo Ransome-Kuti & Ors. v. Attorney-General of the Federation & Ors.* [1985] 2 NWLR (Pt. 6) 211 where the claim against the government was dismissed because the events leading to the claim occurred before the 1979 Constitution came into force and so the case was amenable to the 1963 Constitution which preserved the *Petition of Rights Act* (as amended) and in addition the plaintiffs did not establish the identity of the soldiers who burnt down their house. For a criticism of this latter reason see S.O. Ukhuegbe: “State Responsibility in Nigerian Public Law – a Footnote to the Supreme Court Doctrine” in E. Chianu (ed.): *Legal Essays In Honour of Professor Sagay* (Benin: Dept. of Public Law, Univ. of Benin, 1996) 88-121.
34. For an in-depth treatment of the liability of public servants see E. Malemi: *supra* note 1 at 459-473, and as to that of government at the different levels see M.O. Unegbu: *supra* note 24.
contrary, the *Public Officers Protection Act* and such other laws do not apply to criminal proceedings.36

Under Nigerian law, immunity exists for members of the three arms of government. This would be treated briefly.

(i) **Legislative Immunity**

The 1999 Constitution does not make specific provisions on the immunity of members of legislative houses in Nigeria.37 Rather, it empowers the National Assembly to make laws on the powers of the National Assembly, and the privileges and immunities of its members.38 The current law on immunity for the members of the National Assembly is the Legislative Houses (Powers & Privileges) Act.39 Section 3 of the Act titled “immunity from proceedings” provides:

No civil or criminal proceedings may be instituted against any member of a Legislative House –

(a) in respect of words spoken before that House or a Committee thereof; or

(b) in respect of words written in a report to that House or to any Committee thereof or in any

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37. This assertion applies equally to the 1963, 1979 and the still born 1989 constitutions.

38. Item 47, 2nd Schedule, Part l of the 1999 Constitution. The powers to make law on the privileges and immunities of members of the State Houses of Assembly is residual to the States since it is not contained in the Concurrent List of the Constitution; and in line with this the States have laws on legislative immunity. See for example *Legislative Houses (Powers and Privileges) Law* cap. 62 Laws of Oyo State and *Legislative Houses (Powers and Privileges) Law* Cap. 87 Laws of Bendel State 1988 (applicable in Edo State). The provisions of the State laws on immunity for members of the Houses of Assembly cited above are similar to that of the National Assembly. It follows therefore that our analysis of the *Legislative Houses (Powers and Privileges) Act* apply to the States laws *mutatis mutandis*.

petition, bill, resolution, motion or question brought or introduced by him therein.

Furthermore, by section 29 of the Act, where a member of the National Assembly is arrested or detained in custody upon the warrant or order of a court; or a member is sentenced by a court to a term of imprisonment, the court shall, as soon as possible, inform the President of the Senate or the Speaker of the House of Representatives, as the case may be. By virtue of section 30, neither the President nor Speaker of a legislative house or any officer of a legislative house shall be subject to the jurisdiction of any court in respect of the exercise of any power conferred on or vested in him by, or under the Act or the standing orders of the legislative house, or by the Constitution. Section 31 provides further that civil processes are not to be served in chamber or in the precincts of a legislative house. The legislative immunity contained in this Act is obviously qualified; only legislative communications are covered by the immunity and only the premises of the National Assembly are protected from service of civil process by the Act. It thus follows that a member of a legislative house can face criminal prosecution. Similarly, criminal processes can also be served within the precincts of a legislative house. The utility of section 31 of the Act was queried by one writer while examining its provisions. According to him,

40. Indeed Senator Iyabo Obasanjo-Bello, a serving senator, was charged to court in 2008 on allegations of corruption. See www.afrol.com/articles/28544. (Last visited 17/2/2010). Ndidi Elumelu, a current member of the House of Representatives, was charged to court in 2009 over corruption charges. See www.nigerianobservernews.com (Last visited 17/2/2010).

41. It is arguable that this should not be done in a way that would interfere with the smooth operation of a legislative house based on the principle of separation of powers. The complaint of the National Assembly over the arrest of a witness of a Senate Committee, Mr. Femi Fani-Kayode, former Minister of Aviation, at the premises of the National Assembly should be taken seriously.

in the case of *Tony Momoh v. Senate*, the Lagos High Court held that the court bailiff ought to have been allowed to serve the court civil process within the premises of the National Assembly given the provisions of section 236(1) of the 1979 constitution. He argued that section 31 of the Act was unconstitutional. The view taken here is that those sections of the Legislative Houses (Powers and Privileges) Act are unconstitutional and they have been so pronounced upon by the courts, consequently they have been impliedly amended ‘judicially’.


44. Mr. Omoruyi also queried section 23 of the Act which restricts the admissibility of certain legislative matters as evidence before any court or a person authorised by law to take evidence until permission has been given by the president or chairman of the committee. The writer further looked at the provisions of the Acts Authentication Act Cap. A2 Laws of the Federation of Nigeria 2004, which gives power to certify as ‘true and correct’, records emanating from the National Assembly to the Clerk of the National Assembly. He argued that these provisions are watery when it comes to judicial proceedings in view of the decision in *Attorney General Bendel State v. Attorney General Federation & 22 Ors* *(1981)* 10 SC 1, where the Supreme Court made it clear that where the court has to pronounce upon the constitutionality of the mode of exercise of legislative powers, it is not bound by the evidence emanating as official records from the National Assembly as provided for in the Authentication Act – *Attorney General of Bendel State v. Attorney General of the Federation, supra*, at p. 27, per Fatayi-Williams, CJN. He concluded by canvassing the amendment of the Act to bring it in line with the constitutional provisions as interpreted by the courts. See I.O. Omoruyi: *supra* note 42, at pp. 80-85. Although it seems the provisions of the Legislative Houses (Powers and Privileges) Act queried by Omoruyi are grandiose and serve no special protective purpose, the same can not be said of those of the Authentication Act. Apart from when the constitutionality of a piece of legislation is in issue before the court and evidence other than the one authenticated by the Clerk is admissible, only certified records of the National Assembly may be used in official transactions with the organs of government. A ready example is in the case of a bill or a resolution which of course cannot be used by the other organs except it is the authenticated version. The utility of this is to avoid fraud. There was the time that allegations were rife that two versions of an Appropriation bill were in circulation and much later that the then Minister of Finance was implementing a different version from that passed by the National Assembly. See “How Obasanjo Lost Lawmakers’ Favour” *The Guardian*, May 17, 2005, p.9.

45. There are divergent views as to the effects of the declaration by the courts that a law is unconstitutional. For an examination of these views see: A.A. Emiko:
(ii) Judicial Immunity
The earlier constitutions and the 1999 Constitution did not provide for the immunity of judges. The statutes establishing the various High courts of the States have provisions on judicial immunity. However, the statutes which established the Federal High Court, the Court of Appeal, and the Supreme Court do not contain similar provisions. For example the High Court Law of Lagos State provides in section 88 that:

No judge shall be liable for any act done by him or ordered by him to be done on the discharge of his judicial duty, whether or not within the limits of his jurisdiction provided that he at the time, in good faith, believed himself to have jurisdiction to do or order to be done the act in question.

It follows that the immunity of judges of courts of superior record which are contained in any specific statute would be governed by the common law. For the immunity of a judge to be raised, he/she must have been acting judicially.

(iii) Executive Immunity
By section 5 of the 1999 Constitution, the executive power is conferred on the President at the Federal level and on the Governor at the State level. The immunity for the President and his Vice, the
Governor and his deputy, are constitutionally provided for. Section 308 of the 1999 Constitution provides immunity for the executive office holders and their deputies, thus:

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

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

(2) The provisions of subsection (1) of this section shall not apply to civil proceedings against a person to whom this section applies in his official capacity or to civil or criminal proceedings in which such a person is only a nominal party.

(3) This section applies to a person holding the office of President or Vice-President, Governor or Deputy Governor; and the reference in this section to “period of office” is a reference to the period during which the person holding such office is required to perform the functions of the office.
The immunity granted to the officers named in section 308 is personal and not official. Thus, the immunity covers them in their private capacity and does not extend to the following situations:

1. Civil proceedings against that person in his official capacity.
2. Civil or criminal proceedings where he/she is only a nominal party.49

It is also an absolute one; one that covers all criminal and civil claims against the beneficiary during his/her tenure in office. The incidence of this immunity is clear – no civil or criminal action can be instituted or maintained against the office holder mentioned in section 308 in his/her private capacity during his/her tenure in office; neither can they be compelled to testify in any judicial proceedings as witnesses in their private capacity.50 Executive immunity has generated controversy in recent times because of its scope.

Executive Immunity under the Nigerian Constitution51

One of the earliest cases on the sustainability of suits against the beneficiaries named in the Constitution was Colonel Olu Rotimi and Others v. MacGregor.52 In that case, a civil action was commenced against the 1st appellant in his personal capacity and was continued against him after he became the Military Governor of the former Western State. In compliance with section 161 of the 1963 Constitution, the Supreme Court ordered the suit to be
discontinued. The immunity provided for under the Nigerian Constitution thus means that an action can not be instituted against any of the office holders mentioned in section 308 while in office, and if already instituted, on assumption of office, the action must be discontinued. A similar situation arose in the case of *Tinubu v. IMB Securities PLC.* The Governor was the appellant in this case before the Court of Appeal when the provision of section 308 was invoked. The court adjourned the appellant’s appeal before it *sine die* until the appellant vacates office as Governor of Lagos State. While upholding the decision of the Court of Appeal to discontinue the proceedings by virtue of section 308, the Supreme Court held that the proper order was to strike out the case. The *ratio* in this case is that the immunity conferred by section 308 is for public policy and so cannot be waived either by the court or the office holder concerned.

What determines whether any of the beneficiaries of the immunity is sued in his personal or official capacity is the substance of the action, and not the mere use of name. In *Samuel Igbe v. His Excellency, Professor Ambrose Alli,* the plaintiff brought an application to amend the writ of summons and statement of claim in a substantive suit pending before the High Court “so as to obviate any possible misconception that the Governor was sued in his personal capacity”. While granting the application, Uwaifo, J. held that “it is the substance of the action which determines whether a Governor is sued in his personal or official capacity, not the mere use of his name”. On the converse, however, the beneficiary of immunity can institute a civil action against a person in his private capacity. In *Chief Victor Olabisi Onabanjo v. Concord Press of Nigeria,* the plaintiff, Governor of Ogun State, in his personal capacity sued the defendant, publishers of *Concord Newspapers,* for libel. Kolawole J., of the High Court of Ogun State held that since the Governor was not expressly

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incapacitated by any provision of the Constitution, he could sue in his private and personal capacity. This interpretation was approved by the Supreme Court in a recent decision.\textsuperscript{56} This case commenced at the High Court of Cross River State. The respondent, who at the material time was the Executive Governor of Cross River State, instituted an action against the appellants for an alleged libellous publication in the \textit{Global Excellence Magazine}. Upon service of the writ, a conditional appearance was entered on behalf of the appellants who also filed a notice of preliminary objection based on the provisions of section 308 of the Constitution of the Federal Republic of Nigeria, 1999 challenging the jurisdiction of the court to entertain the suit as constituted. The main ground of objection was that in line with the immunity enjoyed by the plaintiff under section 308 of the Constitution, he too could not institute, maintain, or continue with any legal proceedings, including the present one, in any court of law. Swayed by this submission, the trial court held \textit{inter alia} that a serving Governor could not sue or be sued in his personal capacity while still in office. On appeal, the Court of Appeal, by a majority decision allowed the respondent’s appeal by holding that although a serving Governor cannot be sued, he can sue in his personal capacity while still in office.\textsuperscript{57} On a further appeal to the Supreme Court, the decision of the Court of Appeal was upheld.

A tacit point raised by one writer is if a person entitled to executive immunity decides to maintain a civil action in a private capacity and the defendant counter claims against him, should the office holder still be accorded immunity against such a counterclaim? The writer opined that the answer should be


\textsuperscript{57} See [2007] 5 NWLR (Pt. 1026) 81. In reaching this decision the Court of Appeal adopted the reasoning in the decision in \textit{Tinubu v. IMB} [2001] 16 N.W.L.R.(Pt. 740) 670. See also, the decisions in \textit{Aper Aku v. Plateau Publishing Co Ltd.} (1985) 6 NCLR 338, 342 and \textit{Chief Victor Olabisi Onabanjo v. Concord Press of Nigeria Ltd} (1981) 2 NCLR 298 where also part of the premise on which the decision was based.
negative as the office holder has unwittingly stripped himself of the constitutional protection. It is difficult to say what interpretation the courts would give under such a situation. A counterclaim by its very nature is regarded as a separate and an independent action that may proceed irrespective of the dismissal, stay or discontinuance of the plaintiff’s action. That being the effect of a counter claim, the courts may be reluctant to sustain a counter claim against the beneficiary of executive immunity. This position is reinforced by the courts’ endorsement of the position that immunity cannot be waived.

In the realm of criminal prosecution, the closest case is Alamieyeseigha v. Yeiwa. In this case, an attempt was made to secure an injunction for criminal indictment against a sitting Governor. The appellant, then Governor of Bayelsa State, challenged the leave granted by the Federal High Court to the 1st to 3rd respondent to apply for an order compelling the 4th respondent, the Chief of Air Staff, to dismiss him from the service of the Nigerian Air Force or refer him to a Court Martial to be tried for the offence of cheating in an examination at the Command and Staff College in 1991 while he was still in service. The court granted an order of mandamus to the 1st to 3rd respondent compelling the 4th respondent to act. The application of the appellant at the Federal High Court to set aside both the leave and the order of mandamus was refused by the court on the ground that the court was functus officio and that the appellant could not sue or be sued under the Constitution, which immunity could not be waived. On appeal, the Court of Appeal (Abuja Division) held that:

60. See Tinubu v. IMB Securities, supra note 57.
(1) Section 308 bars any proceedings, civil or criminal which will have the effect of interfering with the running of the office to which he was elected.

(2) To be entitled to the immunity under section 308 of the Constitution it would not matter whether any of the office holders was a party to the suit or not, as in the present case.

(3) It is the interference and the effect of the order sought against him from the court that the Constitution prohibits.

Obviously, proceedings before a court martial are criminal in nature.62 The office holders under section 308 are not immune from criminal investigation, however. In Fawehinmi v. Inspector General of Police,63 the appellant sought an order of mandamus to compel the respondents to investigate the then Governor of Lagos State on criminal allegations of forgery and perjury. Though the order of mandamus was refused based, inter alia, on lack of locus standi by the appellant, the Supreme Court held that the governor and those enjoying the provisions of section 308 can be investigated by the police for an alleged crime or offence. This interpretation notwithstanding, the immunity from criminal prosecution for office holders under section 308 is absolute during their period of office.

Surprisingly, attempts have been made to extend executive immunity to election petitions involving the office holders. In Obih v. Mbakwe,64 the 1st respondent, who was Governor of Imo State from 1979, contested for a second term in an election held on 13th August, 1983 and he was declared duly elected. The appellant, another contestant, challenged the election of the 1st respondent. While the petitioner/appellant’s appeal was pending at the

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Supreme Court on a different ground, the 1st respondent raised the issue whether a governor who is a candidate in an election to the office of governor is immune from legal proceedings against him in an election petition by virtue of section 267 of the 1979 Constitution. It was held by the Supreme Court that section 267 of the 1979 Constitution did not protect a governor from legal proceedings against him in an election petition in respect of an election to the office of governor when he as a contestant has been declared elected.65

It is clear from the provisions of section 308 that no immunity whether in respect of official or private matters, is conferred on the affected officials after they have vacated office and so, they may be compelled to give evidence either by summons or by subpoena, and civil or criminal actions may be instituted against them.66 In Dasuki v. Muazu, the appellant was the erstwhile Sultan of Sokoto. He sued the respondent who at the time of his deposition from office was the Military Administrator of Sokoto State (occupying the office, and performing the functions, of the Governor of the State). His suit was to recover his brief case which he sent for at the time of his deposition but which never got to him. The Commissioner of Police, Sokoto State, in his report had said only the respondent knew the whereabouts of the brief case. The respondent filed a preliminary objection to the action basically on the ground that as the Military Administrator of Sokoto State at the relevant time, he acted in an official capacity and therefore he could not be sued in his personal capacity as in the instant case on the basis of section 267 of the 1979 Constitution. The trial court ruled that the action was instituted against the respondent in his personal capacity for acts done in his official capacity and as such the court had no jurisdiction to entertain the matter based on

65. A similar decision was reached by the Supreme Court in another election petition where this same contention was raised: Paul Unongo v. Aper Aku (1983) 11 SC 129. See also Alliance for Democracy v. Fayose (2004) 8 NWLR (Pt.876) 639 CA (Ilorin Division).
section 267(2) of the 1979 Constitution. On appeal the Court of Appeal (Abuja Division), considered the affidavit in support of the preliminary objection wherein the respondent swore that he acted in his official capacity. The respondent argued that since the action was taken in an official capacity, the appellant could not sue him personally, rather, he could sue the Governor of Sokoto State. The Court of Appeal tacitly agreed that the respondent’s act in this instance was an official act. Nevertheless, while noting the claim of the respondent that the writ was issued after he ceased to hold office, the Court of Appeal held that section 267 clearly did not protect official acts or omissions, rather the section only protects acts done in personal capacity and that protection is only when the person is in office. The respondent was therefore held liable in damages for the missing brief case.

While we agree with the conclusion reached we differ with the reasoning. The decision of the court of Appeal could be interpreted to mean that even when a beneficiary of executive immunity leaves office, he could still not be sued personally, but could be sued in an official capacity. Then the question is, in what official capacity? As an ex-Governor or ex-President? Is ex-Governor or ex-President a recognised office by the Constitution vested with decision making powers or any responsibilities at all, which need not be inhibited? The exception created by the Constitution to the absolute executive immunity is that of civil proceedings against the ‘office holder’ in his/her ‘official capacity’ or, to civil or criminal proceedings in which such a person is only a nominal party. 67 Section 308 (1) (a) (b) (c) and the proviso mentioned the ‘period of office’ as the relevant time the immunity is active. Subsection (3) defined ‘period of office’ to mean the ‘period during which the person holding such office is required to perform the functions of the office’. Furthermore, the proviso to subsection (1) excludes the tenure in office from the time to be computed in ascertaining

67. Section 308 (2).
whether any period of limitation to institute an action against the office holder has lapsed. Flowing from this line of reasoning, the erstwhile Military Administrator could have been sued personally for the loss of the brief case when he left office based on the Commissioner of Police’ report, even though he claimed to have acted officially. On the other hand, if serving State officials or State security agencies were holding unto the brief case on the executive orders of the respondent while he was in office, then the current governor could have been sued in his official capacity instead; if the relief sought, that is, an order for the release of the brief case is to be granted by the court. This we think is what the Constitutional provision means. It is safer to keep within this limit rather than extending immunity to ex-office holders who were once beneficiaries of executive immunity. There is also difficulty in agreeing with the ruling of the Sale of Crude Oil Tribunal of Inquiry of 1980, that a former Head of State was immune from its proceedings by virtue of section 161 of the 1963 Constitution even though he had since left office.68

68. Cited in P.E. Oshio and R. Idubor, note 51 at 19. Surprisingly, supposed belief in their immunity (or fear of the unknown) prevented some former Heads of State from appearing before the Human Rights Violations Investigations Commission headed by Justice Oputa set up by President Obasanjo This culminated in the case of Fawehinmi v. Babangida (2003) 9 NWLR (Pt. 808) 604, in which in a bid to stop a subpoena on him the respondent successfully challenged the setting up of the Investigative Commission. The Supreme Court while pronouncing on the validity of the Tribunal of Inquiry Act, which was earlier promulgated as Decree no 41 held, inter alia, that the National Assembly could not enact a general law for the establishment of tribunals of inquiry for, and applicable in, the Federation of Nigeria. The court noted further that the power to enact such a law has become a residual matter for the states in respect of which the Houses of Assembly can legislate for their respective states while the National Assembly can legislate on it only for the Federal Capital Territory. This decision marked the near demise of the Investigative Commission. For a critique of the Supreme Court’s decision, see: O.N. Ogbo: “Truth and Reconciliation Commissions as Human Rights Protection Mechanism: Tragic near Demise of Oputa Panel” in E. Chianu (ed.): Legal Principles and Policies (Essays In Honour of Justice Chukwuweike Idigbe) (Lagos: Distinct Universal Ltd., 2006) 225-244. See also the case of EFCC v. Peter Odili Suit No. FHC/PH/1291/07 in which Justice Ibrahim Buba gave an order of perpetual injunction against the further arrest or prosecution of
There are occasions when a suit against a former office holder for actions he carried out while in office would fail but this would depend on the nature of the suit and the relief sought. For instance, in the case above, if the appellant had challenged his deposition and sought for reinstatement, it would have been inappropriate to institute an action against the former Military Administrator or an ex-Governor. In conclusion, the immunity conferred by section 308 of the 1999 Constitution protects the private person of executive office holders absolutely, though for a period of time, which is, during the tenure of office of the beneficiary. Also, the immunity is restricted to legal proceedings in a court of law or a special tribunal established by law with the exception of an Election Petition Tribunal and the Code of Conduct Tribunal. Finally, the immunity does not protect them from investigation by law enforcement agencies such as the Police, the Independent Corrupt Practices Commission or the Economic and Financial Crimes Commission.

The Debate on Executive Immunity
The utility of the executive immunity contained in the Nigerian constitution was called to question during the tenure of Nuhu Ribadu as Chairman of the Economic and Financial Crimes Commission (EFCC) when he was reported to have said he had concluded investigations on about 24 serving governors who would be arrested on the expiration of their term in office on the 28th of May, 2007, on alleged economic and financial crimes. This opened a torrent of attacks on the immunity clause in the 1999 Constitution with some arguments to the contrary however. A sample of these opinions would be addressed under this subhead.

Peter Odili, former Governor of Rivers State. However, EFCC has appealed against this ruling. See “2011: EFCC Promises Hard Times for Politicians” This Day, June 9th, 2009 (online version).

Perhaps, in line with his policy of zero tolerance for corruption, President Umaru Musa Yar’Adua declared his support for the removal of the immunity clause from the Constitution at the Partnership Against Corruption Initiative which held in Davos, Switzerland in January 2008. Later in the year, President Yar’Adua reiterated his call that the immunity clause be expunged from the Constitution by the National Assembly at the launch of the Anti-Corruption Revolution (ANCOR) campaign of the EFCC in December 2008. The President was reported as saying that the immunity clause which shields the President, Vice-President, Governors, and Deputy Governors from being prosecuted for any act of corruption while in office has become a cover for non-performance, ineptitude and corrupt practices.70 Applauding President Yar’Adua’s stance on the immunity clause, another writer, a Nigerian resident in the United States of America, canvassed for the removal of the ‘two fertilizers of corruption’ in Nigeria – the immunity clause and security vote for elected office holders.71 Lending his support along this line was a presidential candidate in the 2007 general elections, Professor Pat Utomi.72 A Law Attorney of Nigerian descent in New York City, while supporting these views was more in favour of a qualified immunity for the executive. According to him, the office holder should loose his/her immunity whenever there is allegation of criminal conduct against him/her.73

Corruption, especially corruption by public office holders is one vice that is engaging the attention of Nigerians at the

moment.\textsuperscript{74} The immunity clause does not, in our view provide a cover for non-performance, ineptitude and corrupt practices as President Yar’Adua said, neither does immunity act as fertilizer of corruption. Rather, non-performance and ineptitude are indicative of a corrupt system. Political corruption as evident in fraudulent electoral processes, secrecy in the conduct of government affairs and non-adherence to law invariably give birth to economic and financial corruption. All of these are due to disrespect for law and regularity. In other words, whenever law fails to transform into social order then there is bound to be lack of societal order indexed majorly by corruption.\textsuperscript{75} Non-performance (or poor performance)


\textsuperscript{75} See A. Aka-Bashorun: “Law and Society” (1985) Vol. 20 No. 2 \textit{The Nigerian Bar J.} 45 on the relationship between law and society and the argument that the crisis of law in Nigeria is principally alienation from society. It has been argued that it is difficult to legislate against corruption in Nigeria because of its moral, social and economic characteristic: P.D. Ocheje: “Law and Social Change: A Socio-Legal Analysis of Nigeria’s Corrupt Practices and Other Related Offences Act, 2000” \textit{Journal of African Law}, 45, 2 (2001) 173. While agreeing partially with this view we are of the opinion that corruption is more pronounced in a society where laws are hardly obeyed and order a rarity. Some writers with whom we agree are of the view that corruption is exclusive of immunity. See B.P. Ojealaro, S.K. Mokidi, & G.O. Etose: “Immunity Clause under the 1999 Constitution: Issues and Challenges”, paper delivered at the Annual Conference of the Nigerian Association of Law Teachers held in Abia State University, Umuahia, May 24th-
and ineptitude, which the President mentioned, are not shielded by immunity; they are not crimes, *per se*, in any criminal legislation. They are ‘political offences’ which the electorates are to prosecute against the current office holder and ruling party or the party alone if the current office holder is not seeking re-election, and give verdict on at the next election. With political corruption characterised by fraudulent electoral system, weak party system, parochial non-nationalist interest in politics, etc, this form of sanction is unavailable to the electorate against the office holders with or without immunity from prosecution. On the perceived difficulty in prosecuting alleged corrupt beneficiaries of executive immunity, the view held here is that it is the weakness of state prosecutorial agencies that makes the prosecution difficult. After all, the immunity is not forever, why then are they not tried on those alleged crimes after they left office. The alleged corrupt governors that Ribadu mentioned, who are they? Where are they at the moment? The immunity clause is perceived by some to be a shield for corrupt practices because of the entrenched vices of self-aggrandisement in the Nigerian polity.

The argument in support of a total removal of executive immunity cannot be supported either, going by the events of the recent past, particularly the periods between 2003 and 2007. If immunity is completely removed, given Nigeria’s underdeveloped political system characterised by weak democratic institutions, excessive control wielded by the President over prosecution machinery like the police, the EFCC and allied agencies, and the unbalanced nature of Nigeria’s federalism, the governors and even the Vice President could suffer intense harassment from the President because of political differences he may have with them. This assertion is given credence by the case of *A.G. Anambra v. A.G. Federation & 35 Ors.* 76 The facts of this case were that on the basis of an Enugu High Court order directing the Inspector General

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76. [2005] 7 MJSC 1.
of Police (IGP) to remove the Governor of Anambra State from office (an order that was suspended by the Enugu Division of the Court of Appeal), the IGP, acting on the directive of the President withdrew all police protection and security apparatus of State power from the Governor of Anambra State and refused to restore same despite the order of the Court of Appeal. Furthermore, the federal government through the President continued to prevent the Anambra State Commissioner of Police from taking lawful directives from the Governor of the State for the maintenance of public safety, public order and the provision of police protection, contrary to section 215(4) of the Constitution. It took the intervention of the Supreme Court in exercise of its original jurisdiction for the federal government to respect the right of the government and people of Anambra State to police protection. The random unconstitutional impeachments of some state governors under the pretext of anti-corruption crusade whereas the underlying reasons were to score political points further gives credence to the assertion above.77

The political vendetta of that era was made more manifest with the declaration by the President through his Special Assistant on Public Affairs that the office of Vice-President of the Federal Republic of Nigeria, occupied by Atiku Abubakar was vacant. Granted that Atiku Abubakar had dumped the Peoples Democratic Party (PDP), which sponsored him into office (an act which the Court of Appeal said is morally reprehensible) to form the Action Congress (AC), he could not be sacked by the President because he was elected and not appointed. The principle of resignation by conduct contained in sections 68(1)(g) and 109(1)(g) of the 1999 Constitution applies to members of the National Assembly and the

77. The impeachment of Governor Ladoja of Oyo State was caused by disagreement with Chief Lamidi Adedubu as events during and after the impeachment pointed to. The same was the impeachment of Governor Joshua Dariye of Plateau State which was connected with his dispute with Senator Ibrahim Mantu, then Deputy Senate President.
State Houses of Assembly respectively, only. Of course, both the Court of Appeal and the Supreme Court came to the conclusion that the office of Atiku Abubakar was still subsisting and would not terminate until May 29, 2007. Vice President Atiku was later to be indicted for corrupt practices by an administrative panel of inquiry and was disqualified by the Independent National Electoral Commission (INEC) from contesting the 2007 general elections on the basis of the indictment until the intervention of the Supreme Court reversed the decision of INEC. It appears that if not for the immunity enjoyed by the Vice-President and the governors, they would have been charged to court for trumped up charges, when impeachment or removal processes failed. May be the fear of failure of the prosecution in court with the subsisting section 308 prevented this from happening. Absolute executive immunity or not, what are definitely needed in the Nigerian society are the entrenchment of the rule of law in practice, strong and independent democratic institutions like INEC and the judiciary, greater press freedom, strong and fairly independent prosecutorial agencies, respect for the principles of federalism and separation of powers in the Constitution. When these exist, the fight against corruption would be consistent and devoid of arbitrariness. Furthermore, the fight would no longer depend upon the discretion and sagacity of any political office holder.

It was argued by one other writer that a qualified immunity which covers the official acts of the office holders only should be allowed in the Constitution. According to him:

“[I]t is obvious that section 308 is a provision, too broad for the purpose for which it is meant. It is in effect an excessive protection of the President and Governors as what is sought to be achieved through the section can better be achieved if the immunity is

limited to the official transactions of the persons named in the section to the exclusion of every other transaction, they may get involved in. Such qualified immunity offers a double-barrel blessing. The first is that it would reduce the arbitrariness of such officials, and second, it would roll away the stone from the iniquitous tomb to which section 308 has confined people’s fundamental right to sue when their rights have been trampled upon by any of the persons named in the section….it is time for the legislature to amend the immunity provision of the constitution to make it applicable only when the official acts of the persons named in the section come into question”.

First and foremost, it is seriously doubted if section 308 has confined people’s fundamental rights to sue when their rights have been trampled upon. Secondly, it is hoped that the argument for an amendment of the immunity provision ‘to make it applicable only when the official acts of the persons named in the section come into question’ means the office holders should not be personally liable, and not that the ‘official acts’ should be immune from suit. If the later interpretation were to be the intendment of the argument then the country would be going back on the gains of prior judicial pronouncements on the rights of the citizens to challenge wrong government actions. Thirdly, what would be the

81. See the cases of Abacha v. Fawehinmi, supra note 49 and Ransome Kuti v. Attorney-General, supra note 33 in which the fundamental rights of citizens were to be enforced against the named officers without the immunity clause being pleaded.
82. This would take the country back to the sovereign immunity period when government actions could not be challenged.
limits of the ‘official act’? How will it be determined? The opinion held in this paper is that the current state of the law whereby the office holder is liable officially but not personally when sued during the period of his office is safer and protective of the citizen’s rights.

On the other side of the divide is the argument against the removal of the immunity contained in section 308 of the Constitution. Various reasons were adduced by one writer for his support for the non-removal of the immunity clause. According to him, the immunity provision protects the President and Governors from mischievous litigations that could arise while they are in office, thus preventing a diversion of their attention from effective governance.\(^8\) The argument proceeded further on a not too explicit point that suggests that prosecution for alleged criminal offences may impair impeachment processes. He questioned further the independence of any criminal prosecution against the office holder that may be embarked upon querying ‘Will they (office holders) be prosecutors and defendants at the same time?’ The writer concluded by suggesting that rather than the removal of the immunity clause, emphasis should be placed on creating the enabling environment for enduring democracy through true separation of powers, free press, passage of Freedom of Information Bill, corruption free judiciary, formation of functional and competent public prosecution process, electoral reforms, change in value system and the promotion of good governance.

We are fully in agreement with the writer on the need to strengthen prosecutorial and democratic institutions, the very panacea to the manipulation of prosecution by the executive office holders, so that the office holder is not the prosecutor and the accused at the same time. It can not be disputed that the utility of the immunity clause is the protection of the office holders from

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frivolous litigation so that they can concentrate on effective governance. The worry however is that these same office holders dissipate so much time on local and foreign trips which could be describe as frivolous.\textsuperscript{84} Where that is the case, the time the constitution tries to save and preserve for governance issues are wasted instead. On the other hand, it is difficult to see how an impeachment process can impair criminal prosecution.\textsuperscript{85} In any case, a court trial is based largely on legal considerations with bits of public policy considerations, while impeachment at the legislative houses is more of politics tainted with political considerations.\textsuperscript{86}

In a brief comment on the case of \textit{Global Excellence Communication Ltd. v. Duke} on his inaugural lecture, a legal scholar called for the amendment of the Constitution to bar the executive from instituting legal proceedings in his personal capacity while enjoying absolute immunity, for according to him ‘those who live in glass houses should not throw stones and

\begin{itemize}
\item[84.] Soon after the return to civil democratic rule in 1999, the complaints of the citizens against President Obasanjo and some state governors was that they made too many frequent foreign trips. While that of President Obasanjo could be excused on the ground that he was in search of foreign investors who would come to Nigeria and was involved in image laundering for the nation, that of the state governors could not be justified.
\item[85.] In our view impeachment would only facilitate prosecution as was the case of then Deputy Governor of Oyo State, Iyiola Omisore, who was alleged to have been involved in the murder of former Attorney General of the Federation, Chief Bola Ige.
\item[86.] The courts have said that what is gross misconduct is determined by the houses – \textit{Inakoju v. Adeleke} [2007] 4 NWLR (Pt. 1025) 423. It is in the light of this that the recommendation of I. B. Lawal, note 56, that impeachment as a sanction should be used more and that corrupt practices should qualify as gross misconduct though a laudable one, seems impracticable at the moment as prior impeachments or threats of impeachment have been over issues that are not altruistic. See also A.A. Idowu: “Constitutional Immunity, State Actors and Governance”, note 24, pp. 86-110.
\end{itemize}
equality is equity’.87 Such a move could be hasty as we shall show in our analysis.

**Reconsidering Executive Immunity**

The various arguments already captured in this paper have their merits and demerits as well. Our first observation is that the exaltation of executive immunity to a constitutional status gives cause for a serious concern. The difficulty in amending the Nigerian Constitution under civil democratic rule is evident at least by the failed attempts made so far by the civilian administrations since 1999.88 This is due to the complex nature of the Nigeria nation and the suspicion which characterises the amendment of the Constitution.89 It follows therefore that an amendment of the provision on executive immunity in the Constitution to meet the demands of the time may be met with stiff resistance mounted by its beneficiaries. Now that the highest office holder who benefits from that provision at the moment, President Yar’Adua, is in support of the removal of section 308 from the Constitution going by his public pronouncements, and given the public’s support for

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88. President Olushegun Obasanjo attempted a review of the 1999 Constitution without success, even though a proposal to that effect was made by the Committee he set up. See Report of the Presidential Committee on the Review of the 1999 Constitution, August 2001. An attempt to review the Constitution in 2005 was a complete fiasco because of the alleged tenure elongation bid of the President. Current efforts at amending the Constitution for a better electoral system are going at a snail pace.

this amendment, this time seems to be appropriate for the removal of executive immunity from the Constitution.

However, the support here is not for a total abrogation of executive immunity. Rather, the opinion here is that executive immunity should be contained in an Act of the National Assembly and not the Constitution. This makes for easy amendment to suit changing circumstances in the nation’s political life. For this to be made possible, item 47 of the Second Schedule (Exclusive Legislative) List of the Constitution which is ‘Powers of the National Assembly, and the privileges and immunities of its members’ should be enlarge to include ‘immunities of the President and Vice President of the Federal Republic of Nigeria, and Governors and Deputy Governors’, thereby empowering the National Assembly to validly make a law on executive immunity.

This power should be exclusive to the National Assembly and not shared with the State Houses of Assembly for the sake of uniformity. The benefit of such an amendment is that the immunity enjoyed by one organ of government only is not given a special status. If any organ of government should enjoy constitutional immunity at all, it should not be the executive for two reasons. 90

First, the executive is the domineering organ in the Nigerian governmental structure as a result of prolonged military rule. 91 Secondly, a break from the concept of monarchical sovereignty under colonialism and the position under the Petition of Rights

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90. The United States’ Constitution, for example, does not contain an express provision on executive immunity. It only provides for a qualified legislative immunity. See supra note 16. This perhaps is in realisation of the primacy of the legislature as the index of a country’s sovereignty and status as a democracy. The absence of the legislature is the index of authoritarianism, just as a docile legislature indicates weakness of the democratic system in a country.

91. See O. Achike: Groundwork of Military Law And Military Rule in Nigeria (Enugu: Fourth Dimension Publishers, 1980) for an understanding of the working of military regimes in Nigeria which appropriated both legislative and executive powers to themselves. At the moment, the executive arm of government is perceived to be more powerful than the other two organs going by the attitude of the political actors.
laws should ordinarily require that no special immunity status is granted to the executive. An amendment as we have proposed would curb excessive rigidity in terms of preservation of executive immunity so that possible amendment to meet changing circumstances is made possible, while at the same time impreciseness as it is in the United States is avoided.92

Absolute immunity as it is at the moment is not good for the development of democracy and good governance in the country, the argument that the immunity is only for the period of office or tenure, notwithstanding. The immunity that should be in a statute as we have proposed should be a qualified one in the realm of criminal prosecution. Governance is based, among other things, on trust on the leader based on his perceived credibility (moral or political). Executive immunity, and indeed immunity for members of any of the organs of government, should stop at the point where the credibility to continue in office is in issue. There are crimes that carry with them moral93 and or political incredibility. Economic/financial crimes, corrupt practices, forgery and/or perjury (especially one committed in order to attain the office), homicide and rape are serious offences from the point of view of our penal legislations.94 They are also offences that Nigerians

92. The belief held here is that where there is no legislation the courts would definitely hold that there is some form of immunity for executive office holders as is the case with judicial immunity for judges of the Federal High Court and justices of the Court of Appeal and the Supreme Court. Impreciseness may arise thereby until the Supreme Court would lay such an issue to rest on the act claimed to be immune.

93. The use of the term ‘morality’ here should not be confused with the conflicting views or debate among criminal law scholars as to the moral content of criminal legislation. Morality as used here is in relation to criminally sanctioned behaviours in penal legislations, a breach of which attracts wide criticism. This extends to such conducts with high sanction in the law upon conviction. For an assessment of the argument as to the enforcement of moral principles in criminal legislations see: “Patterns of Contemporary Penal Legislations in Nigeria: the Enforcement of Morals” in E. Chianu (ed.): supra, note 68, pp. 279-288.

94. For example, sections 467, 319/325 and 358, Criminal Code Act, Cap C17 Laws of the Federation of Nigeria, 2004, respectively punishes the offences of forgery, homicide (murder and manslaughter) and rape.
loathe.\textsuperscript{95} It is the view here that just as any one aspiring to public office in Nigeria should not have been tried and convicted of any of these crimes, so also any one alleged to have committed these crimes should not be allowed to remain in office under the guise of immunity. Furthermore, any Governor, Deputy Governor, or even the President or Vice President who is alleged to have committed any of these crimes would suffer from serious moral/political credibility crisis. At such times, the business of governance is hardly concentrated on. Governance involves the government and the governed and where the governed loses faith in the government based on allegations of the commission of heinous crimes, so much public funds may then have to be spent on image laundering with governance gradually loosing its essence.

In order to curb frivolous allegations, these offences must be those alleged to have been committed during their tenure in office or committed in order to attain the office. Financial crimes, homicide, forgery, perjury, and rape committed before office and which were not in furtherance of the attainment of the political office should be prosecuted at the end of the tenure of the executive office holder.

How will the executive office holder be made to answer for his alleged heinous crimes? Will the attorney general be fair to the state in handling such a prosecution? In the law of the National Assembly on executive immunity all of those procedures would be outlined. The suggestion here is that upon the completion of investigation by the relevant agency sequel to an allegation of the

\textsuperscript{95} There was outrage when political office holders were accused of these crimes. For instance, when former Speaker of the House of Representatives, Salisu Buhari was accused of forgery; when Governor Chinwoke Mbadinju of Anambra State and Deputy Governor Iyiola Omisore of Oyo State were separately accused of murder; and when Governor Bola Tinubu of Lagos State was accused of forgery. At the moment, the outcry is against alleged corrupt practices against political office holders. At the moment, no known case of rape involving political officers has been reported, but one holds the view that this offence in itself would not be tolerated by Nigerians if it is alleged against a political office holder.
commission of any of these crimes, the evidence gathered should be brought before a High Court Judge who would assess the evidence to know whether a *prima facie* case has been established against the office holder enjoying the immunity, thus necessitating a full trial. The essence of establishing a *prima facie* case is to further forestall frivolous prosecution. Where the judge rules in the affirmative, then the office holder goes on vacation to stand trial. The law on executive immunity should contain a provision that such cases must be given diligent prosecution. A failure of diligent prosecution entitles the officer on vacation to ask that the case be struck out and should not be entertained by the court during his term in office except fresh facts are presented in the form of evidence before the judge of a High Court to establish again a *prima facie*. This means a fresh application is made to the High Court. Where a criminal prosecution is stopped due to lack of diligent prosecution, the office holder is entitled to resume his office. The details of what would amount to diligent prosecution should be worked out in the law. Where however the criminal suit against him/her goes into full trial and the officer is convicted, subject to the right of appeal, he/she immediately loses his/her office and his or her deputy or vice is sworn-in in a substantive capacity. On the other hand if he/she is found not guilty, he/she immediately resumes his/her office. Given the reality of power tussle and suspicion between Governors and their deputies, the period of vacation may work against the Governor or President in terms of relevance and control of party machinery, but it works to restore credibility to the government of the day and further restores the confidence of the governed in the government. In our view, national interest and political development of the nation should prevail over the interest of the office holder.

Central to the success of the prosecution of an executive temporarily stripped of his immunity for the purposes prosecution in court on the grounds of criminal allegations against him/her is
the power of the Attorney General to issue a *nolle prosequi*. For a successful prosecution, the power of the Attorney General in this respect should be qualified to preclude the issuance of a *nolle prosequi* whenever a prosecution in pursuance of the law on executive immunity is being embarked upon. This necessitates an amendment of the provisions of the Constitution on the power of the Attorney General to accommodate this recommendation.

The freedom to sue in civil matters enjoyed by the executive at the moment seems not to have posed much of a problem. It is believed that it was in a bid to remain credible to continue in office that beneficiaries of immunity instituted court actions in cases like *Onabanjo v. Concord* and *Duke v. Global Communications Ltd*. It was open to the defendants to raise the defence of justification by proving the truthfulness of the defamatory publications. If

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96. This Latin word means “not to wish to prosecute”. It is a legal notice to a court that a criminal prosecution has been abandoned. See *Black’s Law Dictionary 8th edn*. The power is contained in ss. 174(1)(c) and 211(1)(c) of the 1999 Constitution for the Attorney General of the Federation and the Attorney General of a State respectively. Relevant cases on the use of this power include *State v. Chukwura & Ors* (1964) NMLR 64; *State v. Ilori* (1983) 2 SC 155; 1 SCNR 94; *Amaefule v. the State* (1988) 2 NWLR (Pt. 75) 156; *Edet v. the State* (1988) 12 SCNJ (Pt.1) 79; *Anyebe v. the State* (1986) 1 SC 87; and *Emelogu v. the State* (1988) 2 NWLR (Pt.78) 524.

successfully pleaded, this could itself lead to the prosecution of the office holder under an Executive Immunities and Privileges Act. Therefore rushing to remove the immunity from civil suits enjoyed by them is unnecessary. If they begin to embark on distracting suits themselves, the statute on executive immunity can then be amended to take care of that.

Conclusion
Thus far we have captured the arguments in favour and against the continued retention of the executive immunity clause in the Nigerian Constitution; examined the sides to the argument as captured and have come to the conclusion that in view of the peculiarity of our political terrain, there is the need for a continued retention of the executive immunity clause. But, it is our thesis that there should be a restructuring of the present form. To this end, we have suggested that the provisions of section 308 be expunged from the Constitution, and that the Second Schedule, particularly item 47 be amended to incorporate immunities of the President, Vice President as well as that of the Governors and Deputy Governors; consequently vesting in the National Assembly the power to make law on the immunity to be accorded the holders of the offices that come under the purview of section 308.

The efficacy of the regime as adumbrated ante is worthy of reiteration. The suggestion is capable of bringing about transparency, accountability, probity and respect for the governed into governance. Also, with the new regime, the beneficiaries of the provisions of section 308 will still be protected.